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MEDICAL JURISPRUDENCE

VOL. I

MENTAL UNSOUNDNESS

LEGAL QUESTIONS
BY
FRANK H. BOWLBY
OF THE PUBLISHERS' EDITORIAL STAFF

INSANITY: FORMS AND MEDICO-LEGAL RELATIONS
BY
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FIFTH EDITION

ROCHESTER, N. Y.:
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY
1905

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1905

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Entered according to Act of Congress, in the year eighteen hundred eighty-two, by
FRANCIS WHARTON,
In the Office of the Librarian of Congress, at Washington.

Entered according to Act of Congress in the year nineteen hundred five, by
LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
In the Office of the Librarian of Congress, at Washington, D. C.

332871

E. R. Andrews Printing Company, Rochester, N. Y.

KF 55 .P156

PREFACE TO THE THIRD EDITION.

Since the publication, in 1860, of the second edition of this work, the specialty of psychological law has taken a shape which has made necessary the preparation of a treatise which is substantially new. The circumstances which have led to this change may be thus stated.

Until the close of the last century, insanity received but little attention from physicians, and still less from psychologists. "Lunatics," to follow the barbarous old English designation, were regarded as outcasts, mostly incurable; as devoid of those sensibilities which call for tender care; as presenting little more claim to philanthropic consideration than do brutes. Unless birth or wealth gave special opportunities for their custody at home, they were huddled, in England and France, in pens, or chained in cells, where they were generally subjected to treatment the most brutal. In New England they were often let out by the town to the lowest bidder, who undertook to support them for a pittance scarcely sufficient to buy offals for their food, and who permitted them, when they were gentle, to roam at large, or chained them, when violent, in stables. Asylums, as reformatory and hygienic establishments, were unknown. Hence arose the tendency, both of phychologists and courts, to narrow the definition of insanity so as to reduce, as far as possible, the numbers of the class who were to be subjected to so wretched a doom.

But, on the insanity of George III., a new era came in. Insanity could not be so vulgar a thing when it attacked the King. It could scarcely be regarded by loyal Englishmen as a merited curse, when it visited a prince of whose virtues they were justly proud, and of whose obstinate self-will they were blindly ignorant. Philanthropists as well as philosophers poured in with abundant advice as to the tenderest treatment to be applied to the royal sufferer; and committees of the House of Commons vied with medical commissions in speculating on the characteristics of a malady which had become exalted in the exaltation of the victim on whom it had pounced. Fortunately for the interests of humanity, almost simultaneously took place in Paris the investigations of Pinel. This remarkable man, who united in rare excellence great administrative power, untiring

patience of research, and singular attractiveness of style, found the Bicêtre, when he took medical charge of it, in 1791, in a condition at which humanity shuddered. It combined, under one general superintendence, the functions of almshouse, prison, nursery, foundling's home, and lunatic asylum, with no distinction made in the treatment of crime and of disease. Such patients as could do so without disturbance mingled with the other inmates of this vast abode of wretchedness and of guilt; but those who were in any way troublesome were chained in damp and putrid cells, under the charge of convicts whose desperateness seemed to constitute their title to this distinction. Against this inhumanity Pinel protested with such untiring and dauntless eloquence that he succeeded in effecting a thorough reformation. A separate asylum, based on wise sanitary regulations, was opened for the insane, and subsequently the Salpêtrière, a distinct establishment for deranged women, was organized under his particular care. He was succeeded at the Salpêtrière by Esquirol, who had been his assistant, and by whom his wise hygienic reforms were further elaborated and extended.

Nor did the efforts of these eminent physicians stop at the amelioration of the physical and mental condition of the insane. Madness having been shown to be capable of cure, and to be a condition in itself implying no moral stigma, and insane asylums having been proved to be the places where the insane can most readily be restored to health, many persons came to be regarded by their friends and by a rightful public feeling as insane, who previously would have been treated as sane. The definition of insanity, in the philanthropic mind, at least, was so enlarged as to include all persons who, while not being clearly maniacs, were yet subject to mental or moral anomalies which a wise medical treatment could remove.

But this was not the only circumstance that tended to an expansion of the definition. Another influence, still more marked, had already prepared the public mind to treat as insanity much that was really only folly or guilty impulse. Between 1760 and 1764, Rousseau published his *Contrat Social* and *Emile,* works which, in the sentimental humanitarianism they inculcated, were the natural extreme reaction from the inhumanity of the prior absolutist *régime.* Rousseau flamed with a romantic admiration not merely for the liberty to do right, but for the liberty to do wrong. Even the grossest natural instincts were of divine origin, and should be nursed with delicate respect. Crime was something to which a man was impelled by his nature; else, why should he indulge in crime? Heretofore all in-

sanity was crime. Now all crime was to be insanity. Sin was not to be viewed as horrible and odious, but as something abnormal, indeed, but provocative of curious regard and sympathy. And criminals were an interesting class of lunatics, who were especially consecrated to the restorative care of the state.

Pinel, like most other French philosophers of his day, was not slow, when responding to this reaction, to welcome a plan which proposed to extirpate crime and inaugurate liberty by placing crime distinctively under humane medical care. Undoubtedly there was much in his special experience to strengthen him in this view. He had seen many insane persons treated as criminals. It was natural to him to assume the converse, and to hold that there are many criminals who are to be treated as insane. In sustaining this view he cautiously, though distinctly, set forth the proposition, hereafter fully discussed,[1] that there is a distinct form of madness in which the reason remains unimpaired. It is true, when he came to illustrate this by examples, it was found that the "reasoning maniacs" whom he described were more or less maniacs even in their reason. But, nevertheless, the proposition fitted symmetrically into the philosophy of the French Revolution, and was accepted by the apostles of that revolution wherever they taught.

Fifty years afterwards, in times greatly changed, another influence arose to give fresh impetus to the same peculiar theory. The French Revolution was over, and with it had vanished those ideas of sentimental humanitarianism which had lent it so much fascination. It is true that the evaporating process was not without a sensible deposit of good. Insanity, for instance, was no longer associated with crime; and the speculations of Pinel, reproduced in a modified shape by his scholar, Esquirol, were, when accepted by French legislation, interpreted to mean nothing more than that crime is often a consequence of insanity, and, when so, is irresponsible. In 1798, however, Gall startled the scientific world by his alleged discovery of phrenology. His genius, eminently enterprising and constructive, but shut out by the then state of Europe from political adventure, betook itself to adventure in science. Arrested, as he tells us, by the fact that those of his school companions who had good verbal memories had bulging eyes, he gradually developed the theory that each function and propensity had a separate local habitation in the brain; and that the power of the function or propensity varied with the size of its cerebral apartment, as measured on the outside. As, however, each function

[1] *Infra*, § 531 (3d ed.).

and each propensity dwelt alone in its particular cell, each was capable of independent action, and, of course, as each could be independently strong or weak, each could be privately insane. This severance of functions and propensities was the distinguishing feature of Gall's system; and, to establish it psychologically, he devoted the energies of a mind which, while disdaining logical restraint, and rash in leaping at results, was peculiarly quick, curious, and specious. A peripatetic from necessity, for the German reactionary governments, doubtful of the uses to which his philosophy might be put, forced him into a series of exiles, he collected, wherever he went, from newspapers, from sympathetic disciples, from every quarter, in fact, except the official reports of experts and of courts, every anecdote by which his theory could be helped. Such was the piquant plausibility of his publications that they not only attracted interest, but enlisted enthusiasm. Nothing, indeed, could be more racy than his details. A distinguished prince, remarkable for his sagacity and cool sense, was possessed, it was declared, by an irresistible propensity to steal. A young girl, of singular amiability and excellent reasoning powers, was in the habit of setting fire to houses. A philanthropist, blandly sane in all other respects, met with some injury to the cell that restrained the function of destructiveness, and forthwith betook him to killing his neighbors. No doubt there was a basis of reality in most of Gall's cases. The difficulty was that he did not sufficiently investigate the facts. For all he knew, and for all he inquired, the prince and the girl and the philanthropist might have been the descendants of insane parents,—might have been epileptics,—might have betrayed in their families unmistakable symptoms of mental derangement,—might subsequently have died in a madhouse. Nor were his cases cited in such a way as to enable subsequent investigators to inquire into their accuracy. No one could tell whence most of them came. Yet so engaging was the style in which they were narrated, and so great was the confidence felt in Gall as a narrator, that they were readily accepted by those whose theories they subserved. The psychological conclusion was inevitable. If criminal instincts have separate apartments in the brain, then those criminal instincts can be separately insane. Hence, the doctrine of monomania, sustained at once by Gall's facts and by his hypothesis, began, under the impulse thus imparted, once more to challenge judicial assent.

On our distinctive jurisprudence, the causes just mentioned would have had little influence had it not been for the indirect bearings of

another condition. Nothing could have been more barbarous than the old English adjustment of penalty to crime. A man who stole a fowl was capitally punished; and, even after a century of legal reform, the law in England still is that a man who kills another when designing to hurt, but not to kill, is amenable to as high a sentence as he who deliberately assassinates. But humane observers revolted from this subjecting crimes so entirely distinct to the same penalty, and they cast about for some method of relief. In the United States a remedy was seized which was, in a large measure, efficacious. Murder was divided into two degrees, and capital punishment was reserved exclusively for cases in which there was proved a premeditated intention to take life. On this has been not unfrequently grafted the humane construction that where, from mental or nervous excitement, the defendant is incapable of forming a specific intent, then the capital offense is not proven.[2] But in England, these mitigating qualifications were not accepted; and though in the United States the division of murder into two degrees was, at an early period, established almost universally, the courts were at first slow to recognize the fact that a mind disturbed by nervous excitement and blurred by insane predispositions may be incapable of intellectual premeditation, while, at the same time, capable and responsible for passionate crime. Hence, it has been that the jury has been too often narrowed to a choice between conviction of a capital offense and acquittal; and hence, to justify an acquittal, insanity has sometimes been used as a pretext, when insanity, in the correct sense of the term, did not exist.

This unscientific extension of insanity received a quasi scientific sanction under the following circumstances. By the Anglo-American practice, a party is entitled to call on trial any expert he may select; and he is not likely to select any whose views will not promote his cause. It so happens that among the present large body of experts there is little trouble in discovering one or more by whom is maintained the particular psychological theory of which the party on trial stands in need. It is an old truth that there is nothing so absurd but that some philosopher may be found by whom it is affirmed. "*Nihil tam absurde dici potest quod non dicatur ab aliquo philosophorum.*"[3] To sustain a particular defense, for instance, it is necessary to prove that the "morals" may be insane while the mind is sane. The defendant's counsel forthwith proceed to search among the multitudes who have written on insanity, or have been in any way conversant with the insane, for a philosopher by whom this unique hypothe-

[2] See *infra*, § 200 (3d ed.).

[3] Cicero, de Divinatione, II. 58.

sis is held. When the case is tried, this philosopher is produced and swears promptly and positively to his belief. On the strict principles of law, he cannot be cross-examined as to the opinions of others, for this would be hearsay. So far, therefore, as the particular case is concerned, he stands before the jury as if he was the collected sense of the psychological experts of the whole world. It may be that the prosecution may be able to cancel his testimony by the production of a preponderating weight of experts on the other side. But to do so requires energy, skill, and means; and too often has the duty been neglected, and the case left to rest, in criminal trials, on the testimony of the exceptional experts selected by the defense. Hence it is that juries, if not courts, have occasionally succumbed to such testimony in respectful amazement, feeling, indeed, that it is wrong, but not seeing how it could be disregarded.

As influences disturbing the juridical conception of insanity,—to recapitulate those which we have just been enumerating in detail,—we may, therefore, mention (1) the romanticism of the French psychological followers of Rousseau, afterwards aided by phrenology, which refined crime into insanity; (2) reaction from the old English barbarism which punished insanity as if it were crime; and (3) the hesitation felt by the courts in grappling with the philosophy of a question which had been claimed to be purely medical. Under these circumstances arose that confusion of law which was noticed in the prior editions of this treatise.

Since 1860, when the second edition was issued, a great change has taken place. Before that period, we may say generally, there had been no positive and final repudiation by psychological science of the theory of criminal monomanias. Since then medical as well as psychological science has rallied, and from all quarters there has risen, as will be hereafter shown more fully, almost an unbroken denunciation of a scheme of psychological romanticism which sober-minded men have learned to feel is as repugnant to science as it is hostile to society.[4] And this advance of science towards a common reconciliatory standpoint is now met by a corresponding advance of law. It has been just stated that one of the causes of early juridical confusion on this topic was the revulsion from the excessive punishments assigned by the old law to offenses of even lighter grade. Civilization was shocked at seeing a man who, from nervous or mental or physical disorder, was incapable of cool premeditation or exact intent, hurried to the gallows for what might be a comparatively

[4] See *infra*, §§ 552–643 (3d ed.).

venial crime; and it was to the desire to save such that the toleration of the idea of irresponsibility in such cases is, in a large measure, traceable. But it was soon found that this enlargement of irresponsibility worked badly. It exposed many persons, virtually sane, to the pains and penalties of insanity. It enfranchised a dangerous class of outlaws, too insane to be punished for crime, and yet too sane to be restrained. It involved, on the part of the state, the abdication of one of its chiefest functions,—the building up of a right moral sense in those of its subjects in whom such moral sense is deficient.

But is so violent a remedy necessary? Is there no alternative between an unjust conviction of a man of an offense to whose grade of guilt he does not quite reach, and his equally unjust acquittal in the face of evidence showing his guilt of an intermediate grade? It has already been seen that in the United States, at an early day, a statutory approach was made to this result by the beneficent enactments dividing murder into two degrees. But this, by itself, is not enough. A court may say to a jury, "Here is evidence of premeditation; you must here find either murder in the first degree, or acquit." Eminent jurists, in order to meet this difficulty, have authoritatively advanced positions which have just been incidentally noticed, and will now be stated more fully.

The idea of diminished responsibility in cases of abnormal excitement is already familiar to the law. Homicide in hot blood is not murder, but manslaughter; yet, what is rage but a short frenzy? and how difficult is it to distinguish such frenzy from the mania transitoria of the alienists? A drunken man engages in a brawl, and shoots an innocent stranger; and here, as his mind was so stupefied by drink that he was incapable of a specific intent to take life, the offense is reduced to murder in the second degree. Or he receives and passes a counterfeit note when in the same condition, and here his drunkenness is admissible to show that he did not know the note was counterfeit. Or a series of men, swept away by religious or political excitement, fall into such a highly charged and abnormal state of mind that they are incapable of accurate perception, and here, then, homicide committed when in such a state is held to be reduced to murder in the second degree.[5]

How are these last states distinguishable from other well-known exciting influences? What is there that mitigates guilt in cases where

[5]See *infra*, § 181 (3d ed.).

the patient is advanced one degree in the insane scale, but will not mitigate it when he is advanced two degrees?

By the Austrian and Bavarian codes this question has been recently answered by the recognition of degrees in penal responsibility. Diminished responsibility (*verminderte Zurechnungsfähigkeit*) is distinctively and authoritatively defined as a condition in which the mind is incapable of calm and exact premeditation or conception, and to this condition a lesser grade of punishment is assigned. And the same principle is adopted juridically by the North German courts. In England there is no statutory adoption, so far as concerns insanity, of such diminished responsibility, nor have the courts as yet proceeded so far as to look upon nervous or mental disease as lowering the grade of guilt, emphatic as they are in recognizing the entire suspension of responsibility when insanity destroys the capacity of distinguishing between right and wrong. But the reform which the courts, in their distinctively judicial capacity, have felt unable to effect, has been brought about by the joint action of judiciary and executive. Thus, in two remarkable cases of homicide, those of Watson and Edmunds, hereafter fully noticed,[6] the defense being insanity, but the proof amounting merely to insane predisposition, or, at the highest, to a light and incipient stage of insanity, while the jury were directed to convict, yet, after conviction of the capital crime, on application to the Crown, in which the judges joined, capital punishment was commuted to imprisonment for life.

In the United States, in construing the statutes already noticed as establishing degrees in homicide, the courts[7] have uniformly held, as has been already noticed, that when, through drunkenness, the defendant was incapable of premeditation or of specific intent, then only the second degree of murder is reached. The same relaxation has been applied, not only in the United States, but in England, to cases of larceny and other fraudulent crimes when the party's mental condition was such, through drunkenness, that he was incapable of guilty knowledge or intent. And in Pennsylvania, in a series of cases of riotous homicide committed by parties in a high state of political and religious excitement, the courts humanely and wisely accepted the principle already stated, that there may be a fury and distraction of mind in which the capacity to comprehend, to compare, to weigh, and to premeditate may be temporarily so far depressed or disturbed as to bring the offense within the definition of murder in the second, as distinguished from that of murder in the first, degree.[8]

[6] See *infra*, §§ 166–173 (3d ed.). [7] See *infra*, §§ 214–227 (3d ed.).
[8] See *infra*, §§ 181, 200 (3d ed.).

From the scope of the reasoning which has led to such results, it is impossible to withdraw cases of mental excitement and disturbance, which, though not amounting to such mature insanity as to utterly suspend responsibility, yet prevent the patient from forming calm, premeditated, and specific criminal designs. Slow as have the courts been in reaching this conclusion, we may now regard it as gradually winning judicial acceptance;[9] and, if so, we may view the law as having received an expansion philosophically consistent with its own principles, and bringing it in full accord with the mature and humane renditions of science. Heretofore "moral insanity" and "insane monomania" have owed the little practical favor they have wrung from courts and juries to the fact that there were cases in which their recognition seemed to be the only way of escaping a verdict which would involve the penalty of death. The consequence was that the public was outraged, sometimes by the acquittal, on the ground of insanity, of men who, in no other relation, would be viewed as insane, and sometimes by the conviction and execution of men who, though not fully insane, would, in no relation, be regarded as fully and perfectly responsible. The modification of the law now introduced avoids both these extremes. It says, on the one hand, that men not fully and perfectly insane are not to be acquitted of crime. It says, on the other hand, that they are not to be convicted of those higher grades of calm and specific guilt of which they were not capable. It judges them according to their lights, and assigns to them that well-known grade of modified guilt which belongs to those who do wrong, wilfully, indeed, and intentionally, but whose illegal acts are the consequence of such passion as destroys in them the capacity of accurate guilty knowledge or complete guilty design.

Such is the shape into which the law of insanity is now gradually settling. That the change is one of natural and logical development will at once be seen; but with regard to it, so far as concerns the question of time, and therefore, so far as concerns the present edition of this work, two circumstances are to be particularly noticed. The first is that the development here spoken of has, on the law side, evidenced itself distinctively in the last ten years. The second is that, on the psychological and medical side, it has only been within the last ten or fifteen years that the opinions of experts and of scientists have presented themselves in such a body as to enable the full voice of science and experience in this relation to be heard. The results on both sides of the inquiry are exhibited in the following

[9] See *infra*, § 200 (3d ed.).

pages. What has been just said is mainly designed for the purpose of explaining why the text of the former editions has been in a large measure thrown aside, and why, in its place, is presented what is substantially a new treatise.[10]

The author takes this method of expressing his acknowledgments to T. C. Coogan, Esq., and Nathan Franks, Esq., for aid rendered in examination of authorities.

[10] On the special topic of this preface may be consulted Dr. Hammond on "Reasoning Mania," Jour. Nerv. and Ment. Diseases, Jan. 1882. Attention is also directed to the valuable reports of Mr. Richard Vaux on Prison Discipline.

PREFACE TO THE FOURTH EDITION.

In the present edition the text of former editions has been rearranged and condensed; a large amount of new material introduced, the number of citations having been doubled; and the chapters on the jurisprudence of insanity rewritten. In the task of preparation I have been aided by my nephew, Thomas I. Wharton, Esq., of Philadelphia.

F. W.

PHILADELPHIA, March 24, 1882.

PREFACE TO THE FIFTH EDITION.

In this edition the chapters on the jurisprudence of insanity have been entirely rewritten. The general plan of the fourth edition has been followed, but the wonderful growth of the subject since the publication of that edition has led to the addition of twelve new chapters, a large number of principles and points, and a vastly increased number of citations. This has necessitated great condensation,—far greater than that to which previous editions were subjected; but the design has been to completely exhaust the whole subject, and over five thousand cases have been examined in its preparation, though, for brevity, where propositions are supported by a great number of cases, only the leading and the latest cases from each state have been cited. The work is new, but contains all the substance of this subject in the fourth edition, with extensive additions, and brings the whole down to the date of writing by the incorporation of the great mass of decisions rendered since the publication of the former edition.

In this edition the whole subject of the medical jurisprudence of insanity has been written by Dr. James Hendrie Lloyd. This is therefore an entirely new work, not a mere edition of the former volume. Being written by a physician, it presents the subject on a scientific basis, but also in clear relationship to the law.

It may be noted that in some instances there is a tendency to divergence of view between the courts and the physicians. Something of this may appear herein. But the legal aspects of the subject have been treated by Mr. Bowlby, in Chapters I.–XX., with the sole purpose to present exactly what the courts have decided on the subject, and not to exploit any theories of his own. The work of Dr. Lloyd, in the latter part of the book (Chapters XXI.–LIX.), treats the subject independently, from the standpoint of the scientific expert on the subject. The discussion of the legal questions in this part of the work is incidental to the treatment of the subject from the physician's standpoint, and is not to be regarded as, in itself, a treatise on the existing law of the subject as decided by the courts. That is to be found in Chapters I.–XX.

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BOOK I.

MENTAL UNSOUNDNESS IN ITS LEGAL RELATIONS.

MEDICAL JURISPRUDENCE.

BOOK I.

MENTAL UNSOUNDNESS IN ITS LEGAL RELATIONS.

CHAPTER I.

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I. Lunacy, generally.

1. General view.— Persons, not only apparently, but actually, destitute of reason, are incapable of dealing contractually. Hence the incapacity of idiots, when complete, is absolute. Mere imbecility, however, is not sufficient to invalidate a contract where there is not an essential privation of the reasoning faculties, or an incapacity to understand and act with discretion in the ordinary affairs of life. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and, if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him;[1] nor does imbecility not amounting to an essential privation of the reasoning powers.[2] The incapacity must have been such as to render the party incapable of understanding and protecting his interests.[3] To sustain a contract made by him, there being

[1] *Somers* v. *Pumphrey*, 24 Ind. 231; *Mann* v. *Betterly*, 21 Vt. 326; *Farnam* v. *Brooks*, 9 Pick. 212; *Baldwin* v. *Dunton*, 40 Ill. 188; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Willemin* v. *Dunn*, 93 Ill. 511; *Campbell* v. *Hooper*, 3 Smale & G. 153, 24 L. J. Ch. N. S. 644, 1 Jur. N. S. 670, 3 Eq. Rep. 727, 3 Week. Rep. 528; *Henderson* v. *McGregor*, 30 Wis. 78; *Hale* v. *Brown*, 11 Ala. 87.

The jury may consider how far the party was liable to be deceived, though the incapacity was only partial. *Galpin* v. *Wilson*, 40 Iowa, 90. See also *Shakespeare* v. *Markham*, 72 N. Y. 400, and *Cadwallader* v. *West*, 48 Mo. 483. In this last case it was said that wherever inadequacy of consideration and mental weakness concur, the contract should be annulled. And see *Owing's Case*, 1 Bland, Ch. 370, 390, 17 Am. Dec. 311.

[2] *Somers* v. *Pumphrey*, 24 Ind. 231; *Farnam* v. *Brooks*, 9 Pick. 212; *Cain* v. *Warford*, 33 Md. 23; *Shoulters* v. *Allen*, 51 Mich. 529, 16 N. W. 888; *Johnson* v. *Phifer*, 6 Neb. 401; *Mulloy* v. *Ingalls*, 4 Neb. 115; *Missouri P. R. Co.* v. *Brazil*, 72 Tex. 233, 10 S. W. 403; *Harmon* v. *Harmon*, 51 Fed. 113.

[3] *Perry* v. *Pearson*, 135 Ill. 218, 25 N. E. 636.

Under the older rule, imbecility not

no undue advantage, it is, in general, sufficient to show that the party contracting knew what he was about.[4] If he is incapable of such knowledge,—if, in other words, he is either an idiot or a maniac, not capable of knowing what he is about,—then he is incapable of contracting; the capacity, according to the modern view, being required to correspond with the difficulty of the matter in hand.[5]

2. By early authorities lunacy no ground for avoidance of.—The early common-law authorities inclined to the position that, as no man could be allowed to stultify himself, so no man could set up his own insanity at the time of a contract as the ground of avoiding it.[6] At the same time it was conceded that this right of avoidance belonged to the alleged lunatic's heirs and administrators.[7] The restriction, therefore, was purely personal, and was based on a mistaken view of insanity. Insanity was deemed to be perpetual. If it existed at the time of the contract, it existed when suit was brought. If it did not exist when suit was brought, it did not exist at the time of the contract.

The progress of this idea is traced by Blackstone,[8] so far as it relates to the conveyances of lunatics. It seems to have rested

amounting to idiocy or a total want of understanding was not sufficient to void a deed in the absence of fraud. *Odell* v. *Buck*, 21 Wend. 142.

[4] *Lozear* v. *Shields*, 23 N. J. Eq. 509; *Clearwater* v. *Kimler*, 43 Ill. 272; *Myatt* v. *Walker*, 44 Ill. 485; *Emery* v. *Hoyt*, 46 Ill. 258; *Cadwallader* v. *West*, 48 Mo. 483; *Ball* v. *Mannin*, 3 Bligh N. R. 1, 1 Dow & C. 880; *Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Hemingway* v. *Coleman*, 49 Conn. 390, 44 Am. Dec. 243; *Jones* v. *Thompson*, 5 Del. Ch. 374; *Maddox* v. *Simmons*, 31 Ga. 512; *Pickerell* v. *Morss*, 97 Ill. 220; *Miller* v. *Craig*, 36 Ill. 109; *Graham* v. *Castor*, 55 Ind. 559; *Harris* v. *Wamsley*, 41 Iowa, 671; *Des Moines Nat. Bank* v. *Chisholm*, 71 Iowa, 675, 33 N. W. 234; *Wilson* v. *Oldham*, 12 B. Mon. 55; *Davis* v. *Phillips*, 85 Mich. 198, 48 N. W. 513; *Trimbo* v. *Trimbo*, 47 Minn. 389, 50 N. W. 350; *Simonton* v. *Bacon*, 49 Miss. 582; *Keithley* v. *Keithley*, 85 Mo. 217; *Hall* v. *Knappenberger*, 97 Mo. 509, 11 S. W. 239; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Rippy* v. *Gant*, 39 N. C. (4 Ired. Eq.) 443; *Aiman* v. *Stout*, 42 Pa. 114; *Graham* v. *Pancoast*, 30 Pa. 89; *Nace* v. *Boyer*, 30 Pa. 99; *Dodds* v. *Wilson*, 3 Brev. 389; *Dodds* v. *Wilson*, 1 Treadway Const. 448; *Mann* v. *Betterly*, 21 Vt. 326; *Kilgore* v. *Cross*, 1 Fed. 578; *Barker* v. *Northern P. R. Co.* 65 Fed. 460; *Gartside* v. *Isherwood*, 1 Bro. Ch. 560.

To render a deed invalid for want of capacity in the grantor, it is not necessary that he should have been without a glimmer of reason, or that the incapacity should have amounted to idiocy in the strict legal sense. *Ball* v. *Mannin*, 3 Bligh N. R. 1, 1 Dow. & C. 880.

Nor is it necessary that there should have been fraud. *Wager* v. *Wagoner*, 53 Neb. 511, 73 N. W. 937.

[5] *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Fulwider* v. *Ingels*, 87 Ind. 414; *Seerley* v. *Sater*, 68 Iowa, 376, 27 N. W. 262; *Paulus* v. *Reed* (Iowa) 96 N. W. 757; *Turner* v. *Houpt*, 53 N. J. Eq. 526, 33 Atl. 28; *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901; *Glasscock* v. *Tate*, 107 Tenn. 486, 64 S. W. 715; *Hanley* v. *National Loan & Invest. Co.* 44 W. Va. 450, 29 S. E. 1002.

An incurable lunatic confined in an asylum is not competent to abandon a homestead right. *National Loan & Bldg. Asso.* v. *Maloney*, 22 Ky. L. Rep. 1094, 60 S. W. 12.

[6] Co. Litt. 247*a*.

[7] Co. Litt. 247*b*; *Beverley's Case*, 4 Coke, 123*b*.

[8] 2 Bl. Com. 291.

chiefly on the authority of Lord Coke, as Fitzherbert, Britton, and Bracton were directly opposed to him.[9] But it cannot be said ever to have been law in America,[10] and has been exploded in England, though followed by Lord Tenterden in 1827.[11]

3. Subsequent tendency to hold all contracts with lunatics void.— The early doctrine, then, was that the contract of a lunatic could only be avoided after his death by his heirs or representatives; but the cases of *Thompson* v. *Leach*[12] and *Yates* v. *Boen*[13] overthrew this, and took the ground that, with the exception of feoffments, which from their solemn nature could be only voidable, the deeds and contracts of persons incompetent, not only from insanity, but from drunkenness,[14] were void. In this country, several early cases took the ground that the contracts of a lunatic, executed or unexecuted, are *per se* void, unless for necessaries.[15] This is unquestionably correct in cases where the absence of mental capacity is so obvious as to make dealing with the lunatic a fraud. But unless there is such a total deficiency in capacity, it is not reasonable to hold that a contract entered into in good faith with a lunatic is void. If all contracts of persons mentally unsound are void, no matter what may be the degree of the unsoundness, no title to property of any kind would be secure. And even against a party contracting immediately with the alleged lunatic, the contract, if bona fide and fair on both sides, ought not to be set aside on the ground of latent lunacy.[16]

[9] Nat. Brev. 202; Bracton, fol. 100*a*; Britton, chap. 28, folio 66.

[10] See *Den ex dem. State Bank* v. *Moore*, 5 N. J. L. 470; *Webster* v. *Woodford*, 3 Day, 90; *Fitzhugh* v. *Wilcox*, 12 Barb. 235; *Bensell* v. *Chancellor*, 5 Whart. 376, 34 Am. Dec. 561; *M'Creight* v. *Aiken*, Rice L. 56.

[11] *Brown* v. *Jodrell*, 3 Car. & P. 30, Moody & M. 105. Mr. Pollock says that the doctrine was exploded long before it was adopted by Lord Tenterden. See Pollock, Contr., p. 78. Stephen, however (1 Com., 7th ed. 475), considers the maxim still to be one of law as regards transactions merely voidable: though it has, he says, no application to transactions absolutely void, such as conveyances other than feoffments.

[12] 3 Salk. 300, Comb. 468, 2 Ventr. 198.

[13] 2 Strange, 1104.

[14] *Cole* v. *Robbins*, Bull. N. P. 172.

[15] *Lang* v. *Whidden*, 2 N. H. 435; *Burke* v. *Allen*, 29 N. H. 106, 61 Am. Dec. 642; *Mitchell* v. *Kingman*, 5 Pick. 431; *Seaver* v. *Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Somes* v. *Skinner*, 16 Mass. 348; *Grant* v. *Thompson*, 4 Conn. 208, 10 Am. Dec. 119; *Rice* v. *Peet*, 15 Johns. 503; *La Rue* v. *Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Fitzgerald* v. *Reed*, 9 Smedes & M. 94; *Hincs* v. *Potts*, 56 Miss. 346; *Farley* v. *Parker*, 6 Or. 105, 25 Am. Rep. 504; *Cook* v. *Parker*, 4 Phila. 265; *State Bank* v. *McCoy*, 69 Pa. 209, 8 Am. Rep. 246; *Hope* v. *Everhart*, 70 Pa. 231; *Jackson ex dem. Cadwell* v. *King*, 4 Cow. 207, 15 Am. Dec. 354; *Somers* v. *Pumphrey*, 24 Ind. 231; *Marmon* v. *Marmon*, 47 Iowa, 121; *Wilson* v. *Oldham*, 12 B. Mon. 55; *Encking* v. *Simmons*, 28 Wis. 272. And see the remarks of Strong, J., in *Dexter* v. *Hall*, 15 Wall. 20, 21 L. ed. 73.

Under this rule the test of mental capacity was not whether the person had sufficient understanding to know what he was doing, but whether he had the right use of his reason. *Hale* v. *Hills*, 8 Conn. 39.

[16] *Searle* v. *Galbraith*, 73 Ill. 269. In *Jenkins* v. *Morris*, L. R. 14 Ch. Div.

4. **Modern rule voidable, not void.**—By a great preponderance of modern authority, subject to but few exceptions,[17] the contracts of lunatics are regarded as voidable in a proper case, but not void.[18] In many jurisdictions, however, this rule applies only to lunacy not judicially determined, the contracts of lunatics being avoided from the period at which an inquisition finds lunacy to have commenced.[19] But whether void or voidable they may be set aside at the instance of either party, even after restoration to sanity,[20] or at the instance of the heirs or legatees of the insane party.[21] And they may be ratified after recovery or during a lucid interval.[22]

674, 42 L. T. N. S. 817, the lessor of a farm believed that it was impregnated with sulphur, and was at the pains to try many experiments to rid himself of it. A jury found him of sufficient business capacity to make a valid lease thereof and the court refused to disturb the verdict.

So, insanity is no defense to a promissory note unless it is shown that the note was obtained by fraud or without a proper consideration or with knowledge of insanity. *Weaver* v. *Weaver*, 20 Pa. Co. Ct. 392, 28 Pittsb. L. J. N. S. 367.

[17]In Indiana there is a statute providing that contracts by persons of unsound mind are void. But it applies only to persons found to be of unsound mind in the mode prescribed by the statutes. *Crouse* v. *Holman*, 19 Ind. 30; *Copenrath* v. *Kienby*, 83 Ind. 18; *Musselman* v. *Cravens*, 47 Ind. 1.

[18]Among the many cases supporting this proposition are the following: *Orr* v. *Equitable Mortg. Co.* 107 Ga. 499, 33 S. E. 708; *Beasley* v. *Beasley*, 180 Ill. 163, 54 N. E. 187; *Ætna L. Ins. Co.* v. *Sellers*, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97; *Arnett* v. *Owens*, 23 Ky. L. Rep. 1409, 65 S. W. 151; *Riley* v. *Carter*, 76 Md. 581, 19 L. R. A. 489, 35 Am. St. Rep. 443, 25 Atl. 667; *Allis* v. *Billings*, 6 Met. 415, 39 Am. Dec. 744; *Rogers* v. *Blackwell*, 49 Mich. 192, 13 N. W. 512; *Thorpe* v. *Hanscom*, 64 Minn. 201, 66 N. W. 1; *Jamison* v. *Culligan*, 151 Mo. 410, 52 S. W. 224; *Robinson* v. *Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Riggin* v. *Green*, 80 N. C. 236, 30 Am. Rep. 77; *Re Desilver*, 5 Rawle, 111, 28 Am. Dec. 645; *Williams* v. *Sapicha*, 94 Tex. 430, 61 S. W. 115; *French Lumbering Co.* v. *Theriault*, 107 Wis. 627, 51 L. R. A. 910, 81 Am. St. Rep. 856, 83 N. W. 927.

[19]See *post*, chapter VI., § 150.

A deed is a contract within the meaning of the Illinois statute, making contracts of lunatics after inquisition void as against the lunatic and his estate and providing that those made before the finding of lunacy may be avoided except in favor of a person fraudulently making the same. *Burnham* v. *Kidwell*, 113 Ill. 425.

[20]*Clay* v. *Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

But the sane party cannot take advantage of the insanity of the other for the purpose of relieving himself from the performance of the contract. *Mead* v. *Stegall*, 77 Ill. App. 679.

And there must have been an actual disaffirmance. *Ætna L. Ins. Co.* v. *Sellers*, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97.

And ignorance of the insanity is no defense to an action for the recovery of the subject-matter of a contract. *Seaver* v. *Phelps*, 11 Pick. 304, 22 Am. Dec. 372.

[21]*Valpey* v. *Rea*, 130 Mass. 384. And see *Rogers* v. *Blackwell*, 49 Mich. 192, 13 N. W. 512.

It can be done, however, only by privies in blood or legal representatives. *Hunt* v. *Rabitoay*, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59.

[22]*Whitcomb* v. *Hardy*, 73 Minn. 285, 76 N. W. 29; *Blakeley* v. *Blakeley*, 33 N. J. Eq. 502; *Blinn* v. *Schwarz*, 63 App. Div. 25, 71 N. Y. Supp. 343; *Cockrill* v. *Cockrill*, 79 Fed. 143, affirmed in 34 C. C. A. 254, 92 Fed. 811.

So, a contract made by an insane person who afterwards dies, from which his estate realizes property of value, may be ratified, either expressly or impliedly,

5. Contracts executed in good faith will be sustained.—It seems to be settled by the weight of authority, that a contract made with a lunatic in good faith and in ignorance of his incapacity cannot, after the property has been obtained and enjoyed by the lunatic, be set aside or defeated by the latter or his representatives, unless the parties can be put *in statu quo*. Or, to adopt the words of Pollock, C. B.:[23] "When a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be destroyed so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him."

This conclusion is sustained in America by numerous adjudications.[24] And, in order to warrant a rescission, the party asking it

by his personal representatives; and in such case the estate is bound thereby. *Bunn* v. *Postell*, 107 Ga. 490, 33 S. E. 707.

A ratification is effected by bringing an action for the recovery of the proceeds of sale after recovery and notice of the facts. *Blinn* v. *Schwarz*, 63 App. Div. 25, 71 N. Y. Supp. 343.

In Nebraska, neither the county court, nor the person under guardianship, nor his guardian, nor all together, can ratify or confirm a conveyance of land made by the ward previous to the guardianship, but while he was insane. *Gingrich* v. *Rogers* (Neb.) 96 N. W. 156.

[23] *Molton* v. *Camroux*, 2 Exch. 503.

[24] Among the adjudications adopting this rule are *Kendall* v. *May*, 10 Allen, 59; *Young* v. *Stevens*, 48 N. H. 133, 2 Am. Rep. 202; *Beals* v. *See*, 10 Pa. 56, 49 Am. Dec. 573; *Kneedler's Appeal*, 92 Pa. 428; *Eldredge* v. *Palmer*, 185 Ill. 618, 76 Am. St. Rep. 59, 57 N. E. 770; *Thrash* v. *Starbuck*, 145 Ind. 673, 44 N. E. 543; *Jewell* v. *Clay*, 107 Iowa, 52, 77 N. W. 511; *Gribben* v. *Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 8 Pac. 584; *Flach* v. *Gottschalk*, 88 Md. 368, 42 L. R. A. 745, 71 Am. St. Rep. 418, 41 Atl. 908; *McKenzie* v. *Donnell*, 151 Mo. 431, 52 S. W. 214; *Robinson* v. *Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; *Matthiessen & W. Ref. Co.* v. *McMahon*, 38 N. J. L. 536; *Mutual L. Ins. Co.* v. *Hunt*, 79 N. Y. 541; *Hardy* v. *Berger*, 76 App. Div. 393, 78 N. Y. Supp. 109; *Riggin* v. *Green*, 80 N. C. 236, 30 Am. Rep. 77; *McFalls* v. *Brown* (Tex. Civ. App.) 37 S. W. 784; *Encking* v. *Simmons*, 28 Wis. 272; *Stockmeyer* v. *Tobin*, 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504.

But see *Bates* v. *Hyman* (Miss.) 28 So. 567; *Sims* v. *McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *Rusk* v. *Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Beller* v. *Jones*, 22 Ark. 92; *Carr* v. *Holliday*, 40 N. C. (5 Ired. Eq.) 167.

If the contract be executory it will not be upheld. Story, Contr. 5th ed. § 83; *Skidmore* v. *Romaine*, 2 Bradf. 122.

But see *Beavan* v. *M'Donnell*, 9 Exch. 309, 2 C. L. Rep. 474, 23 L. J. Exch. N. S. 94, 22 L. T. 243, affirmed in 10 Exch. 184, 23 L. J. Exch. N. S. 326. In a late case (1881) in Pennsylvania, Judge Trunkey, in holding the accommodation indorsement of a promissory note by a lunatic void, laid down the general principle "that there can be no binding executory agreement where one of the parties is bereft of reason." *Wirebach* v. *Bank of Easton*, 10 W. N. C. 145. For other English cases following *Molton* v. *Camroux*, 2 Exch. 487, affirmed in 4 Exch. 17, see *Price* v. *Berrington*, 7 Hare, 394; *Dane* v. *Kirkwall*, 8 Car. & P. 679; *Beavan* v. *M'Donnell*, 10 Exch. 184, 23 L. J. Exch. N. S. 326; *Hassard* v. *Smith*, Ir. Rep. 6 Eq. 429.

One dealing with an insane person not judicially determined to be so is not chargeable, as matter of law, with

must show willingness and ability to put the other *in statu quo,* or show that the other knew of the insanity and took advantage of it,[25] though the rule has been laid down that the burden rests with the sane party to show fair dealing and ignorance of the insanity;[26] and that it must appear that the lunatic still has the consideration or has spent it for necessaries.[27]

6. Conflict as to whether deeds are voidable.— While, however, the prevalent opinion now is that an ordinary business contract with a lunatic, when fair, and by a party having no notice of his mental disability, will be sustained, there is still much difference of opinion as to whether title to real estate can be passed by a person at the time a lunatic, no matter how completely his lunacy may have been disguised. Some of the earlier authorities recognize the distinction taken in *Thompson* v. *Leach,*[28] between a deed of feoffment and a deed of bargain and sale, holding the latter absolutely void.[29] The Supreme Court of the United States has accepted this position.[30]

knowledge of his mental condition. *Judd* v. *Gray,* 156 Ind. 278, 59 N. E. 849.

And one who has sufficient mental capacity to comprehend the making and execution of a mortgage and its use is precluded from interposing a plea of usury against a person purchasing it upon the faith of his affidavit that the mortgage was a good and valid security. *Hirsch* v. *Trainer,* 3 Abb. N. C. 274.

[25]*Jamison* v. *Culligan,* 151 Mo. 410, 52 S. W. 244; *Rhoades* v. *Fuller,* 139 Mo. 179, 40 S. W. 760.

Where an executed contract has been made in good faith for a valuable consideration and without notice of insanity, with a person of unsound mind, the latter must elect within a reasonable time after regaining his mental capacity, whether he will affirm or disaffirm the contract; and, if he elects to do the latter, he must return the consideration which he received, whether it proceeded from a third party or not. *Morris* v. *Great Northern R. Co.* 67 Minn. 74, 69 N. W. 628.

[26] See *Merritt* v. *Merritt,* 43 App. Div. 68, 59 N. Y. Supp. 357; *Hardy* v. *Berger,* 76 App. Div. 393, 78 N. Y. Supp. 709.

[27]*Williams* v. *Sapieha,* 94 Tex. 430, 61 S. W. 115.

[28] 3 Salk. 300, Comb. 468, 2 Ventr. 198.

By statute in England the feoffments of a lunatic are now void. See 1 Stephen, Com. 7th ed. 475. See also Pollock, Contr. Am. ed. pp. 80, 406.

[29]*Re Desilver,* 5 Rawle, 111, 28 Am. Dec. 645; *Rogers* v. *Walker,* 6 Pa. 371, 47 Am. Dec. 470.

[30]*Dexter* v. *Hall,* 15 Wall. 9, 21 L. ed. 73.

Other cases holding the deed of a lunatic absolutely void do not seem to notice the distinction. *Van Deusen* v. *Sweet,* 51 N. Y. 378; *Farley* v. *Parker,* 6 Or. 105, 25 Am. Rep. 504.

So, in *German Sav. & Loan Soc.* v. *De Lashmutt,* 67 Fed. 399, it was held that a deed of a lunatic is not merely voidable, but absolutely void.

And the same was held in *Wilkinson* v. *Wilkinson,* 129 Ala. 279, 30 So. 578; *Dougherty* v. *Powe,* 127 Ala. 577, 31 So. 524; *Galloway* v. *Hendon,* 131 Ala. 280, 31 So. 603.

And in Alabama the fact that lands were purchased without notice of the grantor's insanity does not prevent such insanity from rendering the conveyance wholly void. *Galloway* v. *Hendon,* 131 Ala. 280, 31 So. 603; *Wilkinson* v. *Wilkinson,* 129 Ala. 279, 30 So. 578; *Dougherty* v. *Powe,* 127 Ala. 577, 30 So. 524.

And the rule seems to be the same in Georgia. *Orr* v. *Equitable Mortg. Co.* 107 Ga. 499, 33 S. E. 708.

And in Nebraska the deed of an insane person may be avoided even against a grantee for value without notice of his grantor's insanity. *Gingrich* v. *Rog-*

It has been held, however, that while a deed of bargain and sale is in this country equivalent to a feoffment, and of an equal solemnity, the deeds of lunatics, like the deeds of infants, though voidable, may be ratified.[31] To the extent of holding the deed of a lunatic not under guardianship voidable only, this is sustained by numerous other authorities,[32] though the appointment of a guardian may avoid subsequent deeds.[33]

7. On rescission, parties to be placed in statu quo.— It has been held that, on suit for avoidance brought, restitution of the consideration by the lunatic is unnecessary as a condition precedent, unless the lunatic be restored to reason, and seeks inequitably to use his prior lunacy as an engine of fraud.[34] But the better opinion is that the parties must be placed *in statu quo,* unless there has been actual fraud.[35]

8. Liable for necessaries.— But in any view it may be regarded as settled, both at law and in equity, that a lunatic's estate is liable for necessaries furnished to him;[36] and the lunatic himself, or his administrator, and not his guardian, must be sued on such debts.[37]

ers (Neb.) 96 N. W. 156; *Dewey* v. *Allgire,* 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276.

[31]*Allis* v. *Billings,* 6 Met. 415, 39 Am. Dec. 744; *Arnold* v. *Richmond Iron Works,* 1 Gray, 434; *Gibson* v. *Soper,* 6 Gray, 279, 66 Am. Dec. 414; *Howe* v. *Howe,* 99 Mass. 88; *Valpey* v. *Rea,* 130 Mass. 384; *Crawford* v. *Scovel,* 8 W. N. C. 364.

[32]*Hovey* v. *Hobson,* 53 Me. 451, 89 Am. Dec. 705; *Eaton* v. *Eaton,* 37 N. J. L. 108, 18 Am. Rep. 716; *Key* v. *Davis,* 1 Md. 32; *Chew* v. *Bank of Baltimore,* 14 Md. 299; *Evans* v. *Horan,* 52 Md. 602; *Rusk* v. *Fenton,* 14 Bush, 490, 29 Am. Rep. 413; *Ashcraft* v. *De Armond,* 44 Iowa, 229; *Nichol* v. *Thomas,* 53 Ind. 42; *Freed* v. *Brown,* 55 Ind. 310; *Elston* v. *Jasper,* 45 Tex. 409; *Scanlan* v. *Cobb,* 85 Ill. 296.

[33]See *infra,* chapter VI., § 150.

[34]*Gibson* v. *Soper,* 6 Gray, 279, 66 Am. Dec. 414; *Jones* v. *Galbraith* (Tenn. Ch. App.) 59 S. W. 350.

To same effect, *Crawford* v. *Scovel,* 8 W. N. C. 364; *Hovey* v. *Hobson,* 53 Me. 451, 89 Am. Dec. 705; *Nichol* v. *Thomas,* 53 Ind. 42; *Lagay* v. *Marston,* 32 La. Ann. 170.

So, in *Roman* v. *Bluhm,* 173 Ill. 277, 50 N. E. 694, it was said that the doctrine that restoration was necessary in case of rescission of a contract is applicable in general only to contracts by persons *compos mentis.*

[35]*Eaton* v. *Eaton,* 37 N. J. L. 108, 18 Am. Rep. 716; *Evans* v. *Horan,* 52 Md. 602; *Scanlan* v. *Cobb,* 85 Ill. 296; *Ashcraft* v. *De Armond,* 44 Iowa, 229; *Rusk* v. *Fenton,* 14 Bush. 490.

And see cases cited with relation to *statu quo* with reference to general contracts, *supra,* § 5.

This is especially so when there is no notice and the party had not been judicially declared insane. *Ronan* v. *Bluhm,* 173 Ill. 277, 50 N. E. 694.

[36]*Baxter* v. *Portsmouth,* 5 Barn. & C. 170, 7 Dowl. & R. 614, 2 Car. & P. 178; *Neill* v. *Morley,* 9 Ves. Jr. 478; *Dane* v. *Kirkwall,* 8 Car. & P. 679; *Sawyer* v. *Lufkin,* 56 Me. 308; *McCrillis* v. *Bartlett,* 8 N. H. 569; *Lincoln* v. *Buckmaster,* 32 Vt. 652; *Kendall* v. *May,* 10 Allen, 59; *Skidmore* v. *Romaine,* 2 Bradf. 122; *La Rue* v. *Gilkyson,* 4 Pa. 375, 45 Am. Dec. 700; *Lancaster County Nat. Bank* v. *Moore,* 78 Pa. 407, 21 Am. Rep. 24; *Matthiessen & W. Ref. Co.* v. *McMahon,* 38 N. J. L. 537; *Van Horn* v. *Hann,* 39 N. J. L. 207; *McCormick* v. *Littler,* 85 Ill. 62, 28 Am. Rep. 610; *Borum* v. *Bell,* 132 Ala. 85, 31 So. 454; *Re Yturburru,* 134 Cal. 568, 66 Pac. 729; *Miller* v. *Hart,* 135 Ind. 201, 34 N. E. 1003; *State* v. *Sweet,* 21 R. I. 87, 41 Atl. 1011; *McNairy County* v. *McCoin,* 101 Tenn. 74, 41 L. R. A. 862, 45 S. W. 1070; *Pearl* v. *M'Dowell,* 3 J. J. Marsh. 658, 20 Am. Dec. 199; *Coleman* v. *Frazer,* 3 Bush, 300; *Richardson* v. *Strong,*

9. Also liable for contracts during lucid intervals.— Where the disease is of such a character that lucid intervals exist, the power to contract returns with the return of reason, and a contract or deed made in a lucid interval is valid.[38] Since, however, as will presently be seen more fully, insanity of a permanent type is continuous, the party alleging a lucid interval will be required to prove its actual existence.[39] On the other hand, where the disease is in its nature periodic or temporary, the presumption of incapacity does not apply.[40] By a lucid interval, moreover, is not meant "a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act."[41] But it must be a restoration of the faculties, and not a mere cessation of the violent symptoms, and requires as strong evidence to establish it as does insanity.[42] It is sufficient to establish such lucid intervals to prove that the party had sufficiently recovered his reason to know what he was about. A discharge from a lunatic asylum is only prima facie evidence of restoration to sanity.[43]

10. Prevailing modern rule; tests.— The more recent rule now pre-

35 N. C. (13 Ired. L.) 106, 55 Am. Dec. 430; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67.

And there need be no express promise. *Palmer* v. *Hudson River State Hospital*, 10 Kan. App. 98, 61 Pac. 506.

In *Read* v. *Legard*, 6 Exch. 636, 20 L. J. Exch. N. S. 309, 15 Jur. 494, it was decided that the maintenance and support of a wife is a necessary; where, however, the husband gives his wife a suitable allowance, he is not liable for her debts contracted with a party who knew of his lunacy. *Richardson* v. *Du Bois*, L. R. 5 Q. B. 51, 10 Best & S. 830, 39 L. J. Q. B. N. S. 69, 21 L. T. N. S. 635, 18 Week. Rep. 62.

The expenses of a commission are a necessary protection for the party and his estate, even though he is found sane thereby. *Nelson* v. *Duncombe*, 9 Beav. 211, 15 L. J. Ch. N. S. 296, 10 Jur. 399; *Williams* v. *Wentworth*, 5 Beav. 325.

[37] See *Van Horn* v. *Hann*, 39 N. J. L. 207.

[38] Story, Contr. § 74; *Hall* v. *Warren*, 9 Ves. Jr. 605; *Tozer* v. *Saturlee*, 3 Grant Cas. 162; *Frazer* v. *Frazer*, 2 Del. Ch. 260; *McCormick* v. *Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Jones* v. *Perkins*, 5 B. Mon. 222; *Blakeley* v. *Blakeley*, 33 N. J. Eq. 502; *Towart* v. *Sellars*, 5 Dow P. C. 231; *Ramsdell* v. *Ramsdell*, 128 Mich. 110, 87 N. W. 81; *Wright* v. *Market Bank* (Tenn. Ch. App.) 60 S. W. 623.

[39] *Staples* v. *Wellington*, 58 Me. 454; *Frazer* v. *Frazer*, 2 Del. Ch. 260; *Aurentz* v. *Anderson*, 3 Pittsb. 310; *Rush* v. *Magee*, 36 Ind. 69; *State* v. *Reddick*, 7 Kan. 143; *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441.

The same rule applies to an alienation of land by one who was of sound memory before he became *non compos mentis* as that applicable to an alienation by an idiot. *Beverley's Case*, 4 Coke, 125.

[40] *Brown* v. *Riggin*, 94 Ill. 560.

So, of epileptic fits. *Carpenter* v. *Carpenter*, 8 Bush, 283; *Aurentz* v. *Anderson*, 3 Pittsb. 310.

[41] *Frazer* v. *Frazer*, 2 Del. Ch. 260; *Ricketts* v. *Jolliff*, 62 Miss. 440; *Ekin* v. *McCracken*, 11 Phila. 534; *Creagh* v. *Blood*, 8 Ir. Eq. Rep. 435, 2 Jones & L. 509; *Bannatyne* v. *Bannatyne*, 14 Eng. L. & Eq. Rep. 581, 16 Jur. 864, 2 Rob. Eccl. Rep. 472; *Sombre* v. *Solaroli*, 1 Deane & S. 110.

[42] *Ricketts* v. *Jolliff*, 62 Miss. 440; *Aubert* v. *Aubert*, 6 La. Ann. 104; *Ekin* v. *McCracken*, 11 Phila. 534; *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574. And see *Ramsdell* v. *Ramsdell*, 128 Mich. 110, 87 N. W. 81.

[43] *Haynes* v. *Swann*, 6 Heisk. 560.

vailing, as has been seen, is that a party is not bound by a contract entered into when he was in such a mental condition as to prevent a reasonable exercise of his faculties, though his mind was not totally eclipsed.[44] And the test of capacity as to contracts generally is whether the person whose contract is in question possessed sufficient mind to reasonably understand the nature of the act he was doing or the business he was transacting, and the consequences thereof;[45] or, as it is sometimes expressed, whether he was capable of transacting ordinary business and of acting rationally in the ordinary affairs of life.[46] And the more usual test as to capacity to make a deed or conveyance is likewise whether the grantor possessed sufficient ability to understand in a reasonable manner the nature and effect of his

[44] *Kilgore* v. *Cross*, 1 Fed. 578.

[45] *Kelly* v. *McGuire*, 15 Ark. 555; *Baldwin* v. *Dunton*, 40 Ill. 188; *Perry* v. *Pearson*, 135 Ill. 218, 25 N. E. 636; *Sands* v. *Potter*, 59 Ill. App. 206; *Coffey* v. *Coffey*, 74 Ill. App. 241; *Behrens* v. *McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Elwood* v. *O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Taylor* v. *Patrick*, 1 Bibb, 168; *Hall* v. *Mutual L. Ins. Co.* 19 Ky. L. Rep. 1240, 43 S. W. 194; *Hovey* v. *Chase*, 52 Me. 304, 83 Am. Dec. 514; *Bond* v. *Bond*, 7 Allen, 1; *Davis* v. *Phillips*, 85 Mich. 198, 48 N. W. 513; *Raynett* v. *Baluss*, 54 Mich. 469, 20 N. W. 533; *Trimbo* v. *Trimbo*, 47 Minn. 389, 50 N. W. 350; *Hill* v. *McLaurin*, 28 Miss. 288; *Nicholas & S. Co.* v. *Hardman*, 62 Mo. App. 153; *State ex rel. Stone* v. *Grand Lodge, A. O. U. W.* 78 Mo. App. 546; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Young* v. *Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Hill* v. *Day*, 34 N. J. Eq. 150; *Lozear* v. *Shields*, 23 N. J. Eq. 509; *Hiett* v. *Shull*, 36 W. Va. 561, 15 S. E. 146; *Whitaker* v. *Hamilton*, 126 N. C. 465, 35 S. E. 815; *Mulligan* v. *Albertz*, 103 Wis. 140, 78 N. W. 1093; *Henrici* v. *Kehr*, 90 Wis. 344, 63 N. W. 285; *Edwards* v. *Davenport*, 20 Fed. 756; *Hall* v. *Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949.

An assignment of an expectancy by one whose mind was so impaired by age that, though she understood its effect, she did not understand its nature, and was not able to distinguish between her own debts and those of others, or to understand whether or not she was equitably required to pay them is invalid and will be set aside. *King* v. *Davis*, 60 Vt. 502, 11 Atl. 727.

An instruction in an action on contract that one who has mind and reason enough to clearly understand the nature and consequences of his act is to be considered sane is not objectionable because of the omission to state that one who lacks that capacity is to be considered insane, since that would be understood. *Norman* v. *Georgia Loan & T. Co.* 92 Ga. 295, 18 S. E. 27.

But an instruction in a contract action that one is disqualified to contract, when, from old age, infirmity, or other misfortune, he is reduced to a state of imbecility which disqualifies him from the proper exercise of his reasoning faculties and the ordinary prudential management of his affairs, is too indefinite and uncertain. *Prather* v. *Naylor*, 1 B. Mon. 244.

[46] *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Perry* v. *Pearson*, 135 Ill. 218, 25 N. E. 636; *Somers* v. *Pumphrey*, 24 Ind. 231; *Prather* v. *Naylor*, 1 B. Mon. 244; *Young* v. *Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 597; *Doe ex dem. Moffit* v. *Witherspoon*, 32 N. C. (10 Ired. L.) 185.

The test is, that the party has sufficient intelligence to carry on business, not that he has sufficient intelligence to carry on business in a proper and prudent manner. *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514.

And where goods are sold by a person alleged to be a lunatic, the sale being invalid for noncompliance with the statute of frauds, and the subsequent delivery is relied upon to validate it, the test of capacity is whether the seller was competent to make the bargain, and, if so, whether his competency continued so as to enable him to perfect it

act or of the business he was transacting, and the legal consequences likely to flow from it.[47]

Capacity to transact ordinary business, however, and to act rationally in the ordinary affairs of life, has been held to be the test in some of the cases;[48] and so has capacity to understand and protect one's

by delivery. *Matthiessen & W. Ref. Co.* v. *McMahon*, 38 N. J. L. 536.

[47]*Doe ex dem. Guest* v. *Beeson*, 2 Houst. (Del.) 246; *Jones* v. *Thompson*, 5 Del. Ch. 374; *Frazer* v. *Frazer*, 2 Del. Ch. 260; *Dicken* v. *Johnson*, 7 Ga. 484; *Richardson* v. *Adams*, 110 Ga. 425, 35 S. E. 648; *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Burt* v. *Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Guild* v. *Hull*, 127 Ill. 523, 20 N. E. 665; *Peabody* v. *Kendall*, 145 Ill. 519, 32 N. E. 674; *Wiley* v. *Ewalt*, 66 Ill. 26; *Carpenter* v. *Carpenter*, 8 Bush, 283; *Ricketts* v. *Jolliff*, 62 Miss. 540; *Hovey* v. *Hobson*, 55 Me. 256; *Darby* v. *Hayford*, 56 Me. 246; *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514; *Boggess* v. *Boggess*, 127 Mo. 305, 29 S. W. 1018; *Pennington* v. *Stanton*, 125 Mo. 658, 28 S. W. 1067; *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Davren* v. *White*, 42 N. J. Eq. 569, 7 Atl. 682; *Earle* v. *Norfolk & N.B. Hosiery Co.* 36 N. J. Eq. 188; *Eaton* v. *Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Blakeley* v. *Blakeley*, 33 N. J. Eq. 508; *Aldrich* v. *Bailey*, 132 N. Y. 85, 30 N. E. 264; *Van Deusen* v. *Sweet*, 51 N. Y. 378; *Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905; *Goodyear* v. *Adams*, 1 Silv. Sup. Ct. 185, 24 N. Y. S. R. 317, 5 N. Y. Supp. 275; *Creagh* v. *Blood*, 2 Jones & L. 509, 8 Ir. Eq. Rep. 434; *Carnagie* v. *Diven*, 31 Or. 366, 49 Pac. 891; *Swank* v. *Swank*, 37 Or. 439, 61 Pac. 846; *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185; *Stringfellow* v. *Hanson*, 25 Utah, 480, 71 Pac. 1052; *Day* v. *Seeley*, 17 Vt. 542; *Miller* v. *Rutledge*, 82 Va. 863, 1 S. E. 202; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Wright* v. *Jackson*, 59 Wis. 569, 18 N. W. 486; *Hall* v. *Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949; *Parker* v. *Marco*, 76 Fed. 510; *Davies* v. *Grindley*, Shelford, Lunatics, 266; *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 57 U. S. App. 634, 86 Fed. 51. And see *Kennedy* v. *Marrast*, 46 Ala. 161; *Furry* v. *Bartling* (Iowa) 94 N. W. 471.

Capacity on the part of a grantor to know that he was transferring title to the grantee is necessary to sustain his deed. *Hovey* v. *Hobson*, 55 Me. 256. But that alone is not sufficient. *Schuff* v. *Ransom*, 79 Ind. 458.

It may be regarded as a test of capacity to make a deed, that the grantor was capable of understanding what he was doing in executing it when its purport was fully explained to him. *Ball* v. *Mannin*, 3 Bligh N. R. 1, 1 Dow & C. 880; *Stewart* v. *Flint*, 59 Vt. 144, 8 Atl. 801.

More mental capacity is required to make a valid deed than to make a valid will. *Jarrett* v. *Jarrett*, 11 W. Va. 584.

But see *Hall* v. *Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949.

Much less capacity is required, however, for the execution of a mortgage which was proposed, discussed, and determined upon previously, when the mortgagor was of unimpaired capacity, leaving nothing to be done but to sign, than would be required for the execution of a complicated contract. *Parker* v. *Marco*, 76 Fed. 510.

[48]*Francis* v. *Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Peabody* v. *Kendall*, 145 Ill. 519, 32 N. E. 674; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *English* v. *Porter*, 109 Ill. 285; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Stone* v. *Witbern*, 83 Ill. 105; *Nichols* v. *King*, 24 Ky. L. Rep. 124, 68 S. W. 133; *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514; *Ball* v. *Mannin*, 3 Bligh N. R. 1, 1 Dow & C. 880.

But see *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 57 U. S. App. 634, 86 Fed. 51.

Buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, constitute the transaction of ordinary business, the capacity to do which shows sufficient capacity to dispose of property by deed. *Francis* v. *Wilkinson*, 147 Ill. 370, 35 N. E. 150.

And one who retains a knowledge of

own interest.[49] The mere fact that the mental powers of a person are somewhat impaired by age, disease, or otherwise, will not affect his deed or contract, where he retains full comprehension of the meaning and effect of his acts;[50] nor will imbecility or weakness of mind;[51] nor mere physical weakness.[52] But weakness of mind is bound to be taken into consideration as a circumstance in determining whether a contract should be enforced or relieved against.[53]

his property and of the character of his acts may make a valid deed, though he may not have capacity to transact all the ordinary business of life. *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383.

It is immaterial on the question of capacity to make a deed whether the grantor had native business capacity to understand it, or whether he learned from competent sources what would be for his interests, or had obtained advice from others so that by their explanation he must have been made to understand. *Doty* v. *Hubbard*, 55 Vt. 278.

[49]*Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Wiley* v. *Ewalt*, 66 Ill. 26; *Lindsey* v. *Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Guild* v. *Warne*, 149 Ill. 105, 36 N. E. 635.

To be valid, a ratification of a deed made while insane must be the intelligent act of the grantor, knowing that he is acting under the contract contained in the deed, and understanding it and availing himself of it. *Bond* v. *Bond*, 7 Allen, 1.

[50]*Guild* v. *Warne*, 149 Ill. 105, 36 N. E. 635; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Burnham* v. *Kidwell*, 113 Ill. 425; *English* v. *Porter*, 109 Ill. 285; *Wiley* v. *Ewalt*, 66 Ill. 26; *Lindsey* v. *Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Stone* v. *Wilbern*, 83 Ill. 105; *Francis* v. *Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Guild* v. *Hull*, 127 Ill. 523, 20 N. E. 665; *Physio-Medical College* v. *Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Hovey* v. *Hobson*, 55 Me. 256; *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514; *Milks* v. *Milks*, 129 Mich. 164, 88 N. W. 402; *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895; *Sprague* v. *Duel*, 11 Paige, 480; *Merritt* v. *Merritt*, 32 Misc. 21, 66 N. Y. Supp. 123; *Carnagie* v. *Diven*, 31 Or. 366, 49 Pac. 891; *Swank* v. *Swank*, 37 Or. 439, 61 Pac. 846; *Stringfellow* v. *Hanson*, 25 Utah, 480, 71 Pac. 1052; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Delaplain* v. *Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201.

The general rule that a deed or other conveyance of an insane person is void or voidable does not refer to insanity in its technical meaning. *Boggess* v. *Boggess*, 127 Mo. 305, 29 S. W. 1018.

And a deed may be upheld under proper circumstances without reference to the abstract question whether the grantor was sane or insane. *Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905.

And the fact that a grantor did not perfectly comprehend the result of the bargain he was making and did not know that the deed given by him would constitute a mortgage would not be sufficient to invalidate it. *Darby* v. *Hayford*, 56 Me. 246.

[51]*Richardson* v. *Adams*, 110 Ga. 425, 35 S. E. 648; *Peabody* v. *Kendall*, 145 Ill. 519, 32 N. E. 674; *Somers* v. *Pumphrey*, 24 Ind. 231; *Wiley* v. *Ewalt*, 66 Ill. 26; *Burt* v. *Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Willemin* v. *Dunn*, 93 Ill. 511; *Miller* v. *Craig*, 36 Ill. 109; *Van Horn* v. *Keenan*, 28 Ill. 445; *Des Moines Nat. Bank* v. *Chisholm*, 71 Iowa, 675, 33 N. W. 234; *Corbitt* v. *Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Paulus* v. *Reed* (Iowa) 96 N. W. 757; *Marmon* v. *Marmon*, 47 Iowa, 121; *Darby* v. *Hayford*, 56 Me. 246; *Dewey* v. *Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; *Hay* v. *Miller*, 48 Neb. 156, 66 N. W. 1115; *Johnson* v. *Phifer*, 6 Neb. 401; *Mulloy* v. *Ingalls*, 4 Neb. 115; *Darren* v. *White*, 42 N. J. Eq. 569, 7 Atl. 682; *Odell* v. *Buck*, 21 Wend. 142; *Lawrence* v. *Willis*, 75 N. C. 471; *Smith* v. *Beatty*, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435; *Aiman* v. *Stout*, 42 Pa. 114; *Anthony* v. *Hutchins*, 10 R. I. 165; *Beville* v. *Jones*, 74 Tex. 148, 1 S. W. 1128; *Miller* v. *Rutledge*, 82 Va. 863, 1 S. E. 202; *Emes* v. *Emes*, 11 Grant Ch. (U. C.) 325.

[52]*Tuite* v. *Hart*, 71 App. Div. 619, 75 N. Y. Supp. 1098.

[53]*Beller* v. *Jones*, 22 Ark. 92; *Doughty* v. *Doughty*, 7 N. J. Eq. 227.

11. Delusion as a test.— Delusion, consisting of belief in things as real which do not in fact exist, and which a rational person would not believe, is not necessarily the true legal test of insanity, or incapacity to contract.[54] But a delusion as to the subject-matter of a contract, which was the cause of its execution, will invalidate it.[55] The question is whether the insane delusion was the moving cause of the act in question.[56]

12. Time of application of tests.— The time to be considered in the application of the tests of capacity to make a contract or deed is the exact time of the performance of the act in question.[57]

13. Monomania as to unrelated subject-matter.—Delusions or hallucinations do not avoid capacity if they do not touch the subject-matter of a contract;[58] nor do monomania or partial insanity.[59] It must appear that the transaction was affected thereby.[60] While every man

[54]*Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380.

[55]*Furry* v. *Bartling* (Iowa) 94 N. W. 471.

[56]*Meigs* v. *Dexter*, 172 Mass. 217, 52 N. E. 75.

[57]*Francis* v. *Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Emery* v. *Hoyt*, 46 Ill. 258; *Fay* v. *Burditt*, 81 Ind. 433, 43 Am. Rep. 142; *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Delaplain* v. *Grubb*, 44 W. Va. 613, 67 Am. St. Rep. 788, 30 S. E. 201; *Anderson* v. *Cranmer*, 11 W. Va. 562; *Farnsworth* v. *Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Towart* v. *Sellars*, 5 Dow, P. C. 231.

An instrument executed upon terms originated by the parties when both were unquestionably sane will not be set aside on the ground of the subsequent mental unsoundness of one of the parties, where he retained capacity to recollect and understand its terms as before agreed upon, though a new transaction then for the first time proposed would be set aside. *Jones* v. *Evans*, 7 Dana, 96; *Parker* v. *Marco*, 76 Fed. 510.

[58]*Staples* v. *Wellington*, 58 Me. 453; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Somes* v. *Skinner*, 16 Mass. 348; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813; *Lozear* v. *Shields*, 23 N. J. Eq. 509; *Emery* v. *Hoyt*, 46 Ill. 258; *Boyce* v. *Smith*, 9 Gratt. 704, 60 Am. Dec. 313; *Lemon* v. *Jenkins*, 48 Ga. 313; *Searle* v. *Galbraith*, 73 Ill. 269; *Johnson* v. *Johnson*, 10 Ind. 387; *McDonald* v. *McDonald*, 16 Grant. Ch. (U. C.) 37; *Campbell* v. *Hill*, 23 U. C. C. P. 473; *Jones* v. *Hughes*, 15 Abb. N. C. 141.

Suspicions entertained by a party, arising from observations made by him and founded upon facts upon which he was satisfied to act, though exaggerated and extremely absurd, are not insane delusions which would legally disqualify him from transferring his property. *Jones* v. *Hughes*, 15 Abb. N. C. 141.

[59]*Burgess* v. *Pollock*, 53 Iowa, 273, 36 Am. Rep. 218, 5 N. W. 179; *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895; *Benoist* v. *Murrin*, 58 Mo. 307; *Ekin* v. *McCracken*, 11 Phila. 534; *Boyce* v. *Smith*, 9 Gratt. 704, 60 Am. Dec. 313.

[60]*Blakeley* v. *Blakeley*, 33 N. J. Eq. 508; *Jenkins* v. *Morris*, L. R. 14 Ch. Div. 674, 42 L. T. N. S. 817.

A mortgage given by a person competent to comprehend what he was doing is valid, though he was afflicted with religious enthusiasm, and was a person of eccentric habits. *Campbell* v. *Hill*, 23 U. C. C. P. 473.

And a deed given by a woman will not be set aside on the ground of incapacity, where she knew the nature of her act and knew the character of her property and had definite wishes with reference thereto, because she believed that there were devils and spirits in her room, and that they crawled over her and made her bed an abiding place.

is presumed to be sane, chronic insanity, when once proved to exist, is presumed to continue.[61] But there is no such presumption of law as to the continuance of a temporary hallucination or delusion arising from disease. The party seeking to avoid a contract by reason of an hallucination must show its existence at the time of making the contract, and that the hallucination was of a character affecting his capacity. Whether an existing delusion as to the subject-matter of the contract affects the capacity to contract is a question for the jury;[62] but when the delusion or hallucination goes to the essence of the contract, and sways the party making it, then he must be regarded in this relation as without contracting power.[63]

14. Question conditioned by fraud.— A party dealing with notice with an insane person, except for necessaries, is chargeable with fraud; and where there is fraud independently shown, a comparatively slight degree of mental debility will suffice to sustain a decree setting aside a contract with the party imposed upon.[64] Imbecility, or partial hallucination if there be fraud, will be a ground for setting

Cutler v. *Zollinger*, 117 Mo. 92, 22 S. W. 895.

[61] Wharton, Ev. § 1252.

Where a grantor had labored under permanent or habitual insane delusions with reference to the subject-matter of the transaction in question, the burden of proof rests with the party claiming under his deed to establish that he was free from such delusions at the time the deed was given. *Jerry* v. *Townshend*, 9 Md. 145.

[62] *Jenkins* v. *Morris*, L. R. 14 Ch. Div. 674, 42 L. T. N. S. 817.

The question whether a party was of insane mind and incapable of understanding and deciding upon the terms of a contract should be submitted to the jury in general terms in an action involving it. *Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380.

[63] *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813; *Alston* v. *Boyd*, 6 Humph. 504; *Young* v. *Young*, 10 Grant Ch. (U. C.) 365; *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Lemon* v. *Jenkins*, 48 Ga. 313; *Hay* v. *Miller*, 48 Neb. 156, 66 N. W. 1115; *Dewey* v. *Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; *Kastell* v. *Hillman*, 53 N. J. Eq. 49, 30 Atl. 535; *Jones's Appeal*, 11 W. N. C. 258.

An insane delusion which was such that, though the person entertaining it knew he was making a deed and what its nature would be, yet rendered him entirely indifferent to property, incapacitating him from a rational care of his own interests or those of others, is sufficient to warrant setting aside the deed. *Bond* v. *Bond*, 7 Allen, 1.

[64] *Gartside* v. *Isherwood*, 1 Bro. Ch. 558; *Dane* v. *Kirkwall*, 8 Car. & P. 679; *Dent* v. *Bennett*, 7 Sim. 539; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Grant* v. *Thompson*, 4 Conn. 208, 10 Am. Dec. 119; *Ronan* v. *Bluhm*, 173 Ill. 277, 50 N. E. 694; *Clay* v. *Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352; *Seeley* v. *Price*, 14 Mich. 541; *Creekmore* v. *Baxter*, 121 N. C. 31, 27 S. E. 994; *Wille* v. *Wille*, 57 S. C. 413, 35 S. E. 804; *Rutherford* v. *Ruff*, 4 Desauss. Eq. 350; *Bible* v. *Wisecarver*, (Tenn. Ch. App.) 50 S. W. 670; *Edwards* v. *Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080; *Encking* v. *Simmons*, 28 Wis. 272; *Henderson* v. *McGregor*, 30 Wis. 78.

One who contracts jointly with another known to him to be incompetent, in consideration of a conveyance of land to the latter, and who is compelled to perform his contract, cannot attack the conveyance to the incompetent party after the death of the grantor, on the ground of such incompetency. *Burkhardt* v. *Burkhardt*, 107 Iowa, 369, 77 N. W. 1069.

aside a contract which would have been sustained without such fraud.[65] Though mere weakness of mind be not of itself a sufficient ground to warrant setting aside a contract, it is a material ingredient of the question whether the contract was obtained by fraud, imposition, or undue influence;[66] and it is an item of proof tending to establish fraud;[67] and it may be controlling, when connected with other facts tending to establish fraud, in giving character to the transaction.[68] So, with deeds and conveyances, as with contracts generally, much less mental incapacity is sufficient to invalidate them when the transaction is accompanied by fraud or undue influence;[69] and a conveyance by a grantor whose mental condition was such as to render him an easy victim to imposition and fraud will be set aside when such influences were successfully exerted;[70] or where the considera-

[65]*Beals* v. *See*, 10 Pa. 56, 49 Am. Dec. 573; *Jones* v. *Perkins*, 5 B. Mon. 222; *Keeble* v. *Cummins*, 5 Hayw. (Tenn.) 43; *Wray* v. *Wray*, 32 Ind. 126; *Harris* v. *Wamsley*, 41 Iowa, 671; *Wilson* v. *Oldham*, 12 B. Mon. 55; *Farnam* v. *Brooks*, 9 Pick. 212; *Sander* v. *Savage*, 75 App. Div. 333, 78 N. Y. Supp. 189; *Schoellhamer* v. *Rometsch*, 26 Or. 394, 38 Pac. 344; *Hunt* v. *Moore*, 2 Pa. St. 105; *Tally* v. *Smith*, 1 Coldw. 290; *Birdsong* v. *Birdsong*, 2 Head, 289; *Sentance* v. *Poole*, 3 Car. & P. 1; *Gartside* v. *Isherwood*, 1 Bro. Ch. 560; *Green* v. *Wood*, 2 Vern. 633; *Dunnage* v. *White*, 1 Swanst. 137, 1 Wils. 67, 18 Revised Rep. 33.

Insanity or imbecility will avoid a contract when taken advantage of, though no sentence of interdiction had been pronounced. *Holland* v. *Miller*, 12 La. Ann. 624.

[66]*Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Jones* v. *Thompson*, 5 Del. Ch. 374; *Donnett* v. *Donnett*, 44 N. H. 531, 84 Am. Dec. 97; *Nace* v. *Boyer*, 30 Pa. 99; *Tally* v. *Smith*, 1 Coldw. 290; *Ellis* v. *Mathews*, 19 Tex. 390, 70 Am. Dec. 353.

That a grantor was of feeble intellect, and that the relation of principal and general agent existed between him and his grantee, and that the price paid for the land was inadequate, are all circumstances calculated to impeach the deed as fraudulent. *Brooke* v. *Berry*, 2 Gill, 83; *Berry* v. *Hall*, 105 N. C. 155, 10 S. E. 903.

[67]*Jackson ex dem. Cadwell* v. *King*, 4 Cow. 207, 15 Am. Dec. 354; *Milner* v. *Turner*, 4 T. B. Mon. 244; *Galpin* v. *Wilson*, 40 Iowa, 90.

The burden of proof rests with the grantee of an ignorant or weak-minded grantor to show that the contents of his deed were made known to him. *Hyer* v. *Little*, 20 N. J. Eq. 443.

[68]*Darnell* v. *Rowland*, 30 Ind. 342; *Jones* v. *Thompson*, 5 Del. Ch. 374. And see *Good* v. *Floyd* (Tenn. Ch. App.) 48 S. W. 687.

But fraud must appear; the mere fact that a person incapable of properly managing his own affairs was induced to sell his land to another does not entitle him to relief. *Devereaux* v. *Hubbard*, 117 Mich. 119, 75 N. W. 450.

Though it need not be active fraud, when the transaction was detrimental to the interests of the grantor. *Reason* v. *Jones*, 119 Mich. 672, 78 N. W. 899.

[69]*Corbit* v. *Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Anthony* v. *Hutchins*, 10 R. I. 165; *Hayes* v. *Candee*, 75 Conn. 131, 52 Atl. 826; *Blachford* v. *Christian*, 1 Knapp P. C. 73.

A deed may be set aside because of a degree of weakness of mind on the part of the grantor far less than that which would be necessary to justify the issuing of a commission or a verdict of lunacy, where such weakness has been taken advantage of to procure its execution. *Blachford* v. *Christian*, 1 Knapp P. C. 73; *Craddock* v. *Cabiness*, 1 Swan, 474; *Greer* v. *Greer*, 9 Gratt. 330.

[70]*Gass* v. *Mason*, 4 Sneed, 497; *Tomlinson* v. *Tomlinson*, 103 Iowa, 740, 72 N. W. 664; *Long* v. *Long*, 9 Md. 348; *Frush* v. *Green*, 86 Md. 494, 39 Atl. 863; *Bennett* v. *Bennett* (Neb.) 91 N. W. 409; *Mott* v. *Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Morton* v. *Morton* (N. J. Eq.) 7 Cent. Rep. 134, 8 Atl. 807; *La-*

tion was grossly inadequate.[71] Where the grantor is weak-minded, equity will take such steps as may be necessary to protect his rights.[72]

15. Better opinion that contracts by lunatics are voidable at option.—That when a contract has been produced by fraud, acting upon mental debility or eccentricity, it will be set aside in equity, is settled.[73] And it is further settled that the mere act of contracting with a lunatic, except for necessaries, is fraudulent in all cases where the lunacy, to the knowledge of the other contracting party, extends to the subject-matter of the contract.[74] On the theory that in the case of lunatics there is an absence of consenting mind, the contracts of a lunatic, made under the circumstances given above, have been considered to

rette v. *Sage*, 29 Conn. 577; *Sprague* v. *Ducl*, Clarke Ch. 90; *Allore* v. *Jewell*, 94 U. S. 506, 24 L. ed. 260; *Harding* v. *Handy*, 11 Wheat. 103, 6 L. ed. 429; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15, 44 L. J. Ch. N. S. 195, 31 L. T. N. S. 525, 23 Week. Rep. 38. And see *Combs* v. *Combs*, 23 Ky. L. Rep. 1264, 65 S. W. 13: *Revels* v. *Revels*, 64 S. C. 256, 42 S. E. 111; *Clarkson* v. *Hanway*, 2 P. Wms. 203.

[71]*Clark* v. *Lopez*, 75 Miss. 932, 23 So. 648; Rehearing denied in 75 Miss. 938, 23 So. 957; *Bennett* v. *Bennett* (Neb.) 91 N. W. 409; *White* v. *White*, 60 N. J. Eq. 104, 45 Atl. 767; *Sander* v. *Savage*, 75 App. Div. 333, 78 N. Y. Supp. 189; *Hoch* v. *Hoch*, 197 Pa. 387, 47 Atl. 351; *Jones* v. *Galbraith* (Tenn. Ch. App.) 59 S. W. 350.

An impaired mind, together with inadequacy of consideration and deception and threats, is sufficient to warrant setting aside a deed as having been obtained by fraud and undue influence. *Krocnung* v. *Goehri*, 112 Mo. 641, 20 S. W. 661: *James* v. *Langdon*, 7 B. Mon. 193; *Churchill* v. *Scott*, 65 Mich. 485, 32 N. W. 737.

And a conveyance for a grossly inadequate consideration, obtained by taking advantage of a delusion under which the grantor labored, will be set aside though the grantee was not responsible for the delusion. *Parkhurst* v. *Hosford*, 21 Fed. 829.

[72]*Watson* v. *Smith*, 7 Or. 448; *Bennett* v. *Bennett* (Neb.) 91 N. W. 409; *Mott* v. *Mott*, 49 N. J. Eq. 192, 22 Atl. 997: *Sprague* v. *Ducl*, Clarke Ch. 90; *Hoch* v. *Hoch*, 197 Pa. 387, 47 Atl. 351; *Perkins* v. *Scott*, 23 Iowa, 237.

[73]*Shakespeare* v. *Markham*, 72 N. Y. 400; *Garrow* v. *Brown*, 60 N. C. (Winst. Eq.) 46, 49, 86 Am. Dec. 450; *Rutherford* v. *Ruff*, 4 Desauss. Eq. 350; *Seeley* v. *Price*, 14 Mich. 541; *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Taylor* v. *Patrick*, 1 Bibb, 168: *Wilson* v. *Oldham*, 12 B. Mon. 55; *Birdsong* v. *Birdsong*, 2 Head, 289: *Killian* v. *Badgett*, 27 Ark. 166; *Henderson* v. *McGregor*, 30 Wis. 78; *Keeble* v. *Cummins*, 5 Hayw. (Tenn.) 43; *Reese* v. *Reese*, 89 Ga. 645, 15 S. E. 846; *New England Loan & T. Co.* v. *Spitler*, 54 Kan. 560, 38 Pac. 799; *Cates* v. *Woodson*, 2 Dana, 452; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 245, 19 Am. Dec. 71.

In *Moore* v. *Hershey*, 90 Pa. 196, Paxson, J., held that the indorsement of a promissory note by a lunatic could be inquired into, and fraud, knowledge of the lunacy, or want of consideration set up as a defense.

See also *Wirebach* v. *Bank of Easton*, 10 W. N. C. 143.

[74]*Price* v. *Berrington*, 7 Hare, 402; *Lincoln* v. *Buckmaster*, 32 Vt. 652; *Henderson* v. *McGregor*, 30 Wis. 78; *Lagay* v. *Marston*, 32 La. Ann. 170; *Jones* v. *Perkins*, 5 B. Mon. 222; Story, Contr. § 83.

But see *Curtis* v. *Brownell*, 42 Mich. 165, 171, 3 N. W. 936, where it seems to be hinted that this presumption of fraud may be overcome by conduct of the lunatic indicating a restoration to reason.

And the presumption may be rebutted, and equity will not interfere except on equitable principles. Where the lunatic has had the benefit of the contract, it will be upheld. *Canfield* v. *Fairbanks*, 63 Barb. 461; *Jones* v. *Perkins*, 5 B. Mon. 222.

In Illinois an action to set aside a deed on the ground of lunacy of the grantor must be brought by his conservator. *Covington* v. *Neftzger*, 140

be void.[75] A more satisfactory conclusion, however, is established by the English cases of *Molton* v. *Camroux*,[76] and *Matthews* v. *Baxter*,[77] to the effect that contracts of lunatics are not void, but voidable, when it is shown that their incapacity was known or practised upon, since the transaction of business is assisted by the opportunity given in lucid intervals, or upon recovery, for the ratification of contracts really conducive to the interests of both parties. In this country there is a growing tendency to adopt the English rule, both as more fair and more philosophical.[78]

16. What weakness incapacitates.— To warrant the cancelation of a contract or conveyance in any event, however, there must have been such mental weakness as to render the party unable to guard against imposition, or to resist importunity or undue influence;[79] and the transaction and his position must have been such as to warrant the inference that he had not exercised deliberate judgment, but had been imposed upon or overcome by cunning, artifice, or undue influence,[80] which would not have prevailed had he had the free use and exercise of his deliberate judgment.[81] And the question with relation to such a contract is not whether the bargain was bad and disadvantageous, but whether the person with deficient mind was led into it by unfair means, and whether the other had obtained an improper

Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764.

[75]See *supra*, §§ 3, 6.

[76]2 Exch. 486, Affirmed in 4 Exch. 17.

[77]L. R. 8 Exch. 132, 42 L. J. Exch. N. S. 73, 28 L. T. N. S. 169, 21 Week. Rep. 389.

[78]See *Murray* v. *Carlin*, 67 Ill. 286; *Searle* v. *Galbraith*, 73 Ill. 269; *Tilcomb* v. *Vantyle*, 84 Ill. 371; *McCormick* v. *Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Willemin* v. *Dunn*, 93 Ill. 511; *Freed* v. *Brown*, 55 Ind. 310; *Turner* v. *Rusk*, 53 Md. 65; *Matthiessen & W. Ref. Co.* v. *McMahon*, 38 N. J. L. 537. And see also *supra*, § 4.

The doctrine that a deed obtained by fraud is not void *ab initio*, but only voidable at the election of the grantor, and that if she, knowing of the fraud, took no steps during her lifetime to have the deed set aside, her privies in blood or estate cannot question its validity after her death, has no application where it is claimed that the grantor was mentally incompetent to contract the day she signed the deed and remained so until she died. *Boynton* v. *Reese*, 112 Ga. 354, 37 S. E. 437.

[79]*Kelly* v. *McGuire*, 15 Ark. 555; *Doe ex dem. Guest* v. *Beeson*, 2 Houst. (Del.) 246; *Baldwin* v. *Dunton*, 40 Ill. 189; *Coleman* v. *Frazer*, 3 Bush, 300; *Bennett* v. *Bennett* (Neb.) 91 N. W. 409; *Rippy* v. *Gant*, 39 N. C. (4 Ired. Eq.) 443; *Tally* v. *Smith*, 1 Coldw. 290; *Johnson* v. *Chadwell*, 8 Humph. 145.

[80]*Taylor* v. *Atwood*, 47 Conn. 498; *Somes* v. *Skinner*, 16 Mass. 348; *Simonton* v. *Bacon*, 49 Miss. 582; *Connelly* v. *Fisher*, 3 Tenn. Ch. 382; *Tally* v. *Smith*, 1 Coldw. 290; *Orr* v. *Pennington*, 93 Va. 268, 24 S. E. 928; *Kilgore* v. *Cross*, 1 McCrary. 144, 1 Fed. 578. And see *Lassiter* v. *Lassiter*, 23 Ky. L. Rep. 481, 63 S. W. 477; *Frush* v. *Green*, 86 Md. 494, 39 Atl. 863.

Where advantage has been taken of mental weakness the cause of such weakness is immaterial. *Jones* v. *Thompson*, 5 Del. Ch. 374. But see *Tracey* v. *Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610.

[81]*Wray* v. *Wray*, 32 Ind. 126; *Chidester* v. *Turnbull*, 117 Iowa, 168, 90 N. W. 583; *Somes* v. *Skinner*, 16 Mass. 348; *Delaplain* v. *Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; *Farnsworth* v. *Noffsinger*, 46 W. Va. 410, 33 S. E. 246.

advantage.[82] Fraud will not be presumed merely from the making of a contract, though by an aged man or one feeble in body and mind.[83] Nor does the fact that the grantor was in such a condition as to be likely to yield to importunity, or to suffer imposition, invalidate a contract or conveyance, when they are not shown to have been actually and successfully exerted.[84] But imbecility, though not absolute, upon the part of a party, subjects a contract made by him to strict examination, and requires scrutiny into its fairness;[85] and the fact that the contract or conveyance was rash and improvident, or that other circumstances existed indicating undue influence and improper advantage, gives rise to a presumption of fraud, where the party was of weak understanding.[86] And great weakness of mind concurring with gross inadequacy of consideration or circumstances of suspicion gives rise to a presumption of undue influence,[87] and will defeat the transaction in the absence of anything to show that it was understood or explained.[88] Likewise, old age of a grantor, combined with weakness and fraud, may warrant setting aside a deed.[89]

[82]*Simonton* v. *Bacon*, 49 Miss. 582; *Storrs* v. *Scougale*, 48 Mich. 387, 12 N. W. 502; *Rhodes* v. *Bate*, L. R. 1 Ch. 252.

[83]*Wirebach* v. *First Nat. Bank*, 97 Pa. 549, 39 Am. Rep. 821; *Cowee* v. *Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Lewis* v. *Pead*, 1 Ves. Jr. 19.

[84]*Walton* v. *Northington*, 5 Sneed, 282; *Willemin* v. *Dunn*, 93 Ill. 511; *Marmon* v. *Marmon*, 47 Iowa, 121; *Beville* v. *Jones*, 74 Tex. 148, 1 S. W. 1128; *Day* v. *Seeley*, 17 Vt. 542.

[85]*Cruise* v. *Christopher*, 5 Dana, 181; *Jones* v. *Thompson*, 5 Del. Ch. 374; *Chevalier* v. *Whatley*, 12 La. Ann. 651; *Mason* v. *Dunbar*, 43 Mich. 410, 38 Am. Rep. 201, 5 N. W. 432; *Martin* v. *Baker*, 135 Mo. 495, 36 S. W. 369; *Morton* v. *Morton* (N. J. Eq.) 7 Cent. Rep. 174, 8 Atl. 807.

[86]*Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Chevalier* v. *Whatley*, 12 La. Ann. 651; *Tally* v. *Smith*, 1 Coldw. 290; *Ellis* v. *Mathews*, 19 Tex. 390, 70 Am. Dec. 353; *Wartemberg* v. *Spiegel*, 31 Mich. 402; *Duncombe* v. *Richards*, 46 Mich. 166, 9 N. W. 149; *Crawford* v. *Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870; *Smith* v. *Smith*, 60 Wis. 329, 19 N. W. 47.

[87]*Cruise* v. *Christopher*, 5 Dana, 181; *Jones* v. *Thompson*, 5 Del. Ch. 374; *Maddox* v. *Simmons*, 31 Ga. 512; *Cadwallader* v. *West*, 48 Mo. 483; *Richards* v. *Pitts*, 124 Mo. 602, 28 S. W. 88; *Tracey* v. *Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610; *Mann* v. *Betterly*, 21 Vt. 326; *Fishburne* v. *Ferguson*, 84 Va. 87, 4 S. E. 575; *Turner* v. *Utah Title Ins. & T. Co.* 10 Utah, 61, 37 Pac. 91; *Turner* v. *Union Nat. Bank*, 10 Utah, 77, 37 Pac. 95; *German Sav. & L. Soc.* v. *De Lashmutt*, 83 Fed. 33; *Peacock* v. *Evans*, 16 Ves. Jr. 512, 10 Revised Rep. 218; *Longmate* v. *Ledger*, 2 Giff. 157, 6 Jur. N. S. 481, 8 Week. Rep. 386; *Davies* v. *Cooper*, 5 Myl. & C. 276; *Gartside* v. *Isherwood*, 1 Bro. Ch. 560; *Clark* v. *Malpas*, 31 Beav. 80, 4 DeG. F. & J. 401, 8 Jur. N. S. 734, 10 Week. Rep. 676. And see *Gates* v. *Cornett*, 72 Mich. 435, 40 N. W. 740; *Cockell* v. *Taylor*, 15 Beav. 115, 21 L. J. Ch. N. S. 545.

[88]*Kedward* v. *Campbell*, 166 Pa. 365, 31 Atl. 114; *Wilson* v. *Oldham*, 12 B. Mon. 55; *Owings's Case*, 1 Bland Ch. 370, 17 Am. Dec. 311; *Bunch* v. *Hurst*, 3 Desauss. Eq. 273, 5 Am. Dec. 551; *McFaddin* v. *Vincent*, 21 Tex. 47; *Allore* v. *Jewell*, 94 U. S. 506, 24 L. ed. 260; *Conley* v. *Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; *German Sav. & L. Soc.* v. *DeLashmutt*, 83 Fed. 33. And see *Hale* v. *Brown*, 11 Ala. 87.

But each case must stand upon its own facts. *Conley* v. *Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

[89]*Smith* v. *Beatty*, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435; *Jones* v. *Thompson*, 5 Del. Ch. 374.

A less degree of proof of mental in-

17. Abuse of confidential relations.— A contract made with a weak-minded person by one occupying a confidential relation with him is presumed to be against justice.[90] And the burden rests with the latter to show the fairness of the transaction, and that the other understood its nature.[91] And a conveyance will be set aside where weakness of mind on the part of the grantor, in connection with the facts that it was made in favor of a person standing in an intimate trust relation, and that it is prejudiced or unfair, or other suspicious circumstances, go to show that the weakness had been taken advantage of.[92]

II. Lunacy which will terminate continuing contract.

18. Partnership contracts.— The lunacy of a partner appearing after the formation of a partnership, as a ground for dissolution thereof, depends upon the degree and probable duration of the disorder as affecting his capacity to fulfil his contract.[1] Permanent, confirmed, and incurable insanity of a partner is a ground for dissolution,[2] and a partnership will be dissolved in equity when a partner becomes so

capacity and undue influence is required to set aside a deed of a feeble old man, ninety years of age, than in case of a younger person. *Smith* v. *Smith*, 60 Wis. 329, 19 N. W. 47.

A complaint in an action to set aside a deed alleging that the grantor was of extreme old age and physical infirmity and was mentally weak and incapable of attending to business personally, and incompetent to comprehend his property and the nature of a business transaction, not alleging that he was insane or completely incompetent to understand the transaction in question, is based upon fraud and will not justify a finding of insanity. *Aldrich* v. *Bailey*, 132 N. Y. 85, 30 N. E. 264.

[90] *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Simonton* v. *Bacon*, 49 Miss. 582; *Haydock* v. *Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385; *Martin* v. *Baker*, 135 Mo. 495, 36 S. W. 369.

[91] *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Haydock* v. *Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385; *Morton* v. *Morton* (N. J. Eq.) 7 Cent. Rep. 134, 8 Atl. 807; *Hyer* v. *Little*, 20 N. J. Eq. 443; *Selden* v. *Myers*, 20 How. 506, 15 L. ed. 976; *German Sav. & L. Soc.* v. *DeLashmutt*, 83 Fed. 33.

Evidence that a deed had been read over to an illiterate grantor by an unprofessional witness, whose capacity to explain it was doubtful, is not sufficient to sustain the burden of proof resting upon the grantee to show that the contents of the deed were made known to him. *Price* v. *Price*, 1 DeG. M. & G. 308.

[92] *Thorn* v. *Thorn*, 51 Mich. 167, 16 N. W. 324; *Prewett* v. *Coopwood*, 30 Miss. 369; *Cadwallader* v. *West*, 48 Mo. 483; *Lyons* v. *Van Riper*, 26 N. J. Eq. 337; *Lawrence* v. *Willis*, 75 N. C. 471; *Craddock* v. *Cabiness*, 1 Swan, 474; *Henderson* v. *McGregor*, 30 Wis. 78; *Harding* v. *Handy*, 11 Wheat. 103, 6 L. ed. 429; *M'Diarmid* v. *M'Diarmid*, 3 Bligh N. R. 374; *Norton* v. *Relly*, 2 Eden, 286. And see *Sands* v. *Sands*, 112 Ill. 225; *Moore* v. *Moore*, 67 Mo. 192.

[1] *Waters* v. *Taylor*, 2 Ves. & B. 299, 13 Revised Rep. 91.

[2] *Sadler* v. *Lee*, 6 Beav. 324, 12 L. J. Ch. N. S. 407, 7 Jur. 476; *Jones* v. *Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785.

Where the incapacity of a partner has continued for eighteen months, and there is reasonable ground for supposing recovery to be hopeless, or at least improbable, during the remainder of the term of the partnership, an application for dissolution is proper and should be granted. *Leaf* v. *Coles*, 1 DeG. M. & G. 175.

disordered in mind as to be incapable of conducting the partnership business according to the terms of the partnership agreement.[3] But courts of equity will look, as between partners, upon application for a dissolution on the ground of insanity, to the effect which will be produced upon the partnership business, and refuse to terminate it unless the insanity materially affects the capacity of the partner to discharge the duties imposed by the relation.[4] And cogent evidence of insanity, as distinguished from mere incapacity, is required.[5] Mere temporary or curable disorder of the mind of a partner will not warrant a dissolution;[6] nor will insanity which will merely sustain an inquisition and the appointment of a conservator, and a commitment to an insane asylum.[7] And a dissolution will not be decreed for insanity of a partner without inquiry as to the state of his mind at the time the relief is sought.[8] The findings of a commission of lunacy are not regarded as dissolving a partnership contract *ipso facto*. To work such a dissolution the decree of a court of equity

[3] *Sayer* v. *Bennet*, 1 Cox Ch. Cas. 107.

A partnership, by the articles of which it was provided that, in the event of lunacy obliging the partner to leave India for more than a year, a dissolution should be had, may be dissolved at once where a partner became an incurable lunatic on the way to India, and was sent back. *Bagshaw* v. *Parker*, 10 Beav. 532.

[4] *Raymond* v. *Vaughn*, 128 Ill. 256, 4 L. R. A. 440, 15 Am. St. Rep. 112, 21 N. E. 566.

The fact that the conduct and condition of mind of a partner were such as to destroy the confidence of the other partners and induce customers to withdraw their custom, and that he had been led to attempt suicide, and might be led to attempt the life of one of his partners, is not sufficient to warrant the court in enjoining him from interfering with the partnership affairs. *Anonymous*, 2 Kay & J. 441.

Nor is the fact that a partner had been habitually insane some months previously, in the absence of evidence of incompetency at the time. *Ogilvy* v. *Gregory*, 4 Week. Rep. 221, 25 L. J. Ch. N. S. 32.

[5] *Kirby* v. *Carr*, 3 Younge & C. Exch. 184, 8 L. J. Exch. in Eq. N. S. 31, 2 Jur. 741.

[6] *Raymond* v. *Vaughn*, 128 Ill. 256, 4 L. R. A. 440, 15 Am. St. Rep. 112, 21 N. E. 566; *Leaf* v. *Coles*, 1 DeG. M. & G. 175; *Pearce* v. *Chamberlain*, 2 Ves. Sr. 33.

Strong evidence is required to avoid the responsibility of a partner taking an active part in the conduct of the partnership affairs, with respect to acts of a copartner on the ground of his insanity. *Sadler* v. *Lee*, 6 Beav. 324, 12 L. J. Ch. N. S. 407, 7 Jur. 476.

[7] *Raymond* v. *Vaughn*, 128 Ill. 256, 4 L. R. A. 440, 15 Am. St. Rep. 112, 21 N. E. 566, Affirming 17 Ill. App. 144. And see *Milne* v. *Bartlet*, 3 Jur. 358, 8 L. J. Ch. N. S. 254.

[8] *Ogilvy* v. *Gregory*, 4 Week. Rep. 221, 25 L. J. Ch. N. S. 32; *Anonymous*, 2 Kay & J. 441.

A partner, previously insane, seeking to avoid a dissolution of the partnership, on the ground of sanity at the time relief was sought, has the affirmative of the issue. *Anonymous*, 2 Kay & J. 441.

And one who, upon the insanity of his partner, continues the business precisely as before, without objection, will be presumed not to have intended dissolution, but to have waited to determine whether the incapacity would prove permanent or temporary. *Raymond* v. *Vaughn*, 128 Ill. 267, 4 L. R. A. 444, 15 Am. St. Rep. 112, 21 N. E. 566.

must be had; and this will not be given where the insanity is only temporary.[9]

19. Agency.— An agency not coupled with an interest is revoked by the insanity of the principal rendering him incapable to contract,[10]—especially where it is provided by statute that an insane person should be represented by his guardian in all matters concerning his estate.[11] And whether the fact of insanity is formally established or not, the agent cannot justify or support an act under the authority originally given, after acquiring knowledge of the incapacity of his principal.[12] The degree of insanity of a principal which will revoke an agency must be such that the principal is deprived of the power to exercise judgment or will on the subject of the agency.[13]

III. Intoxication.

20. Intoxication, unless excessive, no ground for avoiding contract.— A drunkard, *voluntarius dæmon,* is not entitled to the same considera-

[9]Lindley, Partn. 4th ed. 1, *226; Collyer, Partn. 6th ed. Am. notes, 1, 152n. See *contra,* Story, Partn. § 295; *Isler* v. *Baker,* 6 Humph. 85.

[10]*Davis* v. *Lane,* 10 N. H. 156; *Blake* v. *Garwood,* 42 N. J. Eq. 276, 10 Atl. 874; *Matthiessen & W. Ref. Co.* v. *McMahon,* 38 N. J. L. 536; *Hill* v. *Day,* 34 N. J. Eq. 154; *Merritt* v. *Merritt,* 27 App. Div. 208, 50 N. Y. Supp. 604; *Motley* v. *Head,* 43 Vt. 633; *Drew* v. *Nunn,* 40 L. T. N. S. 671, 48 L. J. Q. B. N. S. 591, L. R. 4 Q. B. Div. 661, 27 Week. Rep. 810.

And if the party dealing with the agent knows of the insanity, the transaction is not binding on the principal. *Merritt* v. *Merritt,* 27 App. Div. 208, 50 N. Y. 604.

And a deed executed contemporaneously with a will, and kept by the grantor intending it to be delivered after his death, to carry out the terms of the will, cannot be legally delivered by a third party during the grantor's insanity, though such third party possessed a general power of attorney. *McClun* v. *McClun,* 176 Ill. 376, 52 N. E. 928.

The fact that the mortgagor or occupant of mortgaged premises had become insane, however, does not suspend the power of sale in the mortgage or render void a sale under it, though, if the power is exercised in bad faith for the purpose of using such disability for improper advantage of the mortgagor, the courts will set the sale aside; but it will not be set aside merely because the property was bid off for less than its value, where both the mortgagee and purchaser acted in good faith and in ignorance of the disability of the mortgagor. *Lundberg* v. *Davidson,* 72 Minn. 49, 42 L. R. A. 103, 74 N. W. 1018.

[11]*Renfro* v. *Waco* (Tex. Civ. App.) 33 S. W. 766.

But where a principal becomes insane, and afterwards recovers, and manifests no will to terminate an agency, the insanity will be considered as a mere suspension of the agency; and his assent to acts done during such suspension may be inferred from his forbearance to express dissent when they come to his knowledge. *Davis* v. *Lane,* 10 N. H. 156.

[12]*Bunce* v. *Gallagher,* 5 Blatchf. 489, Fed. Cas. No. 2,133; *Rigney* v. *Plaster,* 88 Fed. 686, Affirmed in 38 C. C. A. 25, 97 Fed. 12.

In *Wallis* v. *Manhattan Co.* 2 Hall, 495, however, it was held that an inquisition of lunacy is the only evidence of insanity which can be admitted to terminate an agency; and that the fact that the principal was put under guardianship as an insane person does not warrant the court in holding that an agency previously created was thereby terminated, where it does not appear that the insanity was of such a character as to disqualify him from entering into a valid contract. *Motley* v. *Head,* 43 Vt. 633.

[13]*Davis* v. *Lane,* 10 N. H. 156.

tion as persons rendered incapable by the visitation of God. And such intoxication is no defense where recovery is sought on the theory of an implied, as distinguished from an express, contract.[13a] In actions *ex contractu*, however, the validity of the transaction depends upon its fairness.[14] A party taking advantage of another's incapacity from drunkenness will not be allowed the aid of the law to enforce an unfair bargain thus obtained. But in cases where one of the parties to a contract was, at the time it was made, intoxicated, to an extent not depriving him of business capacity, he cannot, after having received the benefit of the contract, supposing it to be fair and reasonable, be allowed to rescind it; and in any view executory contracts by persons excited by drink should be considered only voidable, open to ratification when the party is sober,[15] though by some of the earlier cases such contracts were held to be absolutely void.[16]

[13a] *Haneklau* v. *Felchlin*, 57 Mo. App. 602. And see *Richardson* v. *Strong*, 35 N. C. (13 Ired. L.) 106, 55 Am. Dec. 430.

[14] A reasonable agreement to settle a family dispute should be enforced though one of the parties to it was drunk. *Cory* v. *Cory*, 1 Ves. Sr. 20; *Keough* v. *Forcman*, 33 La. Ann. 1434.

And a sale of property for a fair price with the assent of the vendor's family and friends, for the purpose of paying debts then pressing, is binding, though he was subject to temporary derangement caused by intemperance. *Jones* v. *Perkins*, 5 B. Mon. 222.

And a conveyance by a man habitually intemperate though not actually drunk at the time, of all his property in trust for his wife and children, will not be set aside on the ground of undue influence, though made under such circumstances as would authorize its annulment if it had been made to a stranger. *Birdsong* v. *Birdsong*, 2 Head, 289.

As to sustaining reasonable and fair contracts, though made by an intoxicated person, see also *Dulany* v. *Green*, 4 Harr. (Del.) 285; *Menkins* v. *Lightner*, 18 Ill. 282; *Scanlan* v. *Cobb*, 85 Ill. 296; *Mansfield* v. *Watson*, 2 Iowa, 111; *Jones* v. *Perkins*, 5 B. Mon. 222; *Johns* v. *Fritchey*, 39 Md. 258; *Reinicker* v. *Smith*, 2 Harr. & J. 421; *Mitchell* v. *Kingman*, 5 Pick. 431; *Maxwell* v. *Pittinger*, 3 N. J. Eq. 156; *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Seymour* v. *Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Rice* v. *Peet*, 15 Johns. 503; *Wager* v. *Reid*, 3 Thomp. & C. 332; *Richardson* v. *Strong*, 35 N. C. (13 Ired. L.) 106, 55 Am. Dec. 430; *Morrison* v. *McLeod*, 22 N. C. (2 Dev. & B. Eq.) 226; *Campbell* v. *Spencer*, 2 Binn. 129; *Wilson* v. *Bigger*, 7 Watts & S. 111; *Henderson* v. *Hays*, 2 Watts, 148; *Bliss* v. *Connecticut & P. Rivers R. Co.* 24 Vt. 424; *Pitt* v. *Smith*, 3 Campb. 33, 13 Revised Rep. 741; *Cory* v. *Cory*, 1 Ves. Sr. 19; *Say* v. *Barwick*, 1 Ves. & B. 196; *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137; *Shaw* v. *Thackray*, 23 Eng. L. & Eq. Rep. 18, 1 Smale & G. 537, 17 Jur. 1045; *Lightfoot* v. *Heron*, 3 Younge & C. Exch. 586.

[15] *Strickland* v. *Parlin & O. Co.* (Ga.) 44 S. E. 997; *Miller* v. *Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Walker* v. *Davis*, 1 Gray, 506; *Foss* v. *Hildreth*, 10 Allen, 76; *Burroughs* v. *Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Reinicker* v. *Smith*, 2 Harr. & J. 421, 423; *Johns* v. *Fritchey*, 39 Md. 258; *Wigglesworth* v. *Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602; *Mansfield* v. *Watson*, 2 Iowa. 111; *Reynolds* v. *Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Cummings* v. *Henry*, 10 Ind. 109; *Joest* v. *Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Broadwater* v. *Darne*, 10 Mo. 277; *Eaton* v. *Perry*, 29 Mo. 96; *Darby* v. *Cabanné*, 1 Mo. App. 126; *Carender* v. *Waddingham*, 5 Mo. App. 457; *Bates* v. *Ball*, 72 Ill. 108; *Williams* v. *Inabnet*, 1 Bail. L. 343; *Phelan* v. *Gardner*, 43 Cal. 306.

[16] See *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur.

21. Otherwise when combined with fraud.— The inference of fraud is strong when one contracting party knows of the other's disability, and when the bargain is on its face unfair and unequal. Attempts at fraudulent dealing are, under such circumstances, indications from which the jury may judge as to the probability of the party's being deceived. Where advantage has been taken, the contracts will always be avoided, and upon slight evidence,—especially when the drunkenness was connived at or caused by the other party.[17] And while one who voluntarily incapacitates himself to do business by intoxication must take the consequences of his own imprudence, unless a fraud is committed upon him when in that state,[18] a contract may be avoided by the legal representative of a party thereto on the ground of his having been drunk when it was made, though the drunkenness was not occasioned by the procurement of the other party.[19] And where a person in whom a drunken man confides takes advantage of the confidence and obtains from him an unreasonable contract, it will be

140; *Pitt* v. *Smith*, 3 Campb. 33, 13 Revised Rep. 741; *Caulkins* v. *Fry*, 35 Conn. 170; *Jenners* v. *Howard*, 6 Blackf. 240; *Drummond* v. *Hopper*, 4 Harr. (Del.) 327; *Wade* v. *Colvert*, 2 Mill, Const. 27, 12 Am. Dec. 652; *Fitzgerald* v. *Reed*, 17 Miss. 94; *Newell* v. *Fisher*, 11 Smedes & M. 431, 49 Am. Dec. 66.

In *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137, however, it was held that a court of equity will not assist a person to get rid of an agreement or deed on the mere ground that he was intoxicated at the time it was made.

[17]*Lavette* v. *Sage*, 29 Conn. 577; *Mansfield* v. *Watson*, 2 Iowa, 111; *Cruise* v. *Christopher*, 5 Dana, 181; *Crane* v. *Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Curtis* v. *Hall*, 4 N. J. L. 361; *Hutchinson* v. *Brown*, Clarke Ch. 408; *Calloway* v. *Witherspoon*, 40 N. C. (5 Ired. Eq.) 128; *White* v. *Cox*, 3 Hayw. (Tenn.) 82; *Hotchkiss* v. *Fortson*, 7 Yerg. 67; *Nagle* v. *Baylor*, 3 Dru. & W. 60; *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137.

But see *Noel* v. *Karper*, 53 Pa. 97.

A settlement brought about by one of the parties by contrivance, for the purpose of obtaining an undue advantage, will be set aside though the party victimized was not so drunk as to be utterly deprived of his reason and understanding. *Willcox* v. *Jackson*, 51 Iowa, 208, 1 N. W. 513.

And a disadvantageous contract will be set aside where advantage has been taken of the fact that the mind of the party making it was enfeebled by habitual intoxication, though he was not intoxicated when he made it. *Birdsong* v. *Birdsong*, 2 Head, 289.

[18]*Hall* v. *Moreman*, 3 M'Cord L. 477; *Burroughs* v. *Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Rottenburgh* v. *Fowl* (N. J. Eq.) 26 Atl. 338; *Crane* v. *Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Campbell* v. *Ketcham*, 1 Bibb, 406; *Berkley* v. *Cannon*, 4 Rich. L. 136; *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137.

It was held by Sir Joseph Jekyll in *Johnson* v. *Medlicott*, 3 P. Wms. 130, that intoxication does not destroy capacity to contract, unless it be shown that the drunkenness was connived at or caused by the other party. But Lord Ellenborough inclined to the view, in *Pitt* v. *Smith*, 3 Campb. 33, 13 Revised Rep. 741, that drunkenness in itself is sufficient to avoid an agreement.

[19]*Wigglesworth* v. *Steers*, 1 Hen. & M. 70, 3 Am. Dec 602; *Mansfield* v. *Watson*, 2 Iowa, 111; *Calloway* v. *Witherspoon*, 40 N. C. (5 Ired. Eq.) 128.

Inducing a person to sign a paper agreeing to pay a debt he did not owe, when he was so drunk that he did not know what he was about, is a fraud, though he was not induced to drink by the party imposing upon him. *King* v. *Bryant*, 3 N. C. (2 Hayw.) 394.

And evidence that a party to a con-

set aside.[20] Contracts made by persons who, though intoxicated, were not completely so, are governed by the principles applicable in other cases in which one party is exposed to the exercise of improper influences by the other, and will be set aside if the party was drawn into a hard and disadvantageous bargain.[21] And where one enters into a contract, advantageous to himself, for an inadequate consideration, with an intoxicated person or a person enfeebled by habits of intoxication, who reposes confidence in him, a presumption of fraud arises which can only be overcome by evidence of honest dealing and that the other understood what he was doing and intended what he did.[22] To avoid a contract for intoxication, however, it must be shown to have been induced by the procurement of the other party, or it must appear that an improper advantage was taken of the intoxicated person's condition.[23]

22. Tests, generally.— Intoxication which will invalidate a contract in the absence of fraud must be such as to suspend the reason and understanding, and render the party incapable of transacting business or of knowing what he was doing.[24] It must have been such

tract was so intoxicated at the time of making it as to be incapable of exercising his understanding, and that the contract was very unequal and unreasonable, is sufficient to invalidate it though the intoxication was voluntary. *Barrett* v. *Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691.

[20] *M'Cormick* v. *Malin*, 5 Blackf. 509; *Morrison* v. *McLeod*, 22 N. C. (2 Dev. & B. Eq.) 221; *Futrill* v. *Futrill*, 58 N. C. (5 Jones Eq.) 61; *Wiltshire* v. *Marshall*, 14 Week. Rep. 602, 14 L. T. N. S. 396; *Butler* v. *Mulvihill*, 1 Bligh, 137.

[21] *Birdsong* v. *Birdsong*, 2 Head, 289. And see *Rogers* v. *Warren*, 75 Mo. App. 271.

[22] *Holland* v. *Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Hale* v. *Brown*, 11 Ala. 87; *Conant* v. *Jackson*, 16 Vt. 335; *Miskey's Appeal*, 107 Pa. 611. And see *Crane* v. *Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Doughty* v. *Doughty*, 7 N. J. Eq. 227.

An agreement which shows upon its face that the parties did not understand their rights or the nature of the transaction will not be enforced against one of them who surrendered an unimpeachable title without consideration, where he was grossly ignorant and subject to habitual intoxication, though there was no direct proof of fraud or undue influence and he had acquiesced in it for years. *Dunnage* v. *White*, 1 Swanst. 137, 1 Wils. 67, 18 Revised Rep. 33.

[23] *Jones* v. *Perkins*, 5 B. Mon. 222; *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Rodman* v. *Zilley*, 1 N. J. Eq. 320; *Campbell* v. *Ketcham*, 1 Bibb, 406; *Griffith* v. *Frederick County Bank*, 6 Gill & J. 424; *Keough* v. *Foreman*, 33 La. Ann. 1434; *Youn* v. *Lamont*, 56 Minn. 216, 57 N. W. 478; *Seymour* v. *Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Loftus* v. *Maloney*, 89 Va. 576, 16 S. E. 749.

Evidence that a party to a contract was drunk when it was executed, and not in a condition to do business properly, is not sufficient to avoid a contract. *Mansfield* v. *Watson*, 2 Iowa, 111.

And it has been held that it must appear that the intoxication was induced by the procurement of the party obtaining it. *Hutchinson* v. *Brown*, Clarke Ch. 408.

In *Cragg* v. *Holme*, cited in 18 Ves. Jr. 14, however, it was held that specific performance of an agreement, made by a party in a state of intoxication, will be refused, though no advantage was taken, since a court of equity will not interpose on either side in a common case of intoxication.

[24] *Wright* v. *Waller*, 127 Ala. 557, 54 L. R. A. 440, 29 So. 57; *Donelson* v. *Posey*,

as to render the party *non compos mentis* for the time being,—especially when there was no pretense that any person connected with the contract aided in procuring the drunkenness.[25] Whether or not the party was incompetent by reason of drunkenness is a question of fact for the jury,[26] though it is proper for the court to present the rules of law upon the subject, leaving the jury to determine whether the evidence brings the case within them.[27] But it is not necessary that the intoxicated person should have been insensible or entirely incapacitated to perform any physical act.[28]

13 Ala. 752; *Taylor* v. *Purcell*, 60 Ark. 606, 31 S. W. 567; *Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Schramm* v. *O'Connor*, 98 Ill. 539; *Henry* v. *Ritenour*, 31 Ind. 136; *Harbison* v. *Lemon*, 3 Blackf. 51, 23 Am. Dec. 376; *Mansfield* v. *Watson*, 2 Iowa, 111; *Willcox* v. *Jackson*, 51 Iowa, 208, 1 N. W. 513; *Hawley* v. *Howell*, 60 Iowa, 79, 14 N. W. 199; *Taylor* v. *Patrick*, 1 Bibb, 168; *Johns* v. *Fritchey*, 39 Md. 259; *Carender* v. *Waddingham*, 5 Mo. App. 457; *Johnson* v. *Phifer*, 6 Neb. 401; *Burns* v. *O'Rourke*, 5 Robt. 649; *Com.* v. *McAnany*, 3 Brewst. (Pa.) 292; *Bush* v. *Breinig*, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86; *State Bank* v. *McCoy*, 69 Pa. 204, 8 Am. Rep. 246; *McSparran* v. *Neeley*, 91 Pa. 17; *Lee* v. *Ware*, 1 Hill L. 313; *Woodson* v. *Gordon*, Peck (Tenn.) 196, 14 Am. Dec. 743; *Reynolds* v. *Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Smith* v. *Williamson*, 8 Utah, 219, 30 Pac. 753; *Foot* v. *Tewksbury*, 2 Vt. 97; *Arnold* v. *Hickman*, 6 Munf. 15; *Loftus* v. *Maloney*, 89 Va. 576, 16 S. E. 749; *Pitt* v. *Smith*, 2 Camph. 33, 13 Revised Rep. 741. And see *Caulkins* v. *Fry*, 35 Conn 170; *Miller* v. *Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Nagle* v. *Baylor*, 3 Dru. & W. 60; *Pickett* v. *Sutter*, 5 Cal. 412.

It is not sufficient to avoid a contract that it was made under undue excitement from the use of liquor. *Johnson* v. *Phifer*, 6 Neb. 401; *Foot* v. *Tewksbury*, 2 Vt. 97.

And meager and inconclusive evidence of acts which might be attributed either to intoxication or insanity will not justify a finding that a party thereto was so insane as not to know what he was doing. *Taylor* v. *Purcell*, 60 Ark. 606, 31 S. W. 567.

And one who voluntarily pays a debt or claim for liquor or other property cannot recover the money paid, though he was laboring under the effects of excessive drinking,—especially if he was at the time comparatively sober. *Hayes* v. *Huffstater*, 65 Barb. 530.

[25] *Pickett* v. *Sutter*, 5 Cal. 412; *Bates* v. *Ball*, 72 Ill. 108; *Mansfield* v. *Watson*, 2 Iowa. 111; *Burroughs* v. *Richman*, 13 N. J. L. 233, 23 Am. Dec. 717; *Loftus* v. *Maloney*, 89 Va. 576, 16 S. E. 749; *Lewis* v. *Baird*, 3 McLean, 56, Fed. Cas. No. 8,316. And see *Rottenburgh* v. *Fowl* (N. J. Eq.) 26 Atl. 338.

Voluntary intoxication, going only to the extent of rendering the intoxicated person incapable of understanding business clearly, is not enough to invalidate his contracts. *Henry* v. *Ritenour*, 31 Ind. 136.

And a note is not rendered void by the fact that at the time of signing it the maker was voluntarily intoxicated, merely to the extent that he could not give that attention to it which a reasonably prudent man would be able to give. *Wright* v. *Waller*, 127 Ala. 557, 54 L. R. A. 440, 29 So. 57; *Taylor* v. *Purcell*, 60 Ark. 606, 31 S. W. 567.

[26] *Reynolds* v. *Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Cummings* v. *Henry*, 10 Ind. 109; *Murray* v. *Carlin*, 67 Ill. 286.

Evidence, in an action for services as an attorney, that the client had been placed in an asylum while suffering from delirium tremens, and was insane from time to time while under the influence of drink, but that the attorney did not do business with him during such times, raises a question for the jury whether, when the attorney took his instructions, the client was insane, to his knowledge. *Moss* v. *Tribe*, 3 Fost. & F. 297.

[27] *Cummings* v. *Henry*, 10 Ind. 109.

[28] *Carender* v. *Waddingham*, 5 Mo. App. 457; *Cummings* v. *Henry*, 10 Ind. 109.

A finding that a vendor's mind at the time of a sale was in an abnormal condition produced by drunkenness sufficiently shows that he was then mentally

23. Conveyances.— A drunkard is not incompetent to execute a conveyance like an idiot or one generally insane; he is simply incompetent if, at the time of its execution, his understanding was clouded or his reason dethroned by actual intoxication.[29] And the mere fact that a man was drunk at the time, or that he was an habitual drunkard, or that natural weakness of mind had been increased by habits of intoxication, will not relieve him against a deed or agreement made by him, unless it appears that some advantage was taken or undue influence exerted to procure it.[30] But if a man was so drunk when he signed a deed as not to know what he was doing, it is invalid, since consent is an essential ingredient to the contract.[31] And equity will relieve against a conveyance made by an intoxicated person without consideration, though the intoxication was not procured by the grantee.[32] So, intoxication procured by a grantee for the purpose of obtaining the execution of a deed invalidates it.[33] And a deed made by

incapable of making the sale. *Franks* v. *Jones*, 39 Kan. 236, 17 Pac. 663.

[29] *Van Wyck* v. *Brasher*, 81 N. Y. 260; *Wright* v. *Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; *Johnson* v. *Rockwell*, 12 Ind. 76.

A deed cannot be avoided because the grantor, from habitual dissipation or otherwise, was not competent to transact business immediately before or immediately after its date, where it appears that he was sober and of sufficient capacity to dispose of the property, with a knowledge of what he was doing at the time he executed it. *Ralston* v. *Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420, Affirming 25 Fed. 7.

[30] *Woods* v. *Pindall*, Wright (Ohio) 507; *Rottenburgh* v. *Fowl* (N. J. Eq.) 26 Atl. 338; *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Youn* v. *Lamont*, 56 Minn. 216, 57 N. W. 478; *Smith* v. *Elliott*, 1 Patton & H. (Va.) 307; *Johnson* v. *Medlicott*, 3 P. Wms. 130.

[31] *Wade* v. *Colvert*, 2 Mill Const. 27, 12 Am. Dec. 652; *Donelson* v. *Posey*, 13 Ala. 752; *Dulany* v. *Green*, 4 Harr. (Del.) 285; *Shackelton* v. *Sebree*, 86 Ill. 616; *Schramm* v. *O'Connor*, 98 Ill. 539; *Reinskopf* v. *Rogge*, 37 Ind. 209; *Mansfield* v. *Watson*, 2 Iowa, 111; *Harbison* v. *Lemon*, 3 Blackf. 51, 23 Am. Dec. 376; *Wisdom* v. *Shanklin*, 74 Mo. App. 428; *Clifton* v. *Davis*, 1 Pars. Sel. Eq. Cas. 31; *Pitt* v. *Smith*, 3 Camph. 33, 13 Revised Rep. 741.

So, one who was reduced to such extreme debility by the use of intoxicating liquors as to be unable to arise or sit up in bed unless supported, or to hold a pen or make a mark unless the pen and hand were held for him, is as incompetent to execute a conveyance of his property as he would be if actually drunk at the time. *Wilson* v. *Bigger*, 7 Watts & S. 111.

[32] *Warnock* v. *Campbell*, 25 N. J. Eq. 485; *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Mead* v. *Coombs*, 26 N. J. Eq. 173. And see *Crane* v. *Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Nielson* v. *Laffin*, 50 N. Y. S. R. 277, 21 N. Y. Supp. 731.

[33] *O'Connor* v. *Rempt*, 29 N. J. Eq. 156; *Woods* v. *Pindall*, Wright (Ohio) 507; *Van Horn* v. *Keenan*, 28 Ill. 445; *Johnson* v. *Medlicott*, 3 P. Wms. 130; *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137; *Dunn* v. *Amos*, 14 Wis. 107; *Wager* v. *Reid*, 3 Thomp. & C. 332. And see *Samuel* v. *Marshall*, 3 Leigh, 567; *Rutherford* v. *Ruff*, 4 Desauss. Eq. 350.

A deed made by a grantor during a period spent by him in the house of the grantee will be set aside where it appears that he was drunk when he went there, and had delirium tremens and was so weak as to be unable to walk without assistance when he was taken away, and his friends did not know where he was, the grantee alone having had access to him, and he had no memory as to what was done while there. *O'Connor* v. *Rempt*, 29 N. J. Eq. 156.

And a lease made immediately after the lessor became of age, at an inadequate price, will be set aside where he

a person while intoxicated may be set aside if advantage was taken of his situation.[34] But drunkenness of a party which will authorize setting aside a deed made by him must have been so excessive as to utterly deprive him of the use of his reason and understanding.[35] And it must have existed at the very time of the act in question.[36] Nor is drunkenness any defense where the act in question was done in execution of a previous valid contract made while sober.[37]

24. Rule in equity.—Courts of equity will relieve against contracts entered into in a state of intoxication, where the intoxication produced mental incapacity;[38] and where it produced mental excitement, sub-

was subject to habitual intoxication, and it was simply an execution of what he had previously promised to do when in a state of intoxication induced by the lessee, though he knew what he was doing at the time. *Say* v. *Barwick*, 1 Ves. & B. 195.

[34]*O'Conner* v. *Remnt*, 29 N. J. Eq. 156; *Ryerson* v. *Adams*, 6 N. J. Eq. 618; *Samuel* v. *Marshal*, 3 Leigh, 567.

Where the senses of a grantor were blunted at the time of making a deed and his mind enfeebled by age and disease, and he was absent-minded, listless, and inattentive, and his memory uncertain and capricious, and he was somewhat under the influence of intoxicating liquor, his deed will be set aside if his attention was not called to circumstances and details which would naturally affect his decision as to the propriety of the transaction, though he was not insane or an idiot or of that degree of imbecility which would itself render him incapable of executing a valid deed; and though he was at the time capable of understanding the nature of the transaction. *Seeley* v. *Price*, 14 Mich. 541.

And the rights of a vendor of property whose judgment was unsound and rendered still weaker by habits of intoxication, whose vendee was keen and sagacious and in whom he trusted, who sold his property for an inadequate consideration, are not affected by a statement afterward made that the purchase was fair, or by his solemn confirmation of it, unless, previous to such statement and confirmation, he had been free from every delusion, impression, or undue influence under which the sale was made, and became aware that it could be set aside. *McCormick* v. *Malin*, 5 Blackf. 509.

[35]*Belcher* v. *Belcher*, 10 Yerg. 121; *Morris* v. *Nixon*, 7 Humph. 579; *Dulany* v. *Green*, 4 Harr. (Del.) 285. And see *O'Neill* v. *Nolan*, 50 N. Y. S. R. 641, 21 N. Y. Supp. 222; *Harbison* v. *Lemon*, 3 Blackf. 51, 23 Am. Dec. 376.

[36]*Johnson* v. *Rockwell*, 12 Ind. 76.

[37]*Strickland* v. *Parlin & O. Co.* (Ga.) 44 S. E. 997.

A finding in favor of the validity of a deed in an action to set it aside, alleging it to have been obtained while the grantor was intoxicated, will not be overturned where the testimony as to his intoxication was conflicting. *Johnson* v. *Phifer*, 6 Neb. 401.

[38]*Phelan* v. *Gardner*, 43 Cal. 306; *Hale* v. *Story*, 7 Colo. App. 165, 42 Pac. 598; *Menkins* v. *Lightner*, 18 Ill. 282; *Harbison* v. *Lemon*, 3 Blackf. 51, 23 Am. Dec. 376; *Jenners* v. *Howard*, 6 Blackf. 240, *Cummings* v. *Henry*, 10 Ind. 109; *Reinskopf* v. *Rogge*, 37 Ind. 207; *Mansfield* v. *Watson*, 2 Iowa, 111; *Mitchell* v. *Kingman*, 5 Pick. 431; *Newell* v. *Fisher*, 11 Smedes & M. 431, 49 Am. Dec. 66; *Longhead* v. *B. F. Coombs & Bro. Commission Co.* (1896) 2 Mo. App. Rep. 1017; *Phillips* v. *Moore*, 11 Mo. 600; *Prentice* v. *Achorn*, 2 Paige, 30; *Morris* v. *Clay*, 53 N. C. (8 Jones L.) 216; *French* v. *French*, 8 Ohio, 214, 31 Am. Rep. 441; *Klohs* v. *Klohs*, 61 Pa. 245; *Bush* v. *Breinig*, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86; *Clifton* v. *Davis*, 1 Pars. Sel. Eq. Cas. 31; *Williams* v. *Inabnet*, 1 Bail. L. 343; *Wade* v. *Colvert*, 2 Mill Const. 27, 12 Am. Dec. 652; *Barrett* v. *Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Bliss* v. *Connecticut & P. Rivers R. Co.* 24 Vt. 424; *Wigglesworth* v. *Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602; *Mulligan* v. *Albertz*, 103 Wis. 140, 78 N. W. 1093; *Pitt* v. *Smith*, 3 Campb. 33, 13 Revised Rep. 741; *Fenton* v. *Holloway*, 1 Starkie, 126; *Cole* v. *Robins*, Bull, N. P. 172; *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Cooke* v. *Clayworth*, 18

jecting the party to the undue influence of the other contracting party, who thereby gained an unfair advantage.[39]

25. Drunkard liable for necessaries.— A drunkard, like a lunatic, will be held liable for necessaries requisite for his support, though in such cases the suit should be for goods sold and delivered, and not on account stated.[40]

26. Discharge of servant for drunkenness.— A servant who, by intoxication, unfits himself in any degree for the proper performance of his duties may be discharged whether there was any independent agreement to that effect or not.[41] But to justify a discharge where duty was properly performed there must have been a habit of intemperance consisting of something more than a single act of intoxication,[42] or occasional acts.[43]

Ves. Jr. 12, 11 Revised Rep. 137; *Hawkins* v. *Bone*, 4 Fost. & F. 311; *Berkley* v. *Cannon*, 4 Rich. L. 136. And see *Drummond* v. *Hopper*, 4 Harr. (Del.) 327.

So, the defendant in an action upon contract may prove that he was drunk at the time it was made so that he did not know what he was doing, under a plea of nonassumpsit. *Barney* v. *Dimmitt*, Wright (Ohio) 44; *Freeman* v. *Dwiggins*, 54 N. C. (2 Jones Eq.) 162.

And a purchase of property from a bailee thereof, when drunk, whether made so for the purpose or not, is void and gives no right of possession: and taking possession under the conveyance furnishes ground for a replevin. *Drummond* v. *Hopper*, 4 Harr. (Del.) 327.

[39] *Wigglesworth* v. *Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602; *Birdsong* v. *Birdsong*, 2 Head, 289; *Belcher* v. *Belcher*, 10 Yerg. 121; *French* v. *French*, 8 Ohio, 214, 31 Am. Dec. 441; *Mansfield* v. *Watson*, 2 Iowa, 111, at p. 115.

But that equity will only relieve where fraud has been practised, and not otherwise, see *Hutchinson* v. *Brown*, Clarke Ch. 408; *Prentice* v. *Achorn*, 2 Paige, 30; *Wager* v. *Reid*, 3 Thomp. & C. 332; *Seymour* v. *Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Pittenger* v. *Pittenger*, 3 N. J. Eq. 156; *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Jones* v. *Perkins*, 5 B. Mon. 222; *Scanlan* v. *Cobb*, 85 Ill. 296; *White* v. *Cox*, 4 Hayw. (Tenn.) 213; *Campbell* v. *Ketcham*, 1 Bibb, 406; *Rutherford* v. *Ruff*, 4 Desauss Eq. 350; *Johnson* v. *Medlicott*, 3 P. Wms. 130; *Shaw* v. *Thackray*, 3 Smale & G. 537, 17 Jur. 1045, 23 Eng. L. & Eq. Rep. 18. And see *supra*, § 23.

[40] *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, 11 Revised Rep. 137; *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140; *Sawyer* v. *Lufkin*, 56 Me. 309; *McCrillis* v. *Bartlett*, 8 N. H. 569; *Kendall* v. *May*, 10 Allen, 59; *Seymour* v. *Delaney*, 3 Cow. 445, 15 Am. Dec. 270; *Van Horn* v. *Hann*, 39 N. J. L. 207; *Jenners* v. *Howard*, 6 Blackf. 240; *Darby* v. *Cabanné*, 1 Mo. App. 126. So, in equity, *Jones* v. *Perkins*, 5 B. Mon. 222.

Expense of suits undertaken for the protection of the drunkard or of his estate may be considered as necessaries. *Re Mearcs*, L. R. 10 Ch. Div. 552, 48 L. J. Ch. N. S. 190, 40 L. T. N. S. 111, 27 Week. Rep. 369; *Hallett* v. *Oakes*, 1 Cush. 296.

[41] *McCormick* v. *Demary*, 10 Neb. 515, 7 N. W. 283; *Gonsolis* v. *Gearhart*, 31 Mo. 585.

But a defendant who pleads payment of money into court in an action for a wrongful discharge of his servant cannot prove in mitigation of damages that he discharged the servant upon the ground of drunkenness. *Speck* v. *Phillips*, 5 Mees. & W. 279, 7 Dowl. P. C. 470, 8 L. J. Exch. N. S. 249, 277.

[42] *The Ealing Grove*, 2 Hagg. Adm. 15; *Robinett* v. *The Exeter*, 2 C. Rob. 261.

Getting drunk on shore and not returning on board immediately upon expiration of his leave of absence, upon the part of a sailor whose clothes and other property were on board, is not an act of desertion which will work a forfeiture of his wages. *The Ealing Grove*, 2 Hagg. Adm. 15.

[43] *The New Phoenix*, 1 Hagg. Adm. 198.

Occasional acts of drunkenness on the

IV. Morphinism and other addictions.

27. Effect, generally.— An addiction to the use of morphine, opium, or other drug, other than intoxicating liquor, is closely analogous to drunkenness or intoxication, and seems to be subject to the same rules with relation to effect upon capacity to contract. And a contract entered into by one who was so much under the influence of drugs as to be incapacitated is voidable.[44] So, taking advantage of a weak mental or physical condition caused by the use of morphine or other drugs, though taken under medical prescription, by which a person is incapacitated from doing business, to obtain a deed through fraud and undue influence, invalidates the deed.[45]

V. Who may avoid.

28. Who may avoid,—administrators, heirs, etc.— Where the contract of an alleged lunatic is voidable, it may be avoided by his executors or administrators, or by his heirs.[46] And the rule is the same when a contract is voidable on account of intoxication.[47]

29. So, of representatives and guardians.— So, the guardian, committee, curator, or assignee in lunacy, whatever may be his official title, may contest before the proper court his ward's prior dealings, and may either disavow and rescind or ratify the lunatic's contracts made during lunacy.[48]

30. And so, of a party himself.—Notwithstanding the position taken in the older books that no man can stultify himself by alleging his lunacy at a prior period, it is now settled, as has been already incidentally seen, that a person who has been insane, and while insane

part of a sailor, not more than usual with sailors, and subsequent acts more frequent but arising from an undue effect given by bodily disease to the liquor used, are not a sufficient ground for the forfeiture of his wages. *The Lady Campbell*, 2 Hagg. Adm. 15.

[44] *Chicago, R. I. & P. R. Co.* v. *Doyle*, 18 Kan. 58.

And where a release was given by the plaintiff in an action for damages for a personal injury while he was so much under the influence of opiates taken to alleviate his pain caused by such injuries that he was mentally incapacitated to contract, he is not bound to offer to pay back the money received at the time of giving the release as a condition precedent to his right to recover for the injury. *Ibid.*

[45] *Nielson* v. *Lafflin*, 50 N. Y. S. R. 277, 21 N. Y. Supp. 731.

[46] *Beverley's Case*, 4 Coke, 123*b*. See *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414.

[47] See *supra*, § 23.

[48] 2 Bl. Com. 292; *McCrillis* v. *Bartlett*, 8 N. H. 569; *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414.

In *Baker* v. *Baker*, L. R. 5 Prob. Div. 145, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630, it was held that the committee of the estate of a lunatic, as against the committee of the person, was the proper party to bring a proceeding for divorce on account of the adultery of the lunatic's wife.

makes a contract, can, on his restoration to sound mind, contest the validity of the contract.[49]

31. Partnership contracts.— A dissolution of a partnership contract on the ground of permanent, confirmed, and incurable insanity of a partner may be had, either at the instance of the lunatic or at that of the other party.[50]

VI. Proof of incompetency.

32. Sufficiency, generally.— Evidence which will not warrant a commission of lunacy against a party is insufficient to establish insanity or imbecility which will incapacitate him to contract, where no advantage was taken of his condition.[51] And mere proof of general derangement of a grantor will not warrant setting aside a conveyance.[52] But evidence of witnesses present at the execution of a deed or contract is entitled to particular weight,[53] and is of greater weight than the opinions of witnesses based upon facts which might or might not have resulted from unsoundness of mind.[54] A deed may be upheld where the subscribing witnesses detail facts and circumstances evidencing mental capacity, though one of them expresses the opinion that the party was not competent to contract.[55] And next to physicians and persons present at the time, the evidence of persons whose intimacy has given them an opportunity of watching the operations of the party's mind is important.[56] The question whether there was

[49] *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Crawford* v. *Scovel*, 8 W. N. C. 364; *Turner* v. *Rusk*, 53 Md. 65; the same principle applying as in the case of infants.

But where the party is under guardianship, the action must be brought by the guardian. *Nichol* v. *Thomas*, 53 Ind. 42.

It would seem to be impossible that the action should be allowed to be brought by the other party. *Allen* v. *Berryhill*, 27 Iowa, 540, 1 Am. Rep. 309.

[50] *Jones* v. *Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785.

[51] *Baumgarden* v. *Langles*, 35 La. Ann. 441; *Sprague* v. *Duel*, 11 Paige, 480.

[52] *Achey* v. *Stephens*, 8 Ind. 411.

Evidence, however, that at the time of the delivery of a deed a grantor was incapacitated from taking rational care of his property by reason of an insane delusion is sufficient to warrant a finding setting aside the conveyance. *Crowther* v. *Rowlandson*, 27 Cal. 376.

[53] *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383.

And clear and unquestionable evidence is required to overcome a deed executed openly and acknowledged before a notary who had known the grantor for years, and who explained its effect to him, upon the ground of the mental incapacity of the grantor. *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230.

[54] *Beverley* v. *Walden*, 20 Gratt. 147; *Brooks* v. *Pratt*, 55 C. C. A. 515, 118 Fed. 725.

But testimony of an expert in an action to set aside a deed for mental incapacity, that the grantor did not know whether he made a deed, a will, or a lease, and that in his opinion he was not competent to protect his own interest, is sufficient to warrant a decree setting aside the deed. *Sponable* v. *Hanson*, 87 Mich. 204, 49 N. W. 644.

[55] *Jones* v. *Evans*, 7 Dana, 96.

[56] *Jarrett* v. *Jarrett*, 11 W. Va. 584.

any evidence of insanity in an action upon contract is one for the court;[57] where there is evidence, its sufficiency is for the jury.[58] And though a delusion exists, the question of capacity to contract is still one of fact.[59]

33. Previous and subsequent derangement.— While the competency of a person to contract is to be determined as of the time when the contract was made, the condition of his mind both previously and subsequently may be considered as bearing upon his mental condition at that time.[60] And evidence as to sanity or insanity at the time of the trial of an action is competent as tending to show the person's condition of mind at the time the cause of action arose, the jury being left to judge as to its weight.[61] But the difference of time between the execution of a contract and the time at which its validity is challenged is a material consideration,[62] and evidence relating to the period of time nearest to the time of the execution of the contract

[57]*Campbell* v. *Hill*, 23 U. C. C. P. 473.

[58]*Dougherty* v. *Powe*, 127 Ala. 577, 30 So. 524; *Doe ex dem. Sutton* v. *Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Doe ex dem. Guest* v. *Beeson*, 2 Houst. (Del.) 246; *Asbury* v. *Fair*, 111 N. C. 251, 16 S. E. 467; *First Nat. Bank* v. *Wirebach*, 106 Pa. 37; *Hepler* v. *Hosack*, 197 Pa. 631, 47 Atl. 847; *Campbell* v. *Hill*, 23 U. C. C. P. 473.

[59]*Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895; *Jenkins* v. *Morris*, L. R. 14 Ch. Div. 674, 42 L. T. N. S. 817.

But the question of capacity, in an action to set aside a conveyance by a grantor of weak mind, not claimed to be absolutely insane, may be determined by the court; and the verdict of a jury as to such capacity, in an action to set aside a deed as having been obtained by undue influence exercised upon a weak mind, is not conclusive, the court being competent to determine for itself the degree of weakness or imposition which would require it to set the deed aside. *Harding* v. *Handy*, 11 Wheat. 103, 6 L. ed. 429.

[60]*Jarrett* v. *Jarrett*, 11 W. Va. 584; *Anderson* v. *Cranmer*, 11 W. Va. 562; *Watson* v. *Anderson*, 11 Ala. 43; *Grant* v. *Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Hendrix* v. *Money*, 1 Bush, 306; *Jerry* v. *Townshend*, 9 Md. 145; *Peaslee* v. *Robbins*, 3 Met. 164; *Dickinson* v. *Barber*, 9 Mass. 225, 6 Am. Dec. 58; *M'Adam* v. *Walker*, 1 Dow. P. C. 148. And see *Peters* v. *Peters*, 101 Mich. 291, 59 N. W. 609.

Where insanity is established both before and after the execution of a contract, existing so near that time as to leave but a few hours intervening, and the character of the mania is such as to lead to the act, a lucid interval which will sustain it will not be inferred from the fact that the person in question seemed to transact business in an intelligent manner. *Ellars* v. *Mossbarger*, 9 Ill. App. 122.

[61]*Berry* v. *Hall*, 105 N. C. 154, 10 S. E 903.

And an instruction in an action to set aside a deed, that the appearance of the grantor might be taken into consideration in determining his sanity, is not subject to the objection that the verdict should not be permitted to be based upon general appearances, or that the time intervening might be too long, where the evidence was not all in the record. *Koile* v. *Ellis*, 16 Ind. 301.

[62]*Towart* v. *Sellars*, 5 Dow P. C. 231. And see *Berry* v. *Hall*, 105 N. C. 154, 10 S. E. 903; *Haden* v. *Hays*, 14 Pa. 91; *Winchcomb* v. *Hall*, 1 Rep. in Ch. 40.

And the fact that the maker of a bond for a deed showed unmistakable indications of aberration of mind about the time the bond was made does not justify a decree for the restoration of the bond, where he continued in business for several months after that time. *Hubbard* v. *Hoag*, 60 Iowa, 756, 15 N. W. 600.

is entitled to the most weight.[63] And evidence of monomania extending over a long period anterior to and down to the year in which deeds were executed by a grantor, found some years afterwards by commission to have been insane all that time, is not sufficient to overcome a prima facie case of sanity at the time of their execution.[64] Nor will delusions, ranging over a number of years, none of which approach the transaction in question which was rational in its nature, warrant setting it aside.[65]

34. Age, weakness, and disease.— Old age alone is not sufficient to establish incapacity to make a deed or contract.[66] Nor are age and physical weakness alone,[67] though advanced age and weakness and disease and other circumstances may together be so.[68] And the fact that a grantor is much impaired in body and somewhat enfeebled in mind is proper to be taken into consideration with other circumstances upon the question of the existence of undue influence,[69] though it does not necessarily show incapacity.[70] So, proof of disease tending to

[63] *Exum* v. *Canty*, 34 Miss. 533. And see *Bishop* v. *Hendrick*, 42 N. Y. S. R. 296, 17 N. Y. Supp. 241; *Beverage* v. *Ralston*, 98 Va. 625, 37 S. E. 283; *Jones* v. *Rice*, 99 Wis. 429, 75 N. W. 64.

[64] *Ferguson* v. *Borrett*, 1 Fost. & F. 613.

[65] *Campbell* v. *Hill*, 22 U. C. C. P. 526. And see *Stringfellow* v. *Hanson*, 25 Utah, 480, 71 Pac. 1052; *Artrip* v. *Rasnake*, 96 Va. 277, 31 S. E. 4.

General evidence of insanity, not applying to the particular moment of the execution of the deed, will not warrant setting it aside, where there was general evidence of sanity during the same period, corroborated by the performance of sane acts, and the fact that the deed itself was rational. *Towart* v. *Sellars*, 5 Dow P. C. 234.

[66] *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Burt* v. *Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Nichols* v. *King*, 24 Ky. L. Rep. 124, 68 S. W. 133; *Lewis* v. *Pead*, 1 Ves. Jr. 19.

A contract will not be set aside for mental incapacity and undue influence because a party to it was an old man somewhat feeble in body and mind, where it was made at his own suggestion and he afterwards told relatives what he had done, and seemed to understand the terms and nature thereof. *Robinson* v. *Allbee*, 1 Ohio Dec. 19.

And evidence that a grantor remembered events which occurred many years before, more vividly than recent occurrences, and that he would sometimes forget himself in conversation, and not be intelligible, though tending to prove a weakened mind, does not show incapacity to convey property by deed. *Burt* v. *Quisenberry*, 132 Ill. 385, 24 N. E. 622.

[67] *Swank* v. *Swank*, 37 Or. 439, 61 Pac. 846.

[68] *Willemin* v. *Dunn*, 93 Ill. 511; *King* v. *Cummings*, 60 Vt. 502, 11 Atl. 727. And see *Shurte* v. *Fletcher*, 111 Mich. 84, 69 N. W. 233.

Mental incapacity to make a deed is sufficiently established by evidence of forgetfulness of persons and events upon the part of the grantor; that he frequently failed to recognize members of his own family; of carelessness in business matters and forgetfulness of the nature and extent of his property; and that his business was transacted by his son. *Boggess* v. *Boggess*, 127 Mo. 305, 29 S. W. 1018.

And a deed made but a few hours before the death of the grantor, who was afflicted with anæmia, from the regular course of which he must have been delirious or in a stupor, should be set aside. *Worthington* v. *Major*, 94 Mich. 329, 54 N. W. 303.

[69] *Sears* v. *Shafer*, 1 Barb. 408; *Walton* v. *Northington*, 5 Sneed, 282.

[70] *Ralston* v. *Turpin*, 129 U. S. 663, 33 L. ed. 747, 9 Sup. Ct. Rep. 420. And see *Darnell* v. *Rowland*, 30 Ind. 342;

cause insanity or imbecility, such as epilepsy, is evidence of incompetency to make a deed or contract, and may warrant setting it aside;[71] and where the mind of a party to a contract was previously sound, the state of his bodily health may be looked to on the question of his competency, not as evidence of insanity, but to ascertain what effect it had on his mind.[72]

35. Rationality of the act itself.— The fairness and rationality of a transaction, and the probability that one in the possession of his faculties would or would not perform it, may be looked at on the question of mental capacity, and furnishes strong evidence of the presence or absence of insanity.[73] Evidence of prudence and judgment manifested in determining the best mode of carrying a contract into effect and effecting the intention of the parties raises a presumption that the party exercising it was not too mentally weak to execute the contract.[74] So, a deed in the execution of a purpose previously maintained and upheld furnishes evidence to sustain it against the fact that the grantor was old, illiterate, and of weak mind at the time.[75]

Apland v. *Pott* (S. D.) 92 N. W. 19; *Eakin* v. *Hawkins*, 52 W. Va. 124, 43 S. E. 211.

Mere difficulty of speech upon the part of one who had had an attack of paralysis, which was not severe, proves nothing as to his capacity to execute a deed. *Doran* v. *McConlogue*, 150 Pa. 98, 24 Atl. 357.

And testimony of an assignor that he did not recollect making an assignment is not sufficient to shift the burden of proof from the party asserting mental incapacity, where he was not oblivious of the transaction at the time, and his failure of memory was traceable to subsequent causes. *Dorchester* v. *Dorchester*, 18 N. Y. S. R. 402, 3 N. Y. Supp. 238.

[71]*Potter* v. *Woodruff*, 92 Mich. 8, 52 N. W. 83; *Day* v. *Sceley*, 17 Vt. 542. And see *Goodyear* v. *Adams*, 1 Silv. Sup. Ct. 185, 5 N. Y. Supp. 275; *Mulligan* v. *Albertz*, 103 Wis. 140, 78 N. W. 1093.

But that the maker had had a paralytic stroke will not invalidate a note and mortgage, though it affected his mind, where he had so far recovered as to assume control of his business and carry on important transactions. *Peake* v. *Van Lewven*, 59 Iowa, 764, 13 N. W. 843.

And several attacks of paralysis, though the party never recovered and had been getting worse both in body and in mind, will not invalidate a contract, where the consideration was adequate, and he fully comprehended what he was doing, and intended to do what he did. *Hodgdon* v. *Crosby*, 1 Wash. Terr. 578.

[72]*M'Adam* v. *Walker*, 1 Dow P. C. 148. And see *Fane* v. *Devonshire*, 6 Bro. P. C. 137.

[73]*Pike* v. *Pike*, 104 Ala. 642, 16 So. 689; *Hemphill* v. *Holford*, 88 Mich. 293, 50 N. W. 300.

Evidence that there was nothing unnatural or improvident in a transaction will sustain a deed, as against proof of incompetency coming largely from prejudiced witnesses who produced no testimony as to grantor's condition at the time the deed was executed. *Stewart* v. *Curtis*, 85 Mich. 496, 48 N. W. 872.

[74]*Clearwater* v. *Kimler*, 43 Ill. 272. And see *Ripley* v. *Babcock*, 13 Wis. 425; *Argo* v. *Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679.

[75]*James* v. *Langdon*, 7 B. Mon. 193; *Exum* v. *Canty*, 34 Miss. 532; *Lodewyck* v. *Lacroix*, 115 Mich. 590, 73 N. W. 897.

But declarations of a grantor, while sane, as to his intentions concerning the disposition of certain property, do not of themselves tend to prove that he was insane at a subsequent time when he made a different disposition of it. *Howe* v. *Howe*, 99 Mass. 88.

And the fact that a wife intended to

And mere weakness and folly displayed in the disposition of property are not sufficient to warrant setting it aside where the grantor clearly comprehended the nature of the business he was engaged in and freely consented thereto.[76] The execution of a deed under circumstances not consistent with mental capacity, however, such as one by a man of weak intellect in necessitous circumstances, by which he transfers his rights for an inadequate price, furnishes evidence warranting its cancelation in equity.[77] But the act must be one which no person of sound mind would have done.[78] The performance of the act in question by a lunatic, however, is not of itself sufficient evidence of a lucid interval,[79] and a conveyance not in accordance with the conduct of persons of ordinary prudence tends to disprove a lucid interval.[80]

36. Conduct of party.—Absurd or irrational conduct affords evidence of unsoundness of mind, and the greater the number of such acts the stronger the proof.[81] And so do radical changes in one's conduct,[82] though they may not be sufficient to establish the fact.[83] But foolish and absurd sayings and actions by one who had once been insane will not alone establish insanity which will invalidate his

make such a disposition of her property will not sustain a deed procured by her husband from her at a time when there was strong evidence that she was delirious and so near death as to have lost the faintest glimmer of either observation or memory of earthly affairs. *Lenhard* v. *Lenhard*, 59 Wis. 60, 17 N. W. 877.

[76] *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Siemon* v. *Wilson*, 3 Edw. Ch. 36.

A sale of valuable property to be paid for in Confederate currency which was greatly depreciated does not of itself indicate mental incapacity which will affect the validity of the sale, where it does not appear that the property would have been productive in the future, or that the holder might have made a better disposition of it. *Beverley* v. *Walden*, 20 Gratt. 147.

[77] *Lemon* v. *Jenkins*, 48 Ga. 313; *McDaniel* v. *McCoy*, 68 Mich. 340, 36 N. W. 84; *Bunch* v. *Hurst*, 3 Desauss. Eq. 273, 5 Am. Dec. 551. And see *Nevills* v. *Nevills*, 6 Grant Ch. (U. C.) 136.

[78] *Seward* v. *Seward*, 59 Kan. 387, 53 Pac. 63.

[79] *Creagh* v. *Blood*, 8 Ir. Eq. Rep. 435, 2 Jones & L. 509.

[80] *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689.

[81] *Ekin* v. *McCracken*, 11 Phila. 534; *Prather* v. *Naylor*, 1 B. Mon. 244.

Extravagant actions and haggard appearance, unnatural excitement and periods of depression and exaltation, and wild, unreasonable, and visionary projects and delusions as to business enterprises, on the part of a grantor, are sufficient to establish insanity and incapacity, though he had not the appearance of insanity, and his family had not interfered with his affairs. *Curtis* v. *Brownell*, 42 Mich. 165, 3 N. W. 936.

[82] *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Haviland* v. *Hayes*, 37 N. Y. 25.

Rational conduct, however, is evidence of competency. And a woman who can read and write, who is a member of a reputable church in good standing, and who conducted her father's household affairs, and, after her marriage, those of her husband, prudently and with ordinary skill, and instructed her husband's children in the ordinary domestic affairs, cannot to be held to be incompetent to make a deed. *Somers* v. *Pumphrey*, 24 Ind. 231.

[83] *Ekin* v. *McCracken*, 11 Phila. 534. And see *Canfield* v. *Fairbanks*, 63 Barb. 462; *Boorman* v. *Northwestern Mut. Relief Asso.* 90 Wis. 145, 62 N. W. 924.

deed, where an insane delusion did not necessarily appear.[84] Nor does belief in spiritualism and in communication with deceased persons,[85] though a deed procured by a medium who used his power as such would be held invalid.[86] And the fact that a grantor subsequently expressed satisfaction with what he had done and ratified his own action, or took no steps to set it aside, tends to show that he knew what he was doing when the transaction was performed.[87]

37. Conduct of others.—The conduct of interested persons toward a person alleged to have been insane at the time of a contract or conveyance by him, treating him as sane and responsible, or as insane and irresponsible, is evidence on the question of his capacity to do the act,[88] and is of much greater value as proof of their opinion as to his capacity than any terms they might employ as witnesses to express them.[89]

38. Inquisition only prima facie proof as to third parties.—As to strangers, an inquisition of lunacy is only prima facie proof of business incompetency, though it binds the parties.[89a] That it is admis-

[84] *Ripley* v. *Babcock*, 13 Wis. 425. And see *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Speers* v. *Sewell*, 4 Bush, 239.

Hostility of an inmate to the physician of an insane asylum does not establish an insane delusion which will affect the validity of his deed, where it is not shown that his criticisms were unfounded in fact. *Wright* v. *Jackson*, 59 Wis. 569, 18 N. W. 486.

And the impossibility of perpetual motion is not so apparent to the uneducated mind that belief in it is evidence of idiocy or imbecility or insanity, which would disqualify the believer from disposing of property by deed. *Burt* v. *Quisenberry*, 132 Ill. 385, 24 N. E. 622.

[85] *Lewis* v. *Arbuckle*, 85 Iowa, 335, 16 L. R. A. 677, 52 N. W. 237; *Furry* v. *Bartling* (Iowa) 94 N. W. 471; *Turner* v. *Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257.

[86] *Lyon* v. *Home*, L. R. 6 Eq. 655, 37 L. J. Ch. N. S. 674, 18 L. T. N. S. 451, 16 Week. Rep. 824. And see *Leighton* v. *Orr*, 44 Iowa, 691.

[87] *Ralston* v. *Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420; *Aiman* v. *Stout*, 42 Pa. 114.

[88] *Laing* v. *Bruce*, 1 Dunlop, B. & M. 59; *Curtis* v. *Brownell*, 42 Mich. 165, 3 N. W. 936; *Corby* v. *Moran*, 119 Mich. 272, 77 N. W. 930; *Burt* v. *Mason*, 97 Mich. 127, 56 N. W. 365; *Richardson* v. *Medbury*, 107 Mich. 176, 65 N. W. 4; *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 57 U. S. App. 634, 86 Fed. 51.

The facts that a man was considered by his family and others as of unsound mind, and that the entire control and management of his property were taken away from him, together with evidence that he never voted, or attended church or places of public worship; and of frequent violence and senseless conduct and language,—sufficiently establish his incompetency to make a deed. *Hunt* v. *Hunt*, 13 N. J. Eq. 161.

But, on the other hand, a mortgage made by a locomotive engineer will not be set aside for mental incapacity though he had been insane and had been laid off on that account, but had become better, and was again placed in charge of a locomotive at about the time the mortgage was executed, continuing in charge about six weeks, though he afterwards became entirely insane. *Baldrick* v. *Garvey*, 66 Iowa, 16, 23 N. W. 156.

[89] *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Dec. 547; *Latner* v. *Long* (Tenn. Ch. App.) 47 S. W. 1111; *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 57 U. S. App. 634, 86 Fed. 51.

[89a] *Draper's Estate*, 26 W. N. C. 218; *Hart* v. *Deamer*, 6 Wend. 497; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Hoyt* v. *Adee*, 3 Lans. 173; *Demelt* v. *Leonard*, 19 How. Pr. 140; *Hirsch* v. *Trainer*, 3

sible as prima facie proof as to third parties is generally held,[90] though on principle its admission is open to the serious objection of being *res inter alios acta.* And it is never conclusive as to strangers;[91] as to them an inquisition is only presumptive or prima facie evidence of mental incapacity,[92] and it may always be traversed or rebutted by a person not a party to the proceeding;[93] but it destroys the presumption in favor of sanity and casts the burden of showing it upon the party alleging it.[94]

39. Other adjudications of unsoundness.— A decree of a surrogate or probate court in a will contest that the mind of a testator was unsound and that he was mentally incompetent to make a will is competent and prima facie, but not conclusive, evidence of his incapacity to make a deed at or about that time.[95] But the commitment of a person to an insane hospital is not generally regarded as sufficient evidence of incapacity to make contracts,[96] though it has been held ad-

Abb. N. C. 274; *Faulder* v. *Silk*, 3 Camph. 126. And see also chap. VI. §§ 150, *infra*.

A statute providing that every contract, sale, or conveyance by any person of unsound mind shall be void is applicable only to persons who have been found *non compos mentis* in the manner prescribed by law. *Wilder* v. *Weakley*, 34 Ind. 181; *Freed* v. *Brown*, 55 Ind. 310.

[90] *Caulkins* v. *Fry*, 35 Conn. 170; *Nichol* v. *Thomas*, 53 Ind. 53; *Stone* v. *Damon*, 12 Mass. 488; *Breed* v. *Pratt*, 18 Pick. 115; *Crowninshield* v. *Crowninshield*, 2 Gray, 524; *Burke* v. *Allen*, 29 N. H. 106, 61 Am. Dec. 642; *L'Amoureux* v. *Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Fitzhugh* v. *Wilcox*, 12 Barb. 235; *Wadsworth* v. *Sherman*, 14 Barb. 169; *Hart* v. *Deamer*, 6 Wend. 497; *Hicks* v. *Marshall*, 8 Hun, 327; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Hoyt* v. *Adee*, 3 Lans. 173; *Hutchinson* v. *Sandt*, 4 Rawle, 234, 26 Am. Dec. 127; *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Kneedler's Appeal*, 92 Pa. 428; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *M'Creight* v. *Aiken*, Rice L. 56; *Elston* v. *Jasper*, 45 Tex. 409; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *Sergeson* v. *Sealy*, 2 Atk. 412, 9 Mod. 370; *Frank* v. *Mainwaring*, 2 Beav. 115; *Hall* v. *Warren*, 9 Ves. Jr. 609. And see *Covenhoven's Case*, 1 N. J. Eq. 27.

In *Lagay* v. *Marston*, 32 La. Ann. 170, the finding of a commission that the person was notoriously insane was treated as affording the presumption that a party who had previously contracted with her must have been warned of her condition.

[91] *Den ex dem. Aber* v. *Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Rider* v. *Miller*, 86 N. Y. 507; *Cook* v. *Cook*, 53 Barb. 180; *Price* v. *Berrington*, 2 Beav. 286; *Sergeson* v. *Sealy*, 2 Atk. 412, 9 Mod. 370.

[92] *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Hopson* v. *Boyd*, 6 B. Mon. 296; *Den ex dem. Aber* v. *Clark*, 10 N. J. L. 258, 18 Am. Dec. 417; *Van Deusen* v. *Sweet*, 51 N. Y. 386; *Demelt* v. *Leonard*, 19 How. Pr. 141; *Rippy* v. *Gant*, 39 N. C. (4 Ired. Eq.) 443; *Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 535; *Hirsch* v. *Trainer*, 3 Abb. N. C. 274; *Moore* v. *Hershey*, 90 Pa. 196; *Draper's Estate*, 26 W. N. C. 218; *Price* v. *Berrington*, 2 Beav. 286.

[93] *Covenhoven's Case*, 1 N. J. Eq. 27; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Re Christie*, 5 Paige, 242; *Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 535; *Moore* v. *Hershey*, 90 Pa. 196; *Sergeson* v. *Sealy*, 2 Atk. 412, 9 Mod. 370.

[94] *Snook* v. *Watts*, 11 Beav. 105, 12 Jur. 444.

To warrant the annulment of the acts of an incompetent person, however, he need not have been found insane upon inquisition. *Penington* v. *Thompson*, 5 Del. Ch. 328.

[95] *Baxter* v. *Baxter*, 76 Hun, 98, 27 N. Y. Supp. 834; *Bishop* v. *Hendrick*, 42 N. Y. S. R. 296, 17 N. Y. Supp. 241.

[96] *Schaps* v. *Lehner*, 54 Minn. 208, 55

missible as tending to prove the fact.[97] And the preliminary action of the court in appointing a next friend of a party to conduct an action is not such a finding of insanity as will shift the burden of proof.[98]

N. W. 911; *Knox* v. *Haug*, 48 Minn. 58, 50 N. W. 934; *Dewey* v. *Allgire*, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; *Wagener* v. *Harriott*, 20 Abb. N. C. 283. And see *Leggate* v. *Clark*, 111 Mass. 308.

So, deeds executed by a party in confinement in a lunatic asylum, whose hands were unfettered for the purpose, will not be set aside, where he was a man of vigorous intellect, capable of understanding the operation of the instruments, and the restraint imposed upon him was at his own request; and he read them over before execution, suggesting alterations, and acquiesced in them several months after his discharge. *Selby* v. *Jackson*, 13 L. J. Ch. N. S. 249, 6 Beav. 192.

[97] *Wheeler* v. *State*, 34 Ohio St. 394, 32 Am. Rep. 372. And see *Kellogg* v. *Cochran*, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677.

[98] *Smith* v. *Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

CHAPTER II.

MARRIAGE.

I. Lunacy.
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I. Lunacy.

40. Distinctive rule as to marriage.—Marriage is a civil union, depending upon contract, express or implied, and requiring an exercise of reason of which a person of unsound mind is incapable;[1] and a person incapable of solemnizing other contracts is incapable of solemnizing the contract of matrimony.[2] The marriage of an absolute lunatic may be subsequently annulled.[3] A marriage by an insane per-

[1]*Jenkins* v. *Jenkins*, 2 Dana, 103, 26 Am. Dec. 437; *Chapline* v. *Stone*, 77 Mo. App. 523; *Payne* v. *Burdette*, 84 Mo. App. 332; *Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Jaques* v. *Public Administrator*, 1 Bradf. 499; *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414. And see *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

At common law a marriage by an idiot or a lunatic was deemed valid. *Park* v. *Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Stiles* v. *West* Sid. pt. 1, p. 112.

[2]*Atkinson* v. *Medford*, 46 Me. 510; *Banker* v. *Banker*, 63 N. Y. 409; *Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Ward* v. *Dulaney*, 23 Miss. 410; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep 69; *Anonymous*, 4 Pick. 32; *Middleborough* v. *Rochester*, 12 Mass. 363; *Bell* v. *Bennett*, 73 Ga. 784; *Powell* v. *Powell*, 27 Miss. 783. And see *infra*, Tests, § 41.

In *St. George* v. *Biddeford*, 76 Me. 593, however, it was held that an instruction that the same rule would apply to a contract of marriage as applies to other contracts is erroneous. And see *Ex parte Glen*, 4 Desauss. Eq. 546.

And in *Payne* v. *Burdette*, 84 Mo. App. 332, it was held that a statute making contracts of insane persons void does not apply to the contract of marriage.

[3]Bishop, Marr. & Div. 6th ed. § 135; *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414; *Middleborough* v. *Rochester*, 12 Mass. 363; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Ward* v. *Dulaney*, 23 Miss. 410; *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Foster* v. *Means*, Speers Eq. 569, 42 Am. Dec. 332; *Rawdon* v. *Rawdon*, 28 Ala. 565. So intoxication,—*Clement* v. *Mattison*, 3 Rich. L. 93.

son is a nullity because of his inability to consent;[4] and the rule applies though the insanity is temporary.[5] And neither a marriage ceremony nor cohabitation, though continued till death, will constitute a valid marriage, or give claim to dower or curtesy, where one of the parties was deprived of reason.[6] On the other hand, such a marriage may be ratified upon restoration to capacity.[7] And a marriage con-

This may be done by the heirs of the insane party after death. *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197.

So, a marriage with a lunatic incapable of entering into a valid marriage contract does not change the settlement of the lunatic from that of her nativity. *Middleborough* v. *Rochester*, 12 Mass. 363; *Reading* v. *Ludlow*, 43 Vt. 628.

And it does not determine the right to her custody. *Ash's Case*, Freem. Ch. 259.

But a woman may gain a settlement by residence in the house of her husband if she has property and sufficient intellect to choose a home, though she was insane at the time of her marriage and afterwards, and her marriage was decreed to be null and void for that cause. *Concord* v. *Rumney*, 45 N. H. 423.

[4] *Jenkins* v. *Jenkins*, 2 Dana, 103, 26 Am. Dec. 437; *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197; *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Unity* v. *Belgrade*, 76 Me. 419; *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008; *Fornshill* v. *Murray*, 1 Bland Ch. 479, 18 Am. Dec. 344; *Smith* v. *Smith*, 47 Miss. 211: *Forman* v. *Forman*, 53 N. Y. S. R. 639, 24 N. Y. Supp. 917; *Waymire* v. *Jetmore*, 22 Ohio St. 271; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Gathings* v. *Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; *Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Ward* v. *Dulaney*, 23 Miss. 410; *Christy* v. *Clarke*, 45 Barb. 529; *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69. And see *Keyes* v. *Keyes*, 22 N. H. 553; *Clement* v. *Mattison*, 3 Rich. L. 93.

In New York, under the provisions of the revised statutes, a marriage by a lunatic is only voidable. *Stuckey* v. *Mathes*, 24 Hun, 461.

[5] *Parker* v. *Parker*, 2 Lee, Eccl. Rep. 382; *Legeyt* v. *O'Brien*, Milward, 325.

[6] *Jenkins* v. *Jenkins*, 2 Dana, 103, 26 Am. Dec. 437; *Wiser* v. *Lockwood*, 42 Vt. 720; *Smart* v. *Taylor*, 9 Mod. 98; *Ex parte Turing*, 1 Ves. & B. 140.

Administration of the effects of a deceased woman will not be granted to a man who married her where the marriage was null and void on the ground of her mental imbecility. *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69. But see *Parker* v. *Parker*, 2 Lee Eccl. Rep. 382.

[7] *Prine* v. *Prine*, 36 Fla. 676, 34 L. R. A. 87, 18 So. 781; *Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Goodheart* v. *Ransley*, 28 Ohio L. J. 227; *Durie* v. *Morris*, 1 U. S. Law Mag. 49; *Ash's Case*, Freem. Ch. 259. And see *Brown* v. *Westbrook*, 27 Ga. 102; *Secor* v. *Secor*, 1 MacArth. 630; *Stuckey* v. *Mathes*, 24 Hun, 461; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Sabalot* v. *Populus*, 31 La. Ann. 854.

Cohabitation is strong evidence of such ratification. See Bishop, Marr. & Div. *ut supra*. *Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275. In *Rawdon* v. *Rawdon*, 28 Ala. 565, it was held that the right to a decree of nullity would be barred by the lapse of time,—in this case twenty-two years had elapsed. And in *Wiser* v. *Lockwood*, 42 Vt. 720, it was held that the marriage could not be impeached after the death of the lunatic. In *Hancock* v. *Peaty*, L. R. 1 Prob. & Div. 335, 16 L. T. N. S. 182, 15 Week. Rep. 719, 36 L. J. Prob. N. S. 57, it was alleged that the lunatic had recovered, in which case Lord Penzance said he would annul the marriage at her request only. *Contra*, that there can be no confirmation, *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Ward* v. *Dulaney*, 23 Miss. 410; *Sims* v. *Sims*, 121 N. C. 297, 40 L. R. A. 737, 28 S. E. 407.

And one who was married while insane and under guardianship, but who was subsequently declared sane, and the guardian discharged, after which he was again declared insane, and placed in an asylum, will not be deemed to have ratified the marriage by acts performed

tracted by a lunatic during a lucid interval is clearly valid.[8] And one who knowingly enters into and consummates a marriage with an insane person is estopped from denying its validity.[9] It is insanity at the time of the marriage, and not subsequent insanity, that warrants an annulment.[10]

41. Tests.— It was early held that the question to be considered with reference to the validity of a marriage of a person claimed to be insane is whether his mind was diseased or not at the time of the contract; and that if so, the court would not consider the extent of the derangement.[11] And the rule was also laid down that the term "unsound mind," as used to express the degree of insanity which would invalidate a marriage, is synonymous with *non compos mentis*,—embracing a total deprivation of reason accompanying idiocy, lunacy, or adventitious madness, either temporary or permanent, whether remedial or irremedial.[12] And sufficient use of understanding to deal with discretion with the common affairs of life has been made the

after he was declared sane, and before he was the second time declared insane, in the absence of evidence of actual cohabitation, where he was afflicted with paresis, and the disease had been of at least a year's standing, and he subsequently became a confirmed lunatic. *Goodhart* v. *Speer*, 7 Ohio C. Dec. 47; *Goodheart* v. *Ransley*, 28 Ohio L. J. 227.

[8]*Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Ash's Case*, Freem. Ch. 259; *McAdam* v. *Walker*, 1 Dow, P. C. 148; *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414.

[9]*Keyes* v. *Keyes*, 22 N. H. 553, *dictum*; *Secor* v. *Secor*, 1 MacArth. 630.

Neither insanity nor idiocy of a party to a marriage at the time of its solemnization is sufficient ground for its dissolution, under the Mississippi statute, unless the other party was ignorant of such disability at that time. *Smith* v. *Smith*, 47 Miss. 211.

The fact that the nephew of an alleged insane person opposed his marriage, to the knowledge of the person about to marry him, is not notice to her that her intended husband was insane which will sustain the claim that she did not become a party to the marriage contract in good faith, so as to disentitle her to any allowance under a statutory provision therefor upon the marriage being declared a nullity. *Barber* v. *Barber*, 74 Iowa, 301, 37 N. W. 381.

[10]*Forman* v. *Forman*, 53 N. Y. S. R. 639, 24 N. Y. Supp. 917.

And when a woman marries a man who subsequently has to be confined in an asylum for insanity, and continues to cohabit with him until he is so confined, raising a family, it sufficiently establishes either that he was not insane at the time of the marriage, or that she had elected to treat the contract as a valid and subsisting one. *Ibid.*

And an instruction in an action to annul a marriage on the ground of the lunacy of a party, that unsoundness of mind at the time of the marriage, continuing beyond question, to the time of the party's death, without lucid intervals, must be shown,—if erroneous, is rendered harmless by a finding of sanity at the time of the marriage. *Banker* v. *Banker*, 63 N. Y. 409.

[11]*Hancock* v. *Peaty*, L. R. 1 Prob. & Div. 335, 16 L. T. N. S. 182, 15 Week. Rep. 719, 36 L. J. Prob. N. S. 57.

[12]*Jenkins* v. *Jenkins*, 2 Dana, 103, 26 Am. Dec. 437; *Foster* v. *Means*, Speers Eq. 569, 42 Am. Dec. 332.

Within this rule imbecility of mind was not a sufficient ground for a decree of the nullity of a marriage, unless it amounted to idiocy or insanity. *Elzey* v. *Elzey*, 1 Houst. (Del.) 308.

test,[13] and so has capacity to make a valid contract.[14] But the rule best supported by authority makes the capacity to understand the marriage contract the test as to its validity.[15] The question for determination under this rule is not whether the party was aware that a ceremony of marriage was being performed, but whether or not he was capable of understanding the nature of the contract entered into and the rights and responsibilities which attach to it, free from indulgence of morbid delusion upon the subject.[16]

A marriage is not invalid where there was sufficient intelligence to understand at the time of the ceremony that the parties had agreed to cohabit solely together.[17] And mere weakness of understanding

[13]*Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *True* v. *Ranney*, 21 N. H. 53, 53 Am. Dec. 164. And see *Rex* v. *Kelly*, Shelford, Lunatics, 339.

But a husband would not be considered incompetent to marry because he had not sufficient mental capacity to be able to provide a support for his family, where he was possessed of sufficient means for that purpose. *St. George* v. *Biddeford*, 76 Me. 593.

[14] See *supra*, DISTINCTIVE RULE AS TO MARRIAGE, § 40. And see *Ward* v. *Dulaney*, 23 Miss. 410; *Anonymous*, 4 Pick. 32; *Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *Atkinson* v. *Medford*, 46 Me. 510.

One who is incapable, from mental imbecility, of taking care of his or her own person or property, is not competent to dispose of such person or property by marriage. *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69; *Pyott* v. *Pyott*, 90 Ill. App. 210.

[15]*St. George* v. *Biddeford*, 76 Me. 593; *Pyott* v. *Pyott*, 90 Ill. App. 210; *Lewis* v. *Lewis*, 44 Minn. 124, 9 L. R. A. 505, 20 Am. St. Rep. 559, 46 N. W. 323; *Chapline* v. *Stone*, 77 Mo. App. 523; *Concord* v. *Rumney*, 45 N. H. 423; *True* v. *Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Doe* v. *Roe*, 1 Edm. Sel. Cas. 344; *Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69; *Durham* v. *Durham*, L. R. 10 Prob. Div. 80; *Cannon* v. *Smalley*, L. R. 10 Prob. Div. 96; *Hunter* v. *Edney*, L. R. 10 Prob. Div. 93.

Mere proof of the fact of insanity, without more, does not warrant a decree of nullity of the marriage. *Concord* v. *Rumney*, 45 N. H. 423.

But an instruction in an action involving the validity of a marriage, by way of illustrating a theory already presented that the husband must have sufficient mental capacity to understand the nature of the marriage contract, that the same rule would apply to contracts of marriage as that applicable to other contracts, is not erroneous. *St. George* v. *Biddeford*, 76 Me. 593.

[16]*Hunter* v. *Edney*, L. R. 10 Prob. Div. 93; *Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *St. George* v. *Biddeford*, 76 Me. 593; *Slais* v. *Slais*, 9 Mo. App. 96; *Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439; *Ward* v. *Dulaney*, 23 Miss. 410; *Smith* v. *Smith*, 47 Miss. 211.

A delusion as to the supernatural character of the other party to a marriage is sufficient to invalidate it. *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197.

[17]*Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612.

Occasional paroxysms of hereditary insanity upon the part of a wife before marriage, unknown to the husband at the time of, and for some time after, marriage, afford no ground for rescinding the marriage contract on account of fraud or mistake, where, in the interval, she was capable of all the duties of a wife. *Hamaker* v. *Hamaker*, 18 Ill. 137, 65 Am. Dec. 705.

But a marriage with a woman, secretly solemnized, will be set aside on the ground of her incapacity, where she was unable to wash or dress herself properly, or to knit or sew, or to care for her clothes, or distinguish colors or one kind of goods from another, and could not be taught to cook or to do the simplest housework, and could hardly be taught to read or anything else of an educational nature, and could not dis-

does not incapacitate;[18] and the mere fact that a party to a marriage was subject to some vice or uncontrollable impulse or propensity, such as kleptomania, will not justify setting it aside as void, where he was otherwise sane, and fully understood the nature of the marriage contract.[19]

42. Fraud and incapacity combined.— Although, to justify a decree of nullity, there must be an undoubted unsoundness at the time of marriage,[20] yet in marriage, as in other contracts, fraud or coercion, when brought to bear on a person of weak mind, will work an avoidance which, without such fraud or compulsion, would not have been decreed.[21]

43. Deaf-mutes may marry when compos mentis.—If *compos mentis*, deaf and dumb persons can contract matrimony.[22]

44. Capacity, how determined.— The question of the capacity of a

tinguish one piece of money from another, and had no idea of the value of property. *True* v. *Ranney*, 21 N. H. 52, 53 Am. Dec. 164.

[18] *Foster* v. *Means*, Speers Eq. 569, 42 Am. Dec. 332; *Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Ward* v. *Dulaney*, 23 Miss. 410. And see *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439.

Mere dullness of intellect, though coupled with deafness and dumbness, does not incapacitate one to marry. *Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612.

Nor does mere singularity or oddity of character or manner. *Anonymous*, 4 Pick. 32.

But a marriage ceremony performed while the husband was upon his bed, near death, and helpless, surrounded by the woman married and her friends, when he was apparently obvious of the fact that he had a former wife and children, raises no presumption against the validity of the previous marriage. *Christy* v. *Clarke*, 45 Barb. 529.

[19] *Lewis* v. *Lewis*, 44 Minn. 124, 9 L. R. A. 505, 20 Am. St. Rep. 559, 46 N. W. 323.

[20] *Banker* v. *Banker*, 63 N. Y. 409.

[21] *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 355, and see *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69; *Keyes* v. *Keyes*, 22 N. H. 553.

In *Portsmouth* v. *Portsmouth*, 1 Hagg Eccl. Rep. 355, *supra*, it was held that a marriage clandestinely solemnized, accompanied by circumstances of fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor, who had great influence over him, and who treated him and considered him as of unsound mind, is null and void, where he was the mere instrument in their hands to go through the necessary forms.

And practically the same holding was made in *Foster* v. *Means*, Speers Eq. 569, 42 Am. Dec. 332.

So a marriage to, and conveyance from, an old man who believed in spiritualism, secured by a dissolute and designing woman of middle age, who sought an acquaintance for that purpose, procured by pretending to be a medium and to have received communication from spirits commanding their marriage and the conveyance to her, and claiming to be a physician and able to cure his deafness and other fraudulent devices, will be set aside as having been procured by fraud and undue influence; though mere belief in spiritualism is not alone sufficient ground for setting aside a marriage or conveyance. *Hides* v. *Hides*, 65 How. Pr. 17.

[22] Swinburne, Spousals, cited 13 Am. Journal of Insanity, 127.

Inability upon the part of a deaf and dumb person to understand others in general, especially strangers, and an occasional and not infrequent inability to appreciate simple mathematical conclusions, are insufficient to show incapacity to contract marriage, or to warrant the granting of an issue as to the validity of a marriage. *Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612.

party to marry is usually raised and determined in an action for a decree of nullity.[23] But the question may be considered and decided in a collateral action,—such as a suit for dower or distribution;[24] or a proceeding by a widow to obtain a yearly support;[25] or an action to recover for pauper's supplies.[26] It is within the legislative power to prohibit questioning the validity of existing marriages on a collateral issue on the ground of insanity or idiocy of a party.[27] And an action tried and decided as a divorce case cannot be considered as one prosecuted to have a marriage, void because of insanity, pronounced a nullity.[28] Mental incapacity at the time of the marriage is a ground for divorce in Georgia.[29]

45. Proof.—To invalidate a marriage on the ground of insanity, the proof must be clear and unquestionable.[30] The question of sound-

[23]See *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Thayer* v. *Thayer*, 9 R. I. 377; *Hancock* v. *Peaty*, L. R. 1 Prob. & Div. 335, 36 L. J. Prob. N. S. 57, 16 L. T. N. S. 182, 15 Week. Rep. 719.

The next of kin of a deceased woman, claiming to be her heirs at law, are entitled to attack as void an alleged marriage between her and another, on the ground that at the time the marriage ceremony was performed she was mentally incapable of contracting marriage. *Medlock* v. *Merritt*, 102 Ga. 212, 29 S. E. 185.

[24]*Jenkins* v. *Jenkins*, 2 Dana, 103, 26 Am. Dec. 437; *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008. But see *Williamson* v. *Williams*, 56 N. C. (3 Jones Eq.) 446.

[25]*Bell* v. *Bennett*, 73 Ga. 784.

[26]*Unity* v. *Belgrade*, 76 Me. 419. And see *Gathings* v. *Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49.

[27]*Goshen* v. *Richmond*, 4 Allen, 458. And see *Wiser* v. *Lockwood*, 42 Vt. 722.

A statute to that effect would apply to marriages existing at the time it was enacted; and it cannot be shown, in an action to recover for the support of a pauper against a town in which a settlement is sought to be established by reason of a marriage performed before such enactment, that it was invalid by reason of the insanity of a party. *Goshen* v. *Richmond*, 4 Allen, 458.

And under such a statute, if no proceeding is taken to set aside a marriage during the lifetime of an insane husband, his wife is entitled to dower. *Wiser* v. *Lockwood*, 42 Vt. 722.

In *Jaques* v. *Public Administrator*, 1 Bradf. 499, however, it was held that a private contract of marriage by present words with a lunatic, without any preceding or succeeding act indicating the entrance into the marriage state, is not such a marriage as is contemplated by a statute providing that a marriage shall be valid until pronounced null by a court of equity.

[28]*Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774.

[29]*Brown* v. *Westbrook*, 27 Ga. 102.

Under the Georgia statute a libel to dissolve a marriage on the ground of mental incapacity at the time it was solemnized is to be filed and tried in the usual manner, and is subject to all the incidents regulating the practice in divorce cases. *Ibid.*

[30]*Cole* v. *Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Ward* v. *Dulaney*, 23 Miss. 410; *Powell* v. *Powell*, 27 Miss. 783.

Especially after the death of one of the parties. *Powell* v. *Powell*, 27 Miss. 783.

And evidence that a woman went to the house of a man, and that the parties married in an irregular manner, dispensing with the usual ceremony, and agreeing to become man and wife,—though showing indifference to the customs of society, and though tending to show mental incapacity, does not overcome a presumption of sanity. *Ibid.*

Nor does the fact that a man was of weak mind and could not learn to count establish mental incapacity to marry, as against evidence that he knew his father and uncle and the nature of the trustee's office, and displayed shrewdness and intelligence upon the subject of their le-

ness or unsoundness of mind cannot be determined from particular actions, but depends upon the general frame and habit of mind;[31] and while the validity of a marriage depends upon the mental condition of the parties at the very time it took place, evidence as to circumstances and conditions both before and after the marriage are admissible as having some bearing upon such condition.[32] But such evidence will not invalidate a marriage as against clear evidence of sanity at the time.[33] And suicide immediately after marriage does not establish insanity which will invalidate it.[34] So, a delusion, though it rendered necessary the confinement of the party in an asylum, is not sufficient alone to establish incompetency to understand the marriage contract.[35] Recognition of a marriage as legal and binding by the

gal relations. *Elzey* v. *Elzey*, 1 Houst. (Del.) 309.

But proof that in her childhood a woman seemed unable to learn to read or write or to learn a business so as to earn her living, and that she was always supported by a brother, and had to be washed, and cleaned, and put to bed by others, sufficiently establishes her incompetency to contract marriage. *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69.

And evidence that a party to a marriage was ignorant of the most common things in life with which people come into contact every day, together with the opinions of witnesses that he had been an idiot from birth, is sufficient to warrant a finding of incapacity. *Johnson* v. *Kineade*, 37 N. C. (2 Ired. Eq.) 470.

And the fact that a person had attacks of insanity which became more frequent from time to time, and that his father did not trust him with business, and he was unfit to be employed, is sufficient to cast the burden on the other party, in an action to annul the marriage, to establish his sanity or a lucid interval at the time of the marriage. *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414.

[31]*Foster* v. *Means*, Speers, Eq. 569, 42 Am. Dec. 332.

In determining the mental capacity of a party to contract marriage, a preference should be given to the testimony of witnesses who had long been acquainted with him, and that of medical experts, over the result of any personal examination. *Thayer* v. *Thayer*, 9 R. I. 377.

[32]*Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439; *St. George* v. *Biddeford*, 76 Me. 593; *M'Adam* v. *Walker*, 1 Dow P. C. 148; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003.

But little weight, however, can be attached to the testimony of a physician as to the sanity or insanity of a party, where he did not know him at the time of the marriage. *Slais* v. *Slais*, 9 Mo App. 96.

[33]*Ward* v. *Dulaney*, 23 Miss. 410. And see *Kern* v. *Kern*, 51 N. J. Eq. 594, 26 Atl. 837.

But evidence that a man afflicted with inflammation of the lungs, which frequently affects the mind, suddenly sat up in bed in the night and called to his nurse and asked her to be his wife, to which she assented, and that he then declared before God and man that she was his wife, does not establish a valid marriage, where, shortly before and after the event, he was in a state of stupor, with occasional fits of delirium, and a few minutes afterwards he became so ungovernable that assistants had to be sent for, and there was no previous consideration of the subject, and he afterwards died appearing to know nothing about it. *Jaques* v. *Public Administrator*, 1 Bradf. 499.

[34]*Buchanan* v. *Buchanan*, 103 Ga. 90, 29 S. E. 608; *Crum* v. *Thornley*, 47 Ill. 192; *M'Adam* v. *Walker*, 1 Dow, P. C. 148.

[35]*Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837.

So, evidence that there was melancholia in a woman's mental makeup at the time of her marriage, but that she performed her usual duties until that day, though she was at times dull and reticent, and that after the ceremony she stated she was not worthy of her husband, and subsequently could not be

parties to it, is strong evidence against a claim that it was invalid for want of capacity of one of them.[36] And while a finding of lunacy on inquisition, or the appointment of a guardian, is strong evidence of incapacity, a marriage voluntarily contracted by a person of full age, with sufficient capacity to carry it out, is valid though a guardian had been appointed for him, where the parties lived together as husband and wife for a long time, no proceeding having been taken to invalidate it.[37] And though a husband was found to be a lunatic, his subsequent marriage will not be declared void, where a son, the issue of the marriage, had enjoyed an estate devised to the lunatic and his children, as a legitimate child.[38] But knowledge that a ceremony was being performed, and proper behavior at the time of its performance, are not alone sufficient to establish the existence of a lucid interval at that time, after previous insanity had been shown.[39]

aroused to take any interest in anything, and afterwards tried to strangle herself and was sent to an asylum where she became violent and had delusions to the effect that she was not married, is not sufficient to warrant a decree annulling the marriage. *Cannon* v. *Smalley*, L. R. 10 Prob. Div. 96.

But a request by a wife to her husband, the next morning after marriage, to cut her throat, and declarations on her part that she had committed crime and was unfit to be his wife, together with evidence of a previous attempt to commit suicide, sufficiently establishes her inability to understand the nature of the marriage at the time. *Hunter* v. *Edney*, L. R. 10 Prob. Div. 93.

[36] *Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612; *Sabalot* v. *Populus*, 31 La. Ann. 854.

[37] *McCleary* v. *Barcalow*, 6 Ohio C. C. 481; *Castor* v. *Davis*, 120 Ind. 231, 22 N. E. 110. But see *infra*, chapter VI. § 150.

In such case the presumption of continuance of insanity once established will not prevail against the presumption in favor of the legality of the marriage. *Castor* v. *Davis*, 120 Ind. 231, 22 N. E. 110.

But the appointment of a guardian *ad litem* for a respondent in an action to annul the marriage on the ground of insanity is prima facie evidence of her insanity in any subsequent stage of the case. *Little* v. *Little*, 13 Gray, 264.

And the burden of proof rests with the party asserting the validity of a marriage entered into by a person under a decree of lunacy and guardianship to establish that the marriage was entered into during a lucid interval. *Goodheart* v. *Ransley*, 28 Ohio L. J. 227.

[38] *Ellis* v. *Bowman*, 17 L. T. 11. And see *McCleary* v. *Barcalow*, 6 Ohio C. C. 481; *Banker* v. *Banker*, 63 N. Y. 409; *Keys* v. *Norris*, 6 Rich. Eq. 388.

In England, in the ecclesiastical courts, an inquisition finding idiocy or lunacy is regarded as only part of the requisite proof of unsoundness of mind to warrant a decree of nullity of a marriage. *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470.

The fact that a woman had been of unsound mind and confined in a lunatic asylum does not justify a breach of a promise to marry her, where she was of sound mind at the time of the promise. *Baker* v. *Carturight*, 10 C. B. N. S. 124, 30 L. J. C. P. 364, 7 Jur. N. S. 1247.

[39] *Hunter* v. *Edney*, L. R. 10 Prob. Div. 93; *Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69.

But the acts of a man who married with deliberation and after he had himself procured a license and declared his intention to be married, and who went through the ceremony with propriety, and lived with his wife as such, show capacity to marry, though he was of weak understanding and at times a lunatic, and did many mad and frantic acts; and in such case a grant of administration of his effects after death to the woman he married is proper. *Parker* v. *Parker*, 2 Lee, Eccl. Rep. 382; *Anonymous*, 4 Pick. 32. And see *Smith* v. *Smith*, 47 Miss. 211.

46. Necessity of a decree of annulment.— A marriage which is void at its inception because of the insanity of a party to it is a mere nullity from the beginning to the end, and does not require a sentence, decree, or judgment of any court to restore the parties to their original rights.[40] And the invalidity may be shown in any proceeding, in any court, whenever the question arises, whether directly or collaterally.[41] But though a marriage with a lunatic is absolutely void, for the sake of the good order of society, and the quiet and relief of the parties, and social order and public decency and questions of legitimacy and succession, the nullity should be declared by the decision of some court of competent jurisdiction.[42]

47. Jurisdiction and procedure.— A court of equity has authority and jurisdiction to pronounce a marriage null and void from the beginning for want of capacity to marry on the part of one of the parties.[43] And a party may maintain an action to annul a marriage upon the ground of insanity, after recovering.[44]

[40]*Bell* v. *Bennett*, 73 Ga. 784; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Unity* v. *Belgrade*, 76 Me. 419; *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008; *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Jenkins* v. *Jenkins*, 2 Dana. 105, 26 Am. Dec. 437; *Gathings* v. *Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; *Sims* v. *Sims*, 121 N. C. 297, 40 L. R. A. 737, 61 Am. St. Rep. 665, 28 S. E. 407; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470. And see *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Williamson* v. *Williams*, 56 N. C. (3 Jones Eq.) 446.

In *Ex parte Turing*, 1 Ves. & B. 140, however, it was held that though a marriage by a lunatic is declared void by statute, sentence of nullity by the ecclesiastical court is necessary.

[41]*Unity* v. *Belgrade*, 76 Me. 419; *Gathings* v. *Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

[42]*Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Waymire* v. *Jetmore*, 22 Ohio St. 274.

In North Carolina a court of equity will not entertain the question of nullity of marriage on account of imbecility incidentally, but will stay proceedings in the suit in which such issue is made so that it may be determined by a direct sentence in either a superior court of law or a court of equity. *Williamson* v. *Williams*, 56 N. C. (3 Jones Eq.) 446.

And the Vermont rule is that a decree of nullity of a marriage cannot be attacked in a proceeding for the removal of the woman concerned as a pauper. *Reading* v. *Ludlow*, 43 Vt. 628.

[43]*Johnson* v. *Kincade*, 37 N. E. (2 Ired. Eq.) 470; *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Waymire* v. *Jetmore*, 22 Ohio St. 274; *Wiser* v. *Lockwood*, 42 Vt. 720.

A court, in an action for the annulment of a marriage on the ground of lunacy, has no discretion to refuse a decree, where it is legally demanded, on the ground that such refusal would be best for all the parties, under existing circumstances. *Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447.

In Vermont, however, where the existence of a marriage as a fact is established, the probate court has no jurisdiction to try its validity, or power to treat it as a nullity. *Wiser* v. *Lockwood*, 42 Vt. 720.

[44]*Turner* v. *Meyers*, 1 Hagg. Consist. Rep. 414; *Wightman* v. *Wightman*, 4 Johns. Ch. 343.

The sane party to a marriage cannot be admitted as a witness in an action for annulment against the insane party, where the statute provides that if one party to an action is insane the other shall not be permitted to testify in his own favor. *Little* v. *Little*, 13 Gray, 264.

Where the action is brought before recovery it should be brought in the name of the supposed lunatic by his or her committee, and not in the name of the committee or guardian alone.[45] And such a marriage may be declared void at any time during the continuance of the lunacy or after the death of the lunatic, during the lifetime of the other party, on the application of relatives or persons interested in avoiding the marriage.[46] When the question arises collaterally in an action in equity, an issue at law is a proper mode of trying it.[47] But while an action prosecuted and tried and decided as a divorce suit cannot be considered as one prosecuted to have a void marriage pronounced a nullity, alimony *pendente lite* and counsel fees and a provision for the subsistence of the wife may be allowed as an incident of the court's jurisdiction.[48]

48. Effect.— A man who marries a lunatic is, of course, liable for her support though she was incapacitated, where he knew of her incapacity.[49] And he is liable for her support while he voluntarily continues to live with her though the marriage is subsequently declared void because of her insanity; and he cannot make the cost of her support during such time a charge upon her separate estate.[50] So, under the statutes of some of the states, when a marriage is annulled on the ground of insanity, the annulment does not affect the

[45]*Crump* v. *Morgan*, 38 N. C. (3 Ired. Eq.) 91, 40 Am. Dec. 447; *Pence* v. *Aughe*, 101 Ind. 317; *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008. And see *Sims* v. *Sims*, 121 N. C. 297, 40 L. R. A. 737, 61 Am. St. Rep. 665, 28 S. E. 407.

But the fact that a husband was under guardianship as a person of unsound mind at the time of his marriage should be averred in an action for its annulment, and not be left to mere inference. *Pence* v. *Aughe*, 101 Ind. 317.

And the annulment of a marriage without notice to the person against whom the proceeding is brought is without jurisdiction and void; and a person of unsound mind is incapable of giving consent or waiving notice. *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008.

[46]*Jaques* v. *Public Administrator*, 1 Bradf. 499.

[47]*Keys* v. *Norris*, 6 Rich. Eq. 388.

But the question whether a person contracting marriage had sufficient understanding to comprehend its nature and consequences is one of fact for the jury. *Doe* v. *Roe*, 1 Edm. Sel. Cas. 344.

[48]*Lea* v. *Lea*, 104 N. C. 603, 17 Am. St. Rep. 692, 10 S. E. 488; *Prine* v. *Prine*, 36 Fla. 676, 34 L. R. A. 87, 18 So. 781.

[49]*Packer* v. *Windham*, 2 Eq. Cas. Abr. 138, Prec. in Ch. 412, Gilb. Eq. Rep. 98.

[50]*Gerhold* v. *Wyss*, 13 Neb. 90, 12 N. W. 811.

So, an action upon an account for necessaries furnished to a wife cannot be resisted upon the ground that the marriage between her and her supposed husband was solemnized while he was a lunatic, and therefore void. *Stuckey* v. *Mathes*, 24 Hun, 461.

And proof that a woman married an alleged lunatic and continued to live and cohabit with him until he was declared a lunatic, when, without fault on her part, she was obliged to seek the necessities of life apart from him because of a committee of his person and estate having been appointed, no fraud or duress having been practised to bring about the marriage, does not establish that she was not his wife at the time the necessities were furnished her, so as to defeat an action therefor. *Ibid.*

legitimacy of the children of the marriage.[51] And under such statutes an annulment cannot detract from their property rights.[52]

II. Intoxication.

49. Degree which will invalidate marriage.—Intoxication which goes to the extent of rendering the party *non compos mentis* invalidates a marriage entered into by him while in that condition, though a lesser degree of intoxication would not do so.[53] But it must have been such as to deprive him of all sense of volition, and render him incapable of knowing what he was about.[54] Insanity from delirium tremens will invalidate a marriage,[55] unless it was contracted during a lucid interval, in which case it would be binding.[56] But intoxication, however extreme, is not insanity within the meaning of a statutory provision authorizing annulment of marriage because of insanity.[57] And an adjudication that a person was a habitual drunkard, or incapable of taking care of himself through intemperance, is prima facie evidence only, and not conclusive of his incapacity to marry.[58] A marriage entered into while a party was so intoxicated that he did not know what he was about is voidable only, and not void, and may be ratified and confirmed.[59]

[51] See *Unity* v. *Belgrade*, 76 Me. 419; *State ex rel. Setzer* v. *Setzer*, 97 N. C. 252, 2 Am. St. Rep. 290, 1 S. E. 558.

[52] *State ex rel. Setzer* v. *Setzer*, 97 N. C. 252, 2 Am. St. Rep. 290, 1 S. E. 558.

A finding of a trial court in an action to annul a marriage on the ground of lunacy of a party, that he was of sound mind when the marriage took place, which is sustained by the evidence, is conclusive on appeal to the court of appeals. *Banker* v. *Banker*, 63 N. Y. 409.

But a judgment in an action in equity brought by the committee of an alleged lunatic against his wife to declare the marriage contract null and void, whereby it was adjudged that at the time of his marriage he was not a person of unsound mind, merely establishes his ability to enter into the marriage contract, and not that he must be regarded as a person of sound mind, capable of managing his affairs and disposing of his property. *Wiets* v. *Union Nat. Bank*, 101 N. Y. 563, 54 Am. Rep. 743, 5 N. E. 457.

[53] *Prine* v. *Prine*, 36 Fla. 676, 34 L. R. A. 87, 18 So. 781; *Legeyt* v. *O'Brien*, Milward, 325.

[54] *Roblin* v. *Roblin*, 28 Grant Ch. (U. C.) 439; *Johnston* v. *Brown*, 2 Shaw & D. 437. And see *Selah* v. *Selah*, 23 N. J. Eq. 185.

[55] *Clement* v. *Mattison*, 3 Rich. L. 93.

[56] *Scott* v. *Paquet*, 17 Lower Can. Rep. 283.

Temporary insanity, like intoxication, to invalidate a marriage, must be shown to have existed at the very time of the ceremony. *Legeyt* v. *O'Brien*, Milward, 325.

[57] *Elzey* v. *Elzey*, 1 Houst. (Del.) 308.

[58] *McCleary* v. *Barcalow*, 6 Ohio C. C. 481; *Imhoff* v. *Witmer*, 31 Pa. 243.

[59] *Roblin* v. *Roblin*, 28 Grant Ch. (U. C.) 439.

A memorandum, introduced by a man in an action brought for necessaries furnished to a woman alleged to be his wife, for expenses incurred in the burial of her child, in which action the validity of the marriage, which was in issue, was admitted by him, is a sufficient ratification and confirmation of the marriage. *Ibid.*

CHAPTER III.

DIVORCE.

I. Lunacy.
50. Insanity as a ground.
51. Effect of insanity on adultery.
52. Effect of insanity on desertion as a ground.
53. Effect of insanity on cruelty as a ground.
54. Effect of insanity on the action.
II. Drunkenness.
55. Divorce on the ground of drunkenness.
56. Effect of drunkenness on desertion as a ground.
57. Effect of drunkenness on cruelty as a ground.

I. Lunacy.

50. Insanity as a ground.— Insanity occurring after marriage is not a ground for divorce unless made so by statute.[1] And statutes prescribing other grounds for divorce, of a general or kindred nature, do not include insanity after marriage.[2] Divorce on the ground of insanity is authorized by statute, however, in some states.[3] And in Georgia insanity at the time of the marriage is a ground for divorce.[4] And insanity at the time of the marriage, concealed from the other party, has been held to render the marriage invalid on the ground of fraud.[5]

These statutes are not unconstitutional as against public policy,[6] but would appear to be subject to strict construction.[7]

[1] *Lloyd* v. *Lloyd*, 66 Ill. 87; *Baker* v. *Baker*, 82 Ind. 146; *Tiffany* v. *Tiffany*, 84 Iowa, 122, 50 N. W. 554; *Wertz* v. *Wertz*, 43 Iowa, 534; *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Pile* v. *Pile*, 94 Ky. 308, 22 S. W. 215; *Forman* v. *Forman*, 53 N. Y. S. R. 639, 24 N. Y. Supp. 917.

[2] See *Lloyd* v. *Lloyd*, 66 Ill. 87; *Curry* v. *Curry*, Wilson Super. Ct. (Ind.) 236.

A divorce is not warranted on the ground of the impotency of the wife, resulting from a mental disease, without her fault, where she lived happily with her husband for several years after the marriage, discharging all the duties pertaining to the marriage relation. *Pile* v. *Pile*, 94 Ky. 308, 22 S. W. 215.

[3] See *Newcomb* v. *Newcomb*, 13 Bush, 544, 26 Am. Rep. 222; *Hickman* v. *Hickman*, 1 Wash. 257, 22 Am. St. Rep. 148, 24 Pac. 445.

[4] *Brown* v. *Westbrook*, 27 Ga. 102.

[5] *Keyes* v. *Keyes*, 22 N. H. 553; *Hamaker* v. *Hamaker*, 18 Ill. 137, 65 Am. Dec. 705; *Smith* v. *Smith*, 47 Miss. 211.

[6] *Hickman* v. *Hickman*, 1 Wash. 257, 22 Am. St. Rep. 148, 24 Pac. 445.

[7] See *Newcomb* v. *Newcomb*, 13 Bush, 544, 26 Am. Rep. 222; *Hicks* v. *Hicks*, 79 Wis. 465, 48 N. W. 495.

51. Effect of insanity on adultery.— It has been argued that, as an insane person cannot consent to adultery, a decree of divorce on the ground of adultery cannot be granted against an insane person.[8] To this it may be replied that divorce statutes are meant to relieve parties from intolerable wrong, and the wrong of adultery is none the less intolerable because the party committing it was insane.[9] This view was intimated in England in the *Mordaunt Case*,[10] although that case was decided upon the peculiar construction of a statute.[11] The insanity of either party is now held no bar to a divorce in England.[12] And the rule is general that subsequent insanity of a permanent nature of a party to a marriage will not deprive the other party of the right to have the marriage relation dissolved for an act of adultery committed while such party was sane and responsible.[13] In any event, however, insanity is no defense to an action for divorce on the ground of adultery, where, at the time of the commission of the act, the party was capable of appreciating its nature and probable consequences.[14] But evidence of depravity of character and abandoned

[8] *Nichols* v. *Nichols*, 31 Vt. 328, 73 Am. Dec. 352; *Wray* v. *Wray*, 19 Ala. 522; *Rathbun* v. *Rathbun*, 40 How. Pr. 328; *Broadstreet* v. *Broadstreet*, 7 Mass. 474; *Yarrow* v. *Yarrow* [1892] P. 92, 61 L. J. Prob. N. S. 69, 66 L. T. N. S. 383.

So, adultery committed by a wife while insane is no bar to her claim against her husband for alimony, upon the ground that he had abandoned her. *Mims* v. *Mims*, 33 Ala. 98; *Wray* v. *Wray*, 33 Ala. 187.

And the insanity of a wife, proved to have existed at the time of the commission of an act of adultery by her, will be presumed, in an action by her for alimony, to continue until the contrary is proved. *Wray* v. *Wray*, 33 Ala. 187.

[9] *Matchin* v. *Matchin*, 6 Pa. 332, 47 Am. Dec. 466, holding that a wife's insanity would be a defense to an action for divorce though it was such as to efface from her mind all lines of conjugal duty. But this rule was criticised by other American cases and doubt was thrown upon the decision by *Hansell* v. *Hansell*, 3 Pa. Dist. R. 724.

[10] *Mordaunt* v. *Mordaunt*, L. R. 2 Prob. & Div. 109, 18 Week. Rep. 845; *Mordaunt* v. *Mordaunt* L. R. 2 Prob. & Div. 382, 41 L. J. Prob. N. S. 42, 26 L. T. N. S. 812, 20 Week. Rep. 553.

[11] Stat. 20 & 21 Vict. chap. 85, § 27.

[12] *Ecker* v. *Baker*, L. R. 5 Prob. Div. 145, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, Affirmed in L. R. 6 Prob. Div. 12, 49 L. J. Prob. N. S. 83; *Mordaunt* v. *Moncrieffe*, L. R. 2 H. L. Sc. App. Cas. 375, 43 L. J. Prob. 49, 30 L. T. N. S. 649, 23 Week. Rep. 12. But see *Yarrow* v. *Yarrow* [1892] P. 92, 61 L. J. Prob. N. S. 69, 66 L. T. N. S. 383.

But in *Hall* v. *Hall*, 3 Swabey & T. 349, 33 L. J. Prob. N. S. 65, 9 L. T. N. S. 810, it was held that where the evidence on the part of a petitioner for divorce on the ground of adultery discloses the respondent's insanity, the court will require to be satisfied that it admits of a different explanation before it will decree for the petitioner, though the question was not raised in the pleading.

[13] *Rathbun* v. *Rathbun*, 40 How. Pr. 328; *Stratford* v. *Stratford*, 92 N. C. 297.

The fact that a woman had been adjudicated a lunatic two years before, and that the adjudication remained unreversed, will not prevent a divorce on the ground of adultery, where the evidence shows that she was sane at the time of the act, the presumption of continued insanity being rebutted by the evidence of subsequent sanity. *Cook* v. *Cook*, 53 Barb. 180.

[14] *Yarrow* v. *Yarrow* [1892] P. 92, 61 L. J. Prob. N. S. 69, 66 L. T. N. S. 383.

In *Yarrow* v. *Yarrow* [1892] P. 92, 61 L. J. Prob. N. S. 69, 66 L. T. N. S. 383, it was suggested that insanity which would lead to an acquittal on a criminal prosecution would constitute a valid de-

habits is not sufficient to establish insanity as a defense in a divorce case.[15] And nymphomania, consisting of a morbid sexual desire, is not such insanity as will excuse adultery as a ground for divorce.[16]

52. Effect of insanity on desertion as a ground.—Desertion of one party to a marriage by the other, though made a ground of divorce by statute, is not so where it arises from insanity.[17] And an abandonment of a husband which will entitle him to a divorce is not established by the fact that his wife was confined in an insane asylum with his consent.[18] But one party to a marriage who deserts the other while sane, and remains away for the statutory period warranting a divorce, cannot be excused on the ground that he or she became insane before the expiration of the statutory period.[19]

53. Effect of insanity on cruelty as a ground.—Cruel and inhuman treatment resulting from insanity does not warrant a divorce.[20] But to establish insanity as a defense in an action for divorce for cruelty, it must appear that the defendant was in such a mental condition as to deprive him of the use of his reason, rendering him in-

fense in a suit for divorce on the ground of adultery.

[15]*Hill* v. *Hill*, 27 N. J. Eq. 214.

A wife who left her home under a delusion that her husband was trying to poison her, and who committed adultery with the idea that it might probably be the means of bringing about a divorce, is responsible therefor, and her act furnishes a good ground for divorce. *Yarrow* v. *Yarrow* [1892] P. 92, 61 L. J. Prob. N. S. 69, 66 L. T. N. S. 383.

[16]*Hill* v. *Hill*, 27 N. J. Eq. 214.

[17]*Baker* v. *Baker*, 82 Ind. 146.

The time during which a wife has been found, by an inquisition of lunacy, to be insane, is not included in computing the statutory period of desertion required to entitle a husband to a divorce. *Blandy* v. *Blandy*, 20 App. D. C. 535.

And abandonment by a wife of her husband on account of a quarrel will not entitle him to a divorce, where she had been insane, but had been partially cured, and he was not at all times as considerate with her as he might have been in view of her infirmity. *Franklin* v. *Franklin*, 53 Kan. 143, 35 Pac. 1118.

[18]*Pile* v. *Pile*, 94 Ky. 308, 22 S. W. 215.

[19]*Douglass* v. *Douglass*, 31 Iowa, 421; *Harrigan* v. *Harrigan*, 135 Cal. 397, 87 Am. St. Rep. 118, 67 Pac. 506.

And failure of a husband to provide sufficient maintenance for his wife, suitable to her condition, while she is separated from him without her fault, and confined in a lunatic asylum, entitles her to alimony. *Wray* v. *Wray*, 33 Ala. 187.

[20]*Cohn* v. *Cohn*, 85 Cal. 108, 24 Pac. 659; *Tiffany* v. *Tiffany*, 84 Iowa, 122, 50 N. W. 554; *Wertz* v. *Wertz*, 43 Iowa, 534; *Avery* v. *Avery*, 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 418; *Powell* v. *Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Hall* v. *Hall*, 3 Swabey & T. 349, 33 L. J. Prob. N. S. 65, 9 L. T. N. S. 810. And see *Avery* v. *Avery*, 33 Kan. 1, 52 Am. Rep. 523, 5 Pac. 418.

The intent and motive of a party are a necessary ingredient to the offense of cruelty and barbarous treatment and indignities to the person endangering life or health as a ground for divorce, and such intent cannot be held to exist where insanity is established. *Hansell* v. *Hansell*, 3 Pa. Dist. R. 724.

And acts of violence on the part of a husband toward his wife caused by, and consisting principally of, resistance of attempts to take morphine from him while he was in a state of delirium produced by its use, do not constitute extreme and repeated cruelty authorizing a divorce. *Youngs* v. *Youngs*, 130 Ill. 230, 6 L. R. A. 548, 17 Am. St. Rep. 313, 22 N. E. 806.

capable of knowing right from wrong, or choosing the one or the other.[21] The question is whether he was capable of understanding the nature and consequences of the acts charged at the time of their commission.[22] The mere existence of an insane delusion with reference to the conduct of the other party to the marriage or otherwise is not sufficient as an excuse for cruelty as a ground of divorce.[23] And the mental condition of a wife, if not such as to deprive her of the power to desist from provoking conduct, will not remove her case from the rule denying her a divorce on the ground of cruelty, where the conduct complained of was provoked by her, and not disproportionate to the provocation.[24]

54. Effect of insanity on the action.—The rule generally adopted in America is that the right to sue for a divorce is a personal one, depending upon the free and voluntary will of the party, and if such party is insane and cannot consent, his guardian or next friend cannot institute the suit;[25] though in some of the states provision is made by statute for the prosecution of suits for divorce by the guardian of an insane party, or by a next friend, appointed by the court for that

[21] *Hansell* v. *Hansell*, 3 Pa. Dist. R. 724.

Violent acts upon the part of a husband toward his wife, though he was laboring under a state of mental excitement arising from fatigues and anxieties of business, warrant a separation, where he was not an irresponsible agent, and there was a liability of a recurrence of such excitement which would render continued cohabitation with him unsafe. *Martin* v. *Martin*, 8 Week. Rep. 367, 29 L. J. Prob. N. S. 106, 2 L. T. N. S. 118.

[22] *Hanbury* v. *Hanbury* [1892] P. 222, 61 L. J. Prob. N. S. 115.

[23] *Smith* v. *Smith*, 33 N. J. Eq. 458; *Scoland* v. *Scoland*, 4 Wash. 118, 29 Pac. 930.

And a divorce for cruelty will not be granted against a wife because of a charge by her against her husband, that he was attempting to poison her, when it was reasonable to suppose that her fears and the charge were the result of a temporary aberration of the mind. *Sapp* v. *Sapp*, 71 Tex. 348, 9 S. W. 258.

[24] *Durale* v. *Durale* (N. J. Eq.) 34 Atl. 888.

But a husband is not entitled to turn his wife out of doors because she is insane, and the fact that a wife is insane and intends personal violence to her husband furnishes no answer to a claim on her part for restitution of conjugal rights. *Hayward* v. *Hayward*, 1 Swabey & T. 81, 6 Week. Rep. 638.

[25] *Worthy* v. *Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Bradford* v. *Abend*, 89 Ill. 78, 31 Am. Rep. 67; *Mohler* v. *Shank*, 93 Iowa, 273, 34 L. R. A. 161, 57 Am. St. Rep. 274, 61 N. W. 981; *Birdzell* v. *Birdzell*, 33 Kan. 434, 52 Am. Rep. 539, 6 Pac. 561; *Clowry* v. *Clowry*, 16 Ohio C. C. 302, 8 Ohio C. D. 652.

But evidence that a woman was an inmate of an asylum for nearly two years, when she was discharged in an improved condition, but not well, is not sufficient to establish insanity rendering her incompetent to maintain an action for divorce commenced nearly four years later. *Ellis* v. *White*, 61 Iowa, 644, 17 N. W. 28.

And a woman is estopped to claim a share in an estate of a man as his widow, although a divorce obtained from her by him in a suit brought by his guardian in insanity was absolutely void, where she had accepted alimony under the decree, and contracted a subsequent marriage. *Mohler* v. *Shank*, 93 Iowa, 273, 34 L. R. A. 161, 57 Am. St. Rep. 274, 61 N. W. 981.

And fraud will be presumed where a bill was filed for divorce by an alleged next friend of a wife when she was incapable of giving assent, and confined in an asylum in another state, and the de-

purpose.[26] In England, however, the rule is that proceedings for divorce are civil, and that where no provision is made by statute recourse must be had to the ordinary powers of the civil courts where lunatics are litigants, and that therefore the insanity of a husband or wife will not bar a suit by the committee of the lunatic for the dissolution of the marriage.[27] Likewise some of the earlier English cases refuse to permit an action for divorce to proceed against a defendant who had become insane, upon the ground that he was thereby incapacitated from making a defense.[28] But this holding was subsequently superseded by the rule that the lunacy of one party to a marriage after the commission of adultery is no ground for staying proceedings brought by the other for divorce.[29] And this is the rule in America, irrespective of statutes;[30] and a defense by the guardian is provided for in some of the states.[31] But an action for divorce should not be tried against one whose reason has been dethroned, and who is thus rendered incapable of making answer to the charge, or aiding

fendant entered his appearance and answer on the same day, and the cause was then tried and a decree of divorce pronounced. *Bradford* v. *Abend*, 89 Ill. 78, 31 Am. Rep. 67.

[26]*Garnett* v. *Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *Cowan* v. *Cowan*, 139 Mass. 377, 1 N. E. 152; *Denny* v. *Denny*, 8 Allen, 311; *Thayer* v. *Thayer*, 9 R. I. 377.

But the difficulty of ascertaining the real facts in a divorce case when either party is incapable of testifying or of instructing counsel because of insanity requires the court to proceed with the utmost caution,—especially where the object of the suit is to obtain a complete dissolution of the marriage without the intelligent consent of the complainant. And an agreement of guardians or of counsel in such case to submit the case for a final determination upon an imperfect statement of facts does not relieve the court of the responsibility of considering what course public policy and the best interests of the parties require to be pursued. *Garnett* v. *Garnett*, 114 Mass. 379, 19 Am. Rep. 369.

And an action for divorce cannot be maintained by the guardian of a spendthrift on his behalf against the spendthrift's wife. *Winslow* v. *Winslow*, 7 Mass. 96.

[27]*Baker* v. *Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630, Affirmed in L. R. 6 Prob. Div. 12, 49 L. J. Prob. N. S. 83; *Parnell* v. *Parnell*, 2 Phillim. Eccl. Rep. 158, 2 Hagg. Consist. Rep. 169; *Woodgate* v. *Taylor*, 2 Swabey & T. 512, 30 L. J. Prob. N. S. 197, 5 L. T. N. S. 119.

[28]*Bawden* v. *Bawden*, 2 Swabey & T. 417, 31 L. J. Prob. N. S. 94, 8 Jur. N. S. 157, 6 L. T. N. S. 27, 10 Week. Rep. 292; *King* v. *King*, cited in L. R. 2 Prob. & Div. 125; *Mordaunt* v. *Mordaunt*, L. R. 2 Prob. & Div. 129, 18 Week. Rep. 845.

[29]*Mordaunt* v. *Moncrieffe*, 43 L. J. Prob. N. S. 49, 30 L. T. N. S. 649, 22 Week. Rep. 12, L. R. 2 H. L. Sc. App. Cas. 374; *Baker* v. *Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630.

There is no difference between cases of lunatic petitioners and lunatic respondents in actions for divorce on the question of the right to prosecute or defend by committee. *Baker* v. *Baker*, L. R. 5 Prob. & Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630.

[30]*Rathbun* v. *Rathbun*, 40 How. Pr. 328; *Stratford* v. *Stratford*, 92 N. C. 297.

[31] See *Garnett* v. *Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *Little* v. *Little*, 13 Gray, 264; *Thayer* v. *Thayer*, 9 R. I. 377.

counsel in defense, unless at least a reasonable time is allowed for recovery.[32] And in Ohio and, perhaps, some of the other states, an action for divorce will not be allowed to proceed against an insane defendant.[33]

II. Drunkenness.

55. Divorce on the ground of drunkenness.—Drunkenness, independent of other causes, is not a ground for divorce in the absence of statutory enactments making it so.[34] And drunkenness is not insanity for which divorce can be granted under the provisions of a statute authorizing the annulment of a marriage for insanity of a party.[35] Statutory provisions for divorce for habitual drunkenness, however, exist in many of the states. Under them the drunkenness is required to be gross and confirmed, and to continue until the libel for divorce is filed;[36] and such habits are usually required to have been contracted after marriage.[37] A woman who marries a man who is a slave to whisky and morphine, with the knowledge of the fact, assumes the risk, and will not be granted a divorce because he persists in their use.[38] And the intoxication which will authorize a divorce consists in a condition arising from the use of stimulants, such as wine, whisky, brandy, etc.; and the habitual use of opiates, though operating substantially like intoxicating liquors, does not constitute drunkenness which will authorize a divorce, within the meaning of such statutes.[39] And drunkenness must be habitual, consisting of fre-

[32] *Stratford* v. *Stratford*, 92 N. C. 297. And a default will be opened and further proceedings stayed on suggestion that since the commission of the offense the defendant had become insane, unless the appointment of a guardian for him is procured. *Mansfield* v. *Mansfield*, 13 Mass. 409.

[33] *Rhude* v. *Rhude*, 8 Ohio S. & C. P. Dec. 648; *Clowry* v. *Clowry*, 16 Ohio C. C. 302, 8 Ohio C. D. 652.

[34] *Shutt* v. *Shutt*, 71 Md. 193, 17 Am. St. Rep. 519, 17 Atl. 1024; *Mason* v. *Mason*, 131 Pa. 161, 18 Atl. 1008; *Bean* v. *Bean*, 11 Lane. Bar, 138; *McVickar* v. *McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249.

[35] *Elzey* v. *Elzey*, 1 Houst. (Del.) 308.

[36] *Rose* v. *Rose*, 9 Ark. 507; *Brown* v. *Brown*, 38 Ark. 324; *Dunn* v. *Dunn*, 62 Cal. 176; *Lyster* v. *Lyster*, 111 Mass. 327; *Burt* v. *Burt*, 168 Mass. 204, 46 N. E. 622; *Batchelder* v. *Batchelder*, 14 N. H. 380; *Gourlay* v. *Gourlay*, 16 R. I. 705, 19 Atl. 142. And see *Johnson* v *Johnson*, 35 Phila. Leg. Int. 70.

[37] *Blaney* v. *Blaney*, 126 Mass. 205; *Lyster* v. *Lyster*, 111 Mass. 327; *Porritt* v. *Porritt*, 16 Mich. 140.

Though proof of a confirmed habit of drunkenness prior to the period defined in a statute authorizing divorce for general drunkenness for a specific period is admissible in evidence as bearing upon the issue in a divorce case, the statute cannot be construed to allow a divorce for habitual drunkenness during any period prior to such period of time immediately preceding the filing of the petition, and a divorce will not be granted in the absence of evidence of habitual intoxication during that period. *Reynolds* v. *Reynolds*, 44 Minn. 132, 46 N. W. 236.

[38] *Tilton* v. *Tilton*, 16 Ky. L. Rep. 538, 29 S. W. 290.

[39] *Ring* v. *Ring*, 112 Ga. 854, 38 S. E. 330; *Dawson* v. *Dawson*, 23 Mo. App.

quent indulgence in the use of intoxicating liquors,—an habitual use as distinguished from ordinary use,—though it need not be continuous.[40] It is frequent and regular recurrence of excessive indulgence in intoxication which constitutes habitual drunkenness amounting to a ground for divorce.[41] And the reason that habitual drunkenness is made a ground for divorce is not alone because it disqualifies the party for business, but in part, if not mainly, because it renders him unfit for the marital relation; and the habit of becoming intoxicated while at home with his family is sufficient to warrant divorce though when abroad in the community transacting business, he is not habitually intemperate.[42] A man may drink occasionally to excess,

169; *Barber* v. *Barber* (Conn.) 14 Law Rep. 375; *Youngs* v. *Youngs*, 130 Ill. 230, 6 L. R. A. 548, 17 Am. St. Rep. 313, 22 N. E. 806; *Holland* v. *Holland*, 4 Legal Gaz. 372.

The Massachusetts statute expressly includes the use of opium in the provision for divorce on the ground of habitual drunkenness; but to warrant a divorce under that statute the use must be excessive, and must cause gross and confirmed drunkenness, and divorce is not authorized where the habit was not gross and confirmed at the time of filing the libel, though it had previously been so. *Burt* v. *Burt*, 168 Mass. 204, 46 N. E. 622.

[40]*Mack* v. *Handy*, 39 La. Ann. 491, 2 So. 181; *Williams* v. *Goss*, 43 La. Ann. 868, 9 So. 750; *Walton* v. *Walton*, 34 Kan. 195, 8 Pac. 110; *McBee* v. *McBee*, 22 Or. 329, 29 Am. St. Rep. 613, 29 Pac. 887.

A man living in the country, who only drank when he happened to come to town, which was generally on business, and then not always to excess, and who seldom carried liquor home, and became grossly drunk on only a few occasions, and was sober in his family except on such occasions, is not addicted to such habitual drunkenness as to authorize a divorce. *McBee* v. *McBee*, 22 Or. 329, 29 Am. St. Rep. 613, 29 Pac. 887.

And general statements by witnesses in a divorce suit that the defendant was an habitual drunkard are not sufficient to warrant a divorce; the facts must be given so that the court may judge whether or not they amount to habitual drunkenness. *Batchelder* v. *Batchelder*, 14 N. H. 380

[41]*Golding* v. *Golding*, 6 Mo. App. 602; *McGill* v. *McGill*, 19 Fla. 341; *Marous* v. *Marous*, 86 Ill. App. 597; *De Lesdernier* v. *De Lesdernier*, 45 La. Ann. 1364, 14 So. 191.

One may be an habitual drunkard within the divorce law where he has a fixed habit of frequently getting drunk, though he may not be more often drunk than sober, and though sober for weeks at a time. *Brown* v. *Brown*, 38 Ark. 324.

And one who was customarily or habitually given to excessive drinking for a period of years, and had lost the power or will to control his appetite, was an habitual drunkard within a divorce law, though he was not disqualified from attending to his business during business hours. *Richards* v. *Richards*, 19 Ill. App. 465; *Walton* v. *Walton*, 34 Kan. 195, 8 Pac. 110; *Magahay* v. *Magahay*, 35 Mich. 210; *Berryman* v. *Berryman*, 59 Mich. 606, 26 N. W. 789.

And so is one having a fixed habit of drinking to excess to such a degree as to disqualify him from attending to his business during the principal portion of the time usually devoted to business, though he may have been in a position to attend to business affairs during intervals. *Mahone* v. *Mahone*, 19 Cal. 627, 81 Am. Dec. 91.

And evidence that a husband had become grossly intoxicated three or four times a year for twelve or fifteen years, remaining in that condition from a week to ten days, and that he could not resist the desire to drink when it came upon him, and that any undue excitement brought it on, justifies a finding of confirmed habits of intoxication entitling his wife to a divorce. *Blaney* v. *Blaney*, 126 Mass. 205.

[42]*McGill* v. *McGill*, 19 Fla. 341; *Richards* v. *Richards*, 19 Ill. App. 465; *Williams* v. *Goss*, 43 La. Ann. 868, 9 So. 750.

Habitual intemperance within the di-

however, and yet not be an habitual drunkard within the divorce law.[43] And occasional intoxication in a woman is not habitual drunkenness justifying a divorce any more than it is in a man.[44]

Living with a drunken husband after the statutory period upon the expiration of which a divorce is warranted, for the purpose of reclaiming and reforming him, will not affect the rights of the wife; but if she voluntarily continues the marital relation after he ceases to be a drunkard, she condones the offense, and nullifies her right to a divorce.[45] And the commission of an act of adultery is a bar to a divorce on the ground of habitual drunkenness, and a wife sued for divorce on that ground may recriminate that the husband had been guilty of adultery.[46]

56. Effect of drunkenness on desertion as a ground.—A wife whose husband continues his habits of intoxication to the extent of rendering it unsafe for her to live with him after the statutory period authorizing a divorce for desertion is entitled, after her separation from

vorce law refers to a persistent habit of becoming intoxicated, rendering the presence of the party in the marriage relation disgusting and unendurable. *Burns* v. *Burns*, 13 Fla. 369.

So, proof of the wasting on the part of a husband of his mental and physical faculties, and of his failure to make suitable provision for his family, warrants a divorce under a statute authorizing it for confirmed habits of drunkenness on the part of the husband, accompanied by a wasting of his estate, and failure to provide for his family, where his only estate consisted of the mental and physical faculties. *Shuck* v. *Shuck*, 7 Bush, 306; *McKay* v. *McKay*, 18 B. Mon. 8.

[43] *Walton* v. *Walton*, 34 Kan. 195, 8 Pac. 110; *Myrick* v. *Myrick*, 67 Ga. 771; *McBee* v. *McBee*, 22 Or. 329, 29 Am. St. Rep. 613, 29 Pac. 887.

And the fact that a husband became intoxicated about once in three weeks during the evening to such an extent that he could not go to work the next morning, and had continued to do so for about two years, does not warrant a divorce for habitual intemperance, where it had not caused the loss of his position or want or suffering in his family. *Dennis* v. *Dennis*, 68 Conn. 186, 34 L. R. A. 449, 57 Am. St. Rep. 95, 36 Atl. 34.

[44] *Meathe* v. *Meathe*, 83 Mich. 150, 47 N. W. 109.

The ways of life of parties to an action for divorce asked for on the ground of drunkenness, who are unrefined, are not to be tested by the standard of cultivated persons, but by rules which reasonable persons in the same conditions of life would spontaneously acknowledge. *Kline* v. *Kline*, 50 Mich. 438, 15 N. W. 541.

[45] *Moore* v. *Moore*, 41 Mo. App. 176.

The fact that a wife was unrefined and not always ladylike, and was sometimes profane, and that she acquiesced somewhat in the drinking habits of her husband, does not bar her right to a divorce for habitual drunkenness. *Berryman* v. *Berryman*, 59 Mich. 605, 26 N. W. 789.

[46] *Ryan* v. *Ryan*, 9 Mo. 539.

The value of negative testimony in a divorce case, that the witnesses had not seen the defendant drunk depends upon their intimacy with him and their intelligence and opportunity to observe, and is a question for the determination of the trial court. *Walton* v. *Walton*, 34 Kan. 195, 8 Pac. 110.

And such evidence is not sufficient to rebut affirmative evidence of others that they had seen him drunk. *Richards* v. *Richards*, 19 Ill. App. 465.

A decree denying a divorce asked for on the ground of habitual drunkenness will not be disturbed on appeal, where the evidence in the record is not such that the court can feel entirely satisfied what decree ought to be made. *McGonegal* v. *McGonegal*, 46 Mich. 66, 8 N. W. 724.

him on that account, to a divorce upon that ground.[47] And drunkenness which disqualifies a husband from discharging his marital duties and obligations, and compels the wife to leave him, constitutes a degree of cruelty in itself which, if continued for a period in analogy with the time prescribed by the abandonment statute, would warrant a divorce for abandonment.[48] But mere intemperance and improvidence on the part of a husband, on account of which a wife refuses to live with him, do not render the separation a desertion by the husband within the meaning of the divorce law.[49]

57. Effect of drunkenness on cruelty as a ground.— Mere drunkenness upon the part of one party does not entitle the other party to a marriage to a divorce upon the ground of cruelty and inhuman treatment,[50] the cruelty being required to be something different from any other cause of divorce, constituting a separate and distinct cause of action.[56] And even though the drunkenness is accompanied by considerable violence, it is not sufficient where the drunkenness is the real cause of the application.[52] Nor do harshness, indecency, and abusive

[47] *McVickar* v. *McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; *James* v. *James*, 58 N. H. 266.

[48] *Camp* v. *Camp*, 18 Tex. 528.

Where a husband from whom his wife had separated because of his habits of intemperance making it unsafe for her to live with him, so far reformed as to render it reasonably safe for her to resume cohabitation, it is his duty to seek her out and manifest his reformation; and if he fails to do so and prolongs separation for the statutory period after his reformation, the wife being ignorant of the change, he is guilty of desertion which would warrant a divorce on that ground. *McVickar* v. *McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249.

[49] *Plimley* v. *Plimley*, 35 N. J. Eq. 18; *Laing* v. *Laing*, 21 N. J. Eq. 248.

Habits of intoxication on the part of a husband so gross and confirmed as to render a continuance of cohabitation with him unendurable might justify a wife in separating from him, under the Massachusetts statute, so that such separation would not justify a divorce; although, for want of proof that such habits had been contracted since marriage, or of cruel treatment, they would not amount to one of the statutory causes of divorce. *Lyster* v. *Lyster*, 111 Mass. 327.

[50] *Anonymous*, 17 Abb. N. C. 231; *Mason* v. *Mason*, 1 Edw. Ch. 278; *Hudson* v. *Hudson*, 3 Swabey & T. 314, 33 L. J. Prob. N. S. 5, 9 Jur. N. S. 1302, 9 L. T. N. S. 579, 12 Week. Rep. 216.

Nor will cruelty on his part prevent a divorce for adultery in favor of a husband against his wife, where the wife's drunken and vicious habits were the cause of his violence. *Pearman* v. *Pearman*, 1 Swabey & T. 601, 29 L. J. N. S. 54, 8 Week. Rep. 274.

And adulterous conduct falling short of actual adultery, and excessive drinking not amounting to habitual intemperance, do not furnish a cause of action for divorce for extreme cruelty. *Haskell* v. *Haskell*, 54 Cal. 262.

[51] *Haskell* v. *Haskell*, 54 Cal. 262; *Kempf* v. *Kempf*, 34 Mo. 211.

So, the habitual use of opium by a wife, to the neglect of her household duties, is not cruelty which will warrant a divorce in favor of her husband. *Holland* v. *Holland*, 4 Legal Gaz. 372; *Bean* v. *Bean*, 11 Lanc. Bar, 138.

And that a wife was an habitual user of morphine, and under its influence most of the time, is not admissible in an action for divorce for cruelty brought against her by her husband. *Smith* v. *Smith* (Ga.) 46 S. E. 106.

[52] *Scott* v. *Scott*, 29 L. J. Prob. N. S. 64.

And ill treatment of a wife during sprees of inebriation, and proceeding

language, combined with constant intoxication, amount to legal cruelty; there must be something more than mere injury to a person's sensibilities and delicacy.[53] And habitual drunkenness and neglect to provide for one's wife and family do not constitute cruelty and inhuman treatment.[54] But the right of a wife to relief is not affected by the fact that her husband's conduct entitling her to a divorce for cruelty was the result of intemperance to which she did not consent.[55] And the fact that habitual drunkenness is in itself sufficient ground for divorce is no mitigation of the offense.[56] And acts of violence by a husband toward his wife, considered in connection with other misconduct, such as drunkenness, may be sufficient to warrant the dissolution of the marriage on the ground of cruelty, though neither act, taken alone, would constitute legal cruelty.[57] But the difficulties of

from it, does not constitute cruelty justifying a divorce, in the absence of evidence of a fixed purpose to ill treat her, or that he no longer entertained affection for her. *Brown* v. *Brown*, 38 Ark. 324. And see *Shutt* v. *Shutt*, 71 Md. 193, 17 Am. St. Rep. 519, 17 Atl. 1024; *Laing* v. *Laing*, 21 N. J. Eq. 248.

[53]*Powers* v. *Powers*, 20 Neb. 529, 31 N. W. 1; *Waskam* v. *Waskam*, 31 Miss. 154; *C.* v. *C.* 28 Eng. L. & Eq. Rep. 603; *Brown* v. *Brown*, L. R. 1 Prob. & Div. 46, 35 L. J. Prob. N. S. 13, 11 Jur. N. S. 1027, 13 L. T. N. S. 645, 14 Week. Rep. 149; *Mason* v. *Mason*, 1 Edw. Ch. 278. And see *Holland* v. *Holland*, 4 Legal Gaz. 372.

And the facts that the conversation and deportment of a husband were not always characterized by the delicacy and tenderness which might be expected, and that occasionally, when in a passion induced or aggravated by intoxication, he was vulgar, profane, and boisterous, do not entitle his wife to a divorce and alimony on the ground of inhuman treatment endangering her life. *Boggess* v. *Boggess*, 4 Dana, 308.

[54]*Camp* v. *Camp*, 18 Tex. 528; *Laing* v. *Laing*, 21 N. J. Eq. 248.

[55]*Harman* v. *Harman*, 16 Ill. 85; *Bowie* v. *Bowie*, 3 Md. Ch. 51; *McVickar* v. *McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; *Mason* v. *Mason*, 1 Edw. Ch. 278; *Hughes* v. *Hughes*, 19 Ala. 308; *Waddell* v. *Waddell*, 2 Swabey & T. 584, 31 L. J. Prob. N. S. 123, 8 Jur. N. S. 623, 6 L. T. N. S. 552.

Cruelty of a husband while drunk, toward an amiable and inoffensive wife, is a ground for divorce, though he was good and kind when sober. *Lockridge* v. *Lockridge*, 3 Dana, 28, 28 Am. Dec. 52.

And inhuman treatment warranting a divorce is established by proof that a husband frequently became drunk, and while in that condition choked or assaulted his wife and accused her of immoral conduct and locked her up and threatened her. *Wheeler* v. *Wheeler*, 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 689; *Mason* v. *Mason*, 131 Pa. 161, 18 Atl. 1008.

[56]*Lee* v. *Lee*, 3 Wash. 236, 28 Pac. 355; *Camp* v. *Camp*, 18 Tex. 528.

A petition for divorce on the ground of habitual intoxication cannot be amended by adding thereto the ground of cruel treatment, although the facts alleged to constitute such treatment are substantially the same as those set forth in the petition. *Ring* v. *Ring*, 112 Ga. 854, 38 S. E. 330.

[57]*Power* v. *Power*, 11 Jur. N. S. 800, 4 Swabey & T. 173, 34 L. J. Prob. N. S. 137, 12 L. T. N. S. 824, 13 Week. Rep. 1113. And see *Crichton* v. *Crichton*, 73 Wis. 59, 40 N. W. 638; *Wachholz* v. *Wachholz*, 75 Wis. 375, 44 N. W. 506; *Streitwolf* v. *Streitwolf* (N. J. Eq.) 47 Atl. 14; *Powers* v. *Powers*, 20 Neb. 529, 31 N. W. 1; *Allen* v. *Allen*, 31 Mo. 479; *Lee* v. *Lee*, 3 Wash. 236, 28 Pac. 355.

In *Clutch* v. *Clutch*, 1 N. J. Eq. 475, an absolute divorce was denied, but a decree of separation for a term of years was granted upon evidence that the husband had been intemperate and grossly abusive, and that in two instances he turned his wife out of doors, and fre-

the parties must have been the consequence, and not the cause, of the intemperance.[58] Bodily injuries inflicted upon a wife by her husband while suffering from delirium tremens are sufficient ground for judicial separation, where, though the disorder has subsided, the wife cannot cohabit with him without danger of repetition of the injuries.[59] And habits of intoxication on the part of a husband may ordinarily be considered in connection with other objectionable acts on his part as tending to give color to and explain his conduct, and the nature and character of the violence used and threats made.[60]

quently refused to provide for his family the common necessities of life, and used personal violence against her, upon the theory that the case was not one of an aggravated character, and that there might be hope of reformation or conciliation.

[58] *White* v. *White*, 1 Swabey & T. 592, 6 Jur. N. S. 28, 1 L. T. N. S. 197. And see *Mack* v. *Handy*, 39 La. Ann. 491, 2 So. 181; *Leake* v. *Linton*, 6 La. Ann. 262; *Williams* v. *Goss*, 43 La. Ann. 868, 9 So. 750.

[59] *Marsh* v. *Marsh*, 28 L. J. Prob. N. S. 13, 1 Swabey & T. 312, 5 Jur. N. S. 46, 7 Week. Rep. 129; *Roblin* v. *Roblin*, 28 Grant Ch. (U. C.) 439.

[60] *Coursey* v. *Coursey*, 60 Ill. 186; *Harman* v. *Harman*, 16 Ill. 85; *Rodman* v. *Rodman*, 20 Grant Ch. (U. C.) 448.

So, habits of profanity, though furnishing no ground for divorce, may be taken into consideration in connection with habits of intoxication, in an action for divorce for cruelty, as giving color to the conduct of the husband. *Powers* v. *Powers*, 20 Neb. 529, 31 N. W. 1.

CHAPTER IV.

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I. Capacity, generally.

58. Disposing mind; definition and necessity of.—A disposing mind, the existence of which is essential to testamentary capacity, is a mind intelligent enough to have a general idea of the property to be disposed of and of the objects among which the distribution ought to be made. When we come, however, to concrete cases, two important and often conflicting conditions are to be considered. On the one side the comfort of the weak, the dependent, and the aged, depends largely upon their testamentary capacity being maintained. If they cannot leave property to persons kind to them, they may be often left to suffer from want of kindness. On the other side, if a person of feeble intellect is so far exposed to the coercion or fraud of others as to validate testamentary provisions made by him under the pressure of such coercion or fraud, then not only may his life be made miserable, but he may become instrumental in perpetrating great wrongs. Hence it is that to constitute a disposing mind there must be, as will hereafter be more fully seen, capacity as well to resist undue influence as to take a general view of the estate to be bestowed and the objects among whom it is to be distributed.[1]

59. Idiots unable to make a will.— An idiot, it is agreed on all sides, has no testamentary capacity;[2] though as to what constitutes idiocy there is as much doubt in testamentary as in contractual issues. "Idiocy," according to Dr. Ray, "is that condition of mind in which the reflective and all or a part of the affective powers are either entirely wanting, or are manifested to the slightest possible extent."[3]

[1]Mr. Bigelow argues (1 Jarman, Wills, 5th Am. ed., note to *38) that the term, "a disposing mind," is ambiguous and misleading. For, he says, it is "applied to issues of insanity in the sense of perverted (diseased) intellect, where the real question is not whether the decedent had capacity to make a will, but whether he did (normally) will." whereas, "it is applicable properly only to issues of decay or of want of mind; the true question in such cases being whether the supposed testator had sufficient mental ability at the time to exercise will." See also Randolph & T.'s note to Jarman, p. 100.

[2]1 Jarman, Wills, 5th Am. ed. *34, 1 Randolph & T.'s ed. p. 63; 1 Redf. Wills, §§ 7, 8.

[3]Medical Jurisprudence of Insanity, 1871, § 58; and the following remarks are worthy of attention: He tells us

Where there is even a low degree of intelligence, idiocy cannot be said to exist. The test is comparatively simple. If the pretended idiot can be shown to have intelligently performed acts of business during the period in which idiocy be claimed to have existed, the allegation of incompetency on this ground falls, unless fraud or constraint be shown.[4]

60. Different theories as to necessary qualifications.—The cases considering the question, What constitutes unsoundness of mind in its legal sense? may be grouped in three classes. In the first we have those which proceed upon the notion that no man is incapable of making a will unless he is absolutely insane; in the second, those which proceed upon the test of ordinary business sagacity and capacity; while in the third are to be considered such as require of each testator certain specified qualifications for making a will, the absence of any one of which incapacitates.

61. Theory that low grade of intelligence is sufficient.—The rule has been laid down that on questions of testamentary capacity the courts will not undertake to measure the size, degree, or extent of a man's understanding,[5] and that all persons are in law either of sound mind or of unsound mind, there being no middle ground between capacity and incapacity.[6] Within this rule mere imbecility of mind of a testator, however great, does not avoid his will if he be not an idiot or a lunatic.[7] A person is capable of disposing of his property by will, be he wise or unwise, if not totally deprived of reason.[8] The standard

that "there is even more diversity in the characters of the idiotic and imbecile than in those of the sound; and this truth must not be forgotten if we would avoid the flagrant error of regulating judicial decisions by rules, which, though perfectly correct in regard to one case or set of cases, may be wholly incorrect in regard to others."

[4] *Bannatyne* v. *Bannatyne*, 2 Rob. Eccl. Rep. 475, 16 Jur. 864, 14 Eng. L. & Eq. Rep. 581. In this case Dr. Lushington placed the test on the ground that many acts of business could possibly be done by a lunatic and the lunacy not be detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person.

[5] *Stewart* v. *Lispenard*, 26 Wend. 255; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Dornick* v. *Reichenback*, 10 Serg. & R. 84.

[6] *McElroy* v. *McElroy*, 5 Ala. 81; *Aikin* v. *Weckerly*, 19 Mich. 482.

[7] *Blanchard* v. *Nestle*, 3 Denio, 37; *Stewart* v. *Lispenard*, 26 Wend. 255.

[8] *Morris* v. *Stokes*, 21 Ga. 552; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Dufficld* v. *Robeson*, 2 Harr. (Del.) 375; *Blanchard* v. *Nestle*, 3 Denio, 37; *Newhouse* v. *Godwin*, 17 Barb. 236; *Dornick* v. *Reichenback*, 2 Serg. & R. 84.

The term "unsound mind," as used in statutes with relation to wills, is of the same signification under this rule as the term "*non compos mentis*." *Blanchard* v. *Nestle*, 3 Denio, 37. And see *Re Forman*, 54 Barb. 274.

And to be incompetent to make a will, the mind of the testator must have been so prostrated as to lose the government of reason and common sense. *Leeper* v. *Taylor*, 47 Ala. 221; *Crolius* v. *Stark*, 7 Lans. 311.

In *Stewart* v. *Lispenard*, 26 Wend. 255, it was held that a woman who had always lived under the care of her friends, had never attempted to transact business, and who, at the age of forty,

of testamentary capacity was found in the question whether the testator was *compos mentis* or *non compos mentis* according to the legal meaning of the terms.[9] The question to be submitted to the jury was whether he had capacity to make a will; and not whether he had the capacity to make the will in question. If *compos mentis* he could make any will, however complicated; and if *non compos mentis* he could make no will, however simple.[10]

62. Rule changed.—This view of testamentary capacity was followed for a time in several cases in New York,[11] and it has been adopted in Georgia.[12] In that state it is now settled that a disposing mind exists unless there is a total deprivation of reason.[13] But it is no longer the rule in New York.[14] And the rule which is now prevalent, if not universal, is that a total deprivation of reason is not necessary to destroy testamentary capacity, and that the impairment of the mind need not amount to lunacy or absolute imbecility or idiocy;[15] it not being necessary, to invalidate a will, that the incapacity should be such as to render the testator incapable of understanding that he was making a disposition of his property; but only that it should have rendered him unable to comprehend the nature and extent of his property, and to know what persons he intended to provide for.[16]

had not mastered the Lord's Prayer, and whose intellect and understanding were of a very low degree, was nevertheless competent to execute a will.

[9]*Delafield* v. *Parish*, 25 N. Y. 9; *Ean* v. *Snyder*, 46 Barb. 230; *Blanchard* v. *Nestle*, 3 Denio, 37.

[10]*Yoe* v. *McCord*, 74 Ill. 33; *Legg* v. *Myer*, 5 Redf. 628; *Buchanan* v. *Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601.

[11]*Blanchard* v. *Nestle*, 3 Denio, 37; *Clarke* v. *Sawyer*, 2 N. Y. 498; *Burger* v. *Hill*, 1 Bradf. 360. And see *Buchanan* v. *Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601.

[12]*Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329.

[13]*Gardner* v. *Lamback*, 47 Ga. 133; *Morris* v. *Stokes*, 21 Ga. 552.

[14]*Delafield* v. *Parish*, 25 N. Y. 9. But see *Buchanan* v. *Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601. This, however, was not a contested probate, but an action to set aside a will.

[15]*Stubbs* v. *Houston*, 33 Ala. 555; *Abraham* v. *Wilkins*, 17 Ark. 292; *Pelamourges* v. *Clark*, 9 Iowa, 1; *Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Daniel* v. *Daniel*, 39 Pa. 191; *McTaggart* v. *Thompson*, 14 Pa. 149; *Mountain* v. *Bennet*, 1 Cox Ch. Cas. 356.

To invalidate a will, the mind of the testator need not have been in such a condition as to be an object for a commission of lunacy. *Mountain* v. *Bennet*, 1 Cox Ch. Cas. 356; *Townsend* v. *Bogart*, 5 Redf. 93.

[16]*Young* v. *Ridenbaugh*, 67 Mo. 574.

The words "of unsound mind," as used in the Indiana statute of wills, mean such a degree of unsoundness of mind as incapacitates one from making a will according to the standard of testamentary capacity fixed by the adjudicated cases, including other species of mental unsoundness. *Blough* v. *Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Willett* v. *Porter*, 42 Ind. 250; *Young* v. *Miller*, 145 Ind. 652, 44 N. E. 757.

And an instruction in a will contest that it is not necessary to show that the alleged unsoundness of mind had anything to do with the manner of disposing of the property is erroneous, as recognizing but two conditions of the human mind,—one sound and capable of doing all acts, and the other insane and incapable of doing any act. *Durham* v. *Smith*, 120 Ind. 463, 22 N. E. 333.

63. Business capacity test.— Capacity for the transaction of ordinary business has been adopted to some extent as the test of testamentary capacity.[17] Within this rule it is sufficient that the testator is capable of acting rationally and understands the relation of cause and effect in ordinary business affairs.[18] And buying and selling property, settling accounts, collecting and paying out and borrowing and loaning money, and making contracts and conveyances, constitute the transaction of ordinary business within this rule.[19] Many of the later cases, however, tend toward the combination of this test with the requirement of capacity to understand the business engaged in in making a will,[20] and with that to understand and comprehend the disposition made of the property,[21] and with that of capacity to select the objects of one's bounty.[22] And the business capacity test has been expressly repudiated by other cases holding that less capacity is required to make a valid will than to transact ordinary business,[23] and that one who has sufficient capacity to rationally comprehend the effect of his act, and appreciate his relation to the natural objects of his bounty,

So, the words "lunatic" or "*non compos mentis*" in the Tennessee act of April 1, 1885, providing that all personal estate of which a lunatic or *non compos mentis* dies intestate, derived from such person's husband or wife, shall go to the next of kin of the person through whom it was derived, mean one who has not sufficient mental capacity to make a will. *Stratton Claimants* v. *Morris Claimants*, 89 Tenn. 497; *sub nom. Dibrell* v. *Lanier*, 12 L. R. A. 70, 15 S. W. 87.

[17]*Coleman* v. *Robertson*, 17 Ala. 84; *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Lilly* v. *Waggoner*, 27 Ill. 395; *Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Brown* v. *Riggin*, 94 Ill. 560; *Carpenter* v. *Calvert*, 83 Ill. 62; *Yoe* v. *McCord*, 74 Ill. 33; *Rutherford* v. *Morris*, 77 Ill. 397; *Harp* v. *Parr*, 168 Ill. 459, 48 N. E. 113; *Meeker* v. *Meeker*, 75 Ill. 260; *Re Storey*, 20 Ill. App. 183; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Reed's Will*, 2 B. Mon. 79; *Barnes* v. *Barnes*, 66 Me. 286; *Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Rambler* v. *Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Black* v. *Ellis*, 3 Hill L. 68.

[18]*Meeker* v. *Meeker*, 75 Ill. 260; *Brown* v. *Riggin*, 94 Ill. 560; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Re Gleespin*, 26 N. J. Eq. 523.

Within the ordinary business rule, capacity upon the part of a testator to know and understand the extent of his property, who are his relatives, and what are their claims upon his bounty, and how he wishes to dispose of his property, and to hold all these things in his mind at the same time, is not necessary. *Carpenter* v. *Calvert*, 83 Ill. 62.

[19]*Francis* v. *Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Meeker* v. *Meeker*, 75 Ill. 260; *Reed's Will*, 2 B. Mon. 79; *Hoban* v. *Campau*, 52 Mich. 346, 17 N. W. 797; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217.

[20]*Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267.

[21]*Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Farmer* v. *Farmer*, 129 Mo. 530, 31 S. W. 926; *Myers* v. *Hauger*, 98 Mo. 433, 11 S. W. 974; *Benoist* v. *Murrin*, 58 Mo. 307; *Harvey* v. *Sullens*, 56 Mo. 372.

[22]*Freeman* v. *Easly*, 117 Ill. 317, 7 N. E. 656; *Norton* v. *Paxton*, 110 Mo. 456, 19 S. W. 807.

[23]*Stubbs* v. *Houston*, 33 Ala. 555; *Thompson* v. *Kyner*, 65 Pa. 368; *Dyre's Estate*, 12 Phila. 156; *Whitney* v. *Twombly*, 136 Mass. 145; *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58.

and understand the provisions of his will, is competent to make a will, though he may not be competent to manage business generally.[24]

64. Test of contractual capacity.— The degree of mental capacity sufficient for the making of a valid will has been held to be the same as that required to make a valid deed or contract.[25] And this has been held to require that the testator have sufficient capacity to make a disposition of his estate with judgment and understanding with reference to the extent of his property and relative claims of the different persons who would or might have been the objects of his bounty.[26] But other cases have varied the rule to the effect that no greater mental capacity is required to make a valid will than to make a valid deed or contract.[27] And the test of capacity to make a contract has been repudiated.[28] And the weight of authority holds that one may make a valid will though his capacity is less than would be required to make a contract or deed,[29] or to manage his estate,[30] or to make a gift *inter vivos*.[31]

[24]*St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Crossan* v. *Crossan*, 169 Mo. 631, 70 S. W. 136; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

[25]*Stewart* v. *Elliott*, 2 Mackey, 307; *McElroy* v. *McElroy*, 5 Ala. 81; *Coleman* v. *Robertson*, 17 Ala. 84; *Tobin* v. *Jenkins*, 29 Ark. 151; *Tyson* v. *Tyson*, 37 Md. 567.

[26]*Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Davis* v. *Calvert*, 5 Gill & J. 300, 25 Am. Dec. 282, 294.

In *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100, it was held that knowledge on the part of a testator as to what he was about, and as to the consequences of what he was doing, together with sufficient capacity to contract, constitute testamentary capacity.

[27]*Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Ford* v. *Ford*, 7 Humph. 92. And see *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398.

[28]*Kirkwood* v. *Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418; *Maddox* v. *Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734, 21 S. W. 499.

[29]*Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Lemon* v. *Jenkins*, 48 Ga. 313; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Wise* v. *Foote*, 81 Ky. 10; *Howard* v. *Coke*, 7 B. Mon. 655; *Aubert* v. *Aubert*, 6 La. Ann. 104; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Brinkman* v. *Rueggesiek*, 71 Mo. 553; *Crowson* v. *Crowson*, 172 Mo. 691, 72 S. W. 1065; *Von De Veld* v. *Judy*, 143 Mo. 348, 44 S. W. 1117; *Stewart* v. *Lispenard*, 26 Wend. 255; *Re Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496; *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989; *Paine* v. *Roberts*, 82 N. C. 451; *McCann's Estate*, 12 Pa. Co. Ct. 560, 2 Pa. Dist. R. 181; *Thompson* v. *Kyner*, 65 Pa. 368; *Kirkwood* v. *Gordon*, 7 Rich. L. 478, 62 Am. Dec. 418; *Prather* v. *McClellan*, 76 Tex. 574, 13 S. W. 543; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493; *Den ex dem. Stevens* v. *Van Cleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141. But see *Brown* v. *Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621.

In *Wise* v. *Foote*, 81 Ky. 10, it was stated as a reason why less capacity should be required for the making of a will than for the making of a contract, that, in the making of contracts, the parties stand at arm's length, and are opposed to each other.

65. Test of capacity to understand transaction.—The doctrine is also well supported that the competency of the testator should be judged by the nature of the act to be done from a consideration of all the circumstances;[32] and that the test is whether the testator's mind and memory were sufficiently sound to enable him to understand the business in which he was engaged,[33]—whether he was able to understand that he was disposing of his estate by will, and to whom he was

Failure to instruct a jury in a will contest, however, that less capacity would suffice to make a valid will than would be required in making contracts, is not reversible error, where no special charge was requested. *Cockrill* v. *Cox*, 65 Tex. 676; *Brown* v. *Mitchell*, 88 Tex. 350, 31 S. W. 621.

[30]*Howard* v. *Coke*, 7 B. Mon. 655; *Brinkman* v. *Rueggesick*, 71 Mo. 553; *Crowson* v. *Crowson*, 172 Mo. 691, 72 S. W. 1065; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Re Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496.

In *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64. 28 L. T. N. S. 562, 42 L. J. Prob. N. S. 41, however, it was held that a testamentary disposition involves a larger and higher survey of facts than is needed to enter into ordinary contracts of life, and a higher degree of capacity is required to make a will than an ordinary contract; but the judge who decided the case explained his decision in a note to a subsequently decided case (*Burdett* v. *Thompson*, L. R. 3 Prob. & Div. 72), as meaning that whatever is the highest degree of soundness, that degree is required to make a will.

[31]*Clarke* v. *Sawyer*, 3 Sandf. Ch. 351.

[32]*Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Delaney* v. *Salina*, 34 Kan. 532, 9 Pac. 271; *Sheldon* v. *Dow*, 1 Dem. 503; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Garrison* v. *Blanton*, 48 Tex. 299; *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. Rep. 84.

[33]*Stubbs* v. *Houston*, 33 Ala. 555; *Abraham* v. *Wilkins*, 17 Ark. 292; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Lodge* v. *Lodge*, 2 Houst. (Del.) 419; *Cordrey* v. *Cordrey*, 1 Houst. (Del.) 269; *Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Chandler* v. *Ferris*, 1 Harr. (Del.) 454; *Ball* v. *Kane*, 1 Penn. (Del.) 90, 39 Atl. 778; *Smith* v. *Day*, 2 Penn. (Del.) 245, 45 Atl. 396; *Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Yoe* v. *McCord*, 74 Ill. 33; *Pittard* v. *Foster*, 12 Ill. App. 133; *Conway* v. *Vizzard*, 122 Ind. 266, 23 N. E. 771; *Runkle* v. *Gates*, 11 Ind. 95; *Webber* v. *Sullivan*, 58 Iowa, 260, 12 N. W. 319; *Re Convey*, 52 Iowa, 197, 2 N. W. 1084; *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Young* v. *Ridenbaugh*, 67 Mo. 574; *McClintock* v. *Curd*, 32 Mo. 411; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; *Frost* v. *Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612; *Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *Re Hansburgh*, 82 Hun, 49, 31 N. Y. Supp. 177; *Re Otis*, 1 Misc. 258, 22 N. Y. Supp. 1060; *Barnhardt* v. *Smith*, 86 N. C. 473; *Paine* v. *Roberts*, 82 N. C. 451; *Re McCullough*, 35 Pittsb. L. J. 169; *Cornelius* v. *Cornelius*, 52 N. C. (7 Jones L.) 593; *Horne* v. *Horne*, 31 N. C. (9 Ired. L.) 99; *Zeltner* v. *Bodman German Protestant Widows' Home*, 1 Ohio Dec. 306; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *Thompson* v. *Kyner*, 65 Pa. 368; *Re Restine*, 3 W. N. C. 27; *Wisener* v. *Maupin*, 2 Baxt. 342.

A testator cannot make a valid will when he did not know what he was doing, or understand that he was executing a will. *Bittleston* v. *Clark*, 2 Lee, Eccl. Rep. 229; *Etter* v. *Armstrong*, 46 Ind. 197; *Den ex dem. Merritt* v. *Johnson*, 5 N. J. L. 454, 8 Am. Dec. 610.

And this is true though the incapacity was caused by the use of medicines. *Stedham* v. *Stedham*, 32 Ala. 525.

And it is capacity to understand the business engaged in which is required of a testator, and not merely capacity to understand the act which he is performing, that act being simply the making and signing of a will. *Pittard* v. *Foster*, 12 Ill. App. 132.

giving it;[34] and whether he appreciated the effects of the transaction,[35]—that is, whether he had mind and memory sufficient to make the will in question,—the term *compos mentis* not being regarded as a safe standard.[36] Knowledge on the part of the testator of what he was about and how he was disposing of his property, and a purpose to do so, constitute testamentary capacity under this rule.[37] But it is sufficient if the testator had such mind and memory as would enable him to understand the elements of which his will was composed, and the disposition of his property, in its simplest forms. He need not be competent to view his will with the eye of a lawyer, and comprehend the legal effect of its provisions.[38]

66. Test of capacity to collect and retain in mind.—The rule is also laid down in many of the cases that to be competent to make a will, a testator must have sufficient active memory to collect in his mind, without prompting, the parts or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in regard to them,[39] and sufficient capacity to determine whether the will drawn makes the desired disposi-

[34] *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Cordrey* v. *Cordrey*, 1 Houst. (Del.) 269; *Re Restine*, 3 W. N. C. 27; *Re Rodger's Estate*, 19 W. N. C. 383; *Garrison* v. *Blanton*, 48 Tex. 299.

[35] *Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Webber* v. *Sullivan*, 58 Iowa, 260, 12 N. W. 319; *Re Convey*, 52 Iowa, 197, 2 N. W. 1084; *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Re Flansburgh*, 82 Hun, 49, 31 N. Y. Supp. 177; *Re Otis*, 1 Misc. 258, 22 N. Y. Supp. 1060.

It is not sufficient to the validity of a will that the testator was merely able to answer familiar and usual questions. *Aikin* v. *Wackerly*, 19 Mich. 482.

A testator, to be competent to make a will, must have ability to remember and call to mind all the items of his property, and to know and comprehend, as well as to remember, the value of each item, or, at least, each subject of ownership. *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432.

And an alteration in a will, leaving a son of the testator totally unprovided for, is invalid, where the testator did not know the important alteration he was making, though he did know that he was doing some testamentary act. *Brouncker* v. *Brouncker*, 2 Phillim. Eccl. Rep. 57. See also *Young* v. *Ridenbaugh*, 67 Mo. 574.

[36] *Kempsey* v. *McGinniss*, 21 Mich. 123; *Re Forman*, 54 Barb. 274; *Townsend* v. *Bogart*, 5 Redf. 93; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449.

Less capacity is generally required to make a codicil than to make a will, though the question is always one of fact for the jury. *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543.

[37] *Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Horn* v. *Pullman*, 72 N. Y. 269.

It is sufficient, under this rule, if the testator had knowledge to comprehend the condition of his property, and the scope, meaning, and effect of the provisions of his will. *Cornwell* v. *Riker*, 2 Dem. 354.

And testamentary capacity is to be determined by the capacity of the testator to understand what he was doing, and not by his actual knowledge and understanding thereof. *Brown* v. *Mitchell*, 75 Tex. 9, 12 S. W. 606.

[38] *Gaither* v. *Gaither*, 20 Ga. 709; *Young* v. *Ridenbaugh*, 67 Mo. 574; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141.

[39] *Bulger* v. *Ross*, 98 Ala. 267, 12 So. 803; *McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Yeo* v. *McCord*, 74

tion.[40] It has been criticised, however, as not being adapted to use as a test,[41] and as requiring too high a degree of mental capacity.[42]

67. Test of capacity to understand claims to bounty.—The test of testamentary capacity supported by a great majority of cases, however, and which probably differs from the two tests last above given only in the more elaborate method of expression, is whether the testator had capacity to understand the nature of the business in which he was engaged, and ability to recollect and comprehend the condition of the property he wished to dispose of, and understand and decide upon the method of such distribution, and knowledge, memory, and capacity to comprehend his relation to the persons who were or might naturally be the objects of his bounty, and the relative merits of their claims,[43] and was capable of making a rational selection among them

Ill. 33; *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118; *Lowder* v. *Lowder*, 58 Ind. 538; *Rush* v. *Megee*, 36 Ind. 69; *McHugh* v. *Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627; *Aikin* v. *Weekerly*, 19 Mich. 482; *Van Guysling* v. *Van Kuren*, 35 N. Y. 70; *Delafield* v. *Parish*, 25 N. Y. 9; *Re Richardson*, 51 App. Div. 637, 64 N. Y. Supp. 944; *Re Mabie*, 5 Misc. 179, 24 N. Y. Supp. 855; *Re Lang*, 9 Misc. 521, 30 N. Y. Supp. 388; *Re Henry*, 18 Misc. 149, 41 N. Y. Supp. 1096; *Re Lawrence*, 48 App. Div. 83, 62 N. Y. Supp. 673; *Townsend* v. *Bogart*, 5 Redf. 93; *Cheney* v. *Price*, 90 Hun, 238, 37 N. Y. Supp. 117; *Re Skaats*, 74 Hun, 462, 26 N. Y. Supp. 494; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Re Lewis*, 51 Wis. 101, 7 N. W. 829; *Holden* v. *Meadows*, 31 Wis. 284.

Where a testator was suffering from a disease of the mind at the time of the execution of his will, which was progressive and required some time to develop, and which afterwards caused his death, the question with relation to the validity of the will is not whether, at the time of its execution, he was suffering from the disease which afterwards rendered him insane, but whether, at the date of the execution of the will, the disease had so far progressed that he had not sufficient memory to collect in his mind, without prompting, the particular elements of the business to be transacted, and to hold them a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment with relation to them. *Re Lawrence*, 48 App. Div. 83, 62 N. Y. Supp. 673.

[40] *Young* v. *Ridenbaugh*, 67 Mo. 574.

It is sufficient if a testator understands the meaning and effect of his will as a whole, and if it truly expresses his testamentary intentions. It is not necessary that he should understand the meaning of all the technical terms and legal phraseology therein employed. *O'Brien* v. *Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100.

[41] *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735.

[42] *Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79.

[43] This rule of testamentary capacity is supported by such a large number of cases, and such a large number of late cases, many of which were decided by courts which had announced other or differently stated rules, as to warrant the assumption that it has become or is becoming the almost, if not quite, universal test. Among the cases announcing this rule are: *Eastis* v. *Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204; *Schieffelin* v. *Schieffelin*, 127 Ala. 14, 28 So. 687; *Ouachita Baptist College* v. *Scott*, 64 Ark. 349, 42 S. W. 536; *Cordrey* v. *Cordrey*, 1 Houst. (Del.) 269; *Dunham's Appeal*, 27 Conn. 192; *Wood* v. *Lane*, 102 Ga. 199, 29 S. E. 180; *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881; *Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118; *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 909; *Bramel* v. *Bramel*, 101 Ky. 64, 39 S. W. 520; *Godden* v. *Burke*, 35 La. Ann. 160; *Brown* v. *Ward*, 53 Md. 393, 36 Am. Rep.

according to his settled purpose.[44] He must have capacity to recollect the claims of those who are excluded from participating in his bounty as well as those who participate in it,[45] and be competent to understand the scope and meaning of the provisions of his will, and the manner in which it distributes his property,[46] and have capacity to comprehend the relations of each of these factors to the other.[47] But it is not necessary that he should be able to collect them all in one compre-

422; *Berry* v. *Safe Deposit & T. Co.* 96 Md. 45, 53 Atl. 720; *Whitney* v. *Twombly*, 136 Mass. 145; *Beaubien* v. *Cicotte*, 12 Mich. 459; *Spencer* v. *Terry*, 127 Mich. 420, 86 N. W. 998; *Young* v. *Otto*, 57 Minn. 307, 59 N. W. 199; *Jackson* v. *Hardin*, 83 Mo. 175; *Southworth* v. *Southworth*, 173 Mo. 59, 73 S. W. 129; *Sloan* v. *Maxwell*, 3 N. J. Eq. 563; *Claffey* v. *Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Ivison* v. *Ivison*, 80 App. Div. 599, 80 N. Y. Supp. 1011; *Re Murphy*, 41 App. Div. 153, 58 N. Y. Supp. 450; *Bost* v. *Bost*, 87 N. C. 477; *Kettemann* v. *Metzger*, 23 Ohio C. C. 61; *Hubbard* v. *Hubbard*, 7 Or. 42; *Ames's Will*, 40 Or. 495, 67 Pac. 737; *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Re McKim*, 9 Pa. Co. Ct. 209; *Kirkwood* v. *Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58; *Kerr* v. *Lunsford*, 31 W. Va. 659, 680, 2 L. R. A. 668, 8 S. E. 493; *Re Blakely*, 48 Wis. 294, 4 N. W. 337; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Ingoldsby* v. *Ingoldsby*, 20 Grant. Ch. (U. C.) 131; *Sefton* v. *Hopwood*, 1 Fost. & F. 578; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549.

Capacity to transact business is not a proper test. *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881; *Waugh* v. *Moan*, 200 Ill. 298, 65 N. E. 713.

[44]*Hall* v. *Hall*, 18 Ga. 40; *Stanecll* v. *Kenan*, 33 Ga. 56; *Re Shropshire*, 4 J. J. Marsh. 15; *Newcomb* v. *Newcomb*, 96 Ky. 120, 27 S. W. 997; *Phillips* v. *Phillips*, 81 Ky. 329; *Smith* v. *Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Stoutenburgh* v. *Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Forman* v. *Smith*, 7 Lans. 443; *Kinne* v. *Johnson*, 60 Barb. 69; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Lawrence* v. *Steel*, 66 N. C. 584; *Re Farnsworth*, 62 Wis. 474, 22 N. W. 523.

[45]*McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Mecker* v. *Mecker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Beaubien* v. *Cicotte*, 12 Mich. 459; *Goldie* v. *Murray*, 6 Jur. 608.

And to know whether he had done anything for the persons who might naturally be the objects of his bounty, and what he had done. *Reynolds* v. *Root*, 62 Barb. 250.

[46]*Cordrey* v. *Cordrey*, 1 Houst. (Del.) 269; *Webber* v. *Sullivan*, 58 Iowa, 260, 12 N. W. 319; *McCoon* v. *Allen*, 45 N. J. Eq. 708, 17 Atl. 820; *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525; *O'Brien* v. *Dwyer*, 45 N. J. Eq. 689, 17 Atl. 777; *Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Hampton* v. *Westcott*, 49 N. J. Eq. 522, 25 Atl. 254; *Westcott* v. *Sheppard*, 51 N. J. Eq. 315, 30 Atl. 428; *Re Wheeler*, 5 Misc. 279, 25 N. Y. Supp. 313; *Wade* v. *Holbrook*, 2 Redf. 378; *Snyder* v. *Sherman*, 23 Hun, 139; *Reynolds* v. *Root*, 62 Barb. 250; *Bost* v. *Bost*, 87 N. C. 477; *Lawrence* v. *Steel*, 66 N. C. 584; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Franke* v. *Shipley*, 22 Or. 104, 29 Pac. 268; *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Thompson* v. *Kyner*, 65 Pa. 368; *Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *Sefton* v. *Hopwood*, 1 Fost. & F. 578.

And he must be capable of weighing, to a reasonable degree, the consequences of his will, and its effect upon his estate and family. *Re Convey*, 52 Iowa, 197, 2 N. W. 1084.

[47]*Westcott* v. *Sheppard*, 51 N. J. Eq. 315, 30 Atl. 428; *Hampton* v. *Westcott*, 49 N. J. Eq. 522, 25 Atl. 254; *Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525; *O'Brien* v. *Dwyer*, 45 N. J. Eq. 689, 17 Atl. 777; *Knox* v. *Knox*, 95 Ala. 495, 36 Am. St. Rep. 235, 11 So. 125; *Kramer* v. *Weinert*, 81 Ala. 414, 1 So. 26.

But the fact that a testator did not recall all that he had done for each of the persons coming within the reasonable range of his bounty does not invalidate his will. *Couch* v. *Gentry*, 113 Mo. 248, 20 S. W. 890.

hensive view.[48] It is only necessary that he should understand fairly and rationally the nature of his property and the disposition he wishes to make,[49] and he need not have actually understood the business in which he was engaged, and comprehended the condition of his property, and recollected the natural objects of his bounty, if he was capable of doing so.[50]

68. Delusion test.— Delusion has been held to be the true and only test of the presence or absence of insanity,[51] delusion and insanity being regarded as almost, if not entirely, convertible terms.[52] But an exception to the delusion test exists in cases of dementia or loss of mind and intellect,[53] and it has been held that delusion cannot be said to be the only legal test as a rule of law;[54] and this holding is supported by other tests adopted by a great majority of the cases.

69. Capacity for criminal responsibility as a test.— Mental capacity

[48] *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *McMasters* v. *Blair*, 29 Pa. 298.

To be competent to make a will, it is not necessary that the testator should have been capable of discussing and feeling the connections and obligations of family and blood, and of recollecting the number, condition, and extent of those who are the proper objects of his bounty, and of weighing their deserts with respect to conduct and capacity, forgetting none. *Couch* v. *Gentry*, 113 Mo. 248, 20 S. W. 890. See also *McMasters* v. *Blair*, 29 Pa. 298; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627.

[49] *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Shaver* v. *McCarthy*, 110 Pa. 339; *Rodgers's Estate*, 19 W. N. C. 383.

[50] *Trezevant* v. *Rains*, 85 Tex. 329, 23 S. W. 890; *Kerr* v. *Lunsford*, 31 W. Va. 659, 680, 2 L. R. A. 668, 8 S. E. 493; *Perkins* v. *Perkins*, 116 Iowa, 253, 90 N. W. 55.

It is not necessary to the validity of a will that the testator should name all his children, or give each of them a portion of his estate. It is sufficient if he was mentally capable of understanding the disposition he was making, and acted freely. *Kerr* v. *Lunsford*, 31 W. Va. 659, 680, 2 L. R. A. 668, 8 S. E. 493.

And it is not necessary that the testator should have correctly ascertained the legal status of each person who apparently stands in a natural relation to him, or understand and appreciate the exact legal effect of all the provisions of the will. *Smith* v. *Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Barker* v. *Comins*, 110 Mass. 477.

So, a testator need not have a recollection of the property he intends to dispose of, or of the persons related to him, where he intends to give his whole estate to a stranger, to the exclusion of his relatives. *Stevenson* v. *Stevenson*, 33 Pa. 469.

[51] *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574; *Stanton* v. *Wetherwax*, 16 Barb. 259; *Re Forman*, 54 Barb. 274. And see *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118.

[52] *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 28 L. T. N. S. 562, 42 L. J. Prob. N. S. 41; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18.

Within the delusion rule, strong, violent, and unjust prejudice, not founded in any delusion, does not show mental incapacity which will invalidate a will. *Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253.

[53] *American Seamen's Friend Soc.* v. *Hopper*, 33 N. Y. 619; *Re Shaw*, 2 Redf. 107.

[54] *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Denson* v. *Beazley*, 34 Tex. 191.

The existence of a delusion is evidence of insanity; but it is not conclusive. *Gardner* v. *Lamback*, 47 Ga. 133.

to make a will and mental capacity to be criminally responsible have been held to be substantially the same;[55] but this has been contradicted,[56] and the rule would seem to be that a less degree of incapacity is necessary to invalidate a will than to exonerate one from criminal responsibility.[57]

70. Time of application of tests.— The point of time at which the capacity of a testator is to be tested is that at which the will was executed.[58] Where there are one or more codicils, however, capacity at the date of the execution of one of them renders that act valid as well as all preceding acts;[59] and the will of a testator who had sufficient soundness of mind to make a disposition of his property when he gave instructions for preparing it, and actually intended to execute it, when written, as his will, has been held to be valid, though he had grown much worse, and did not have testamentary capacity when it was signed.[60]

71. Mere mental weakness does not incapacitate.—Weakness of mind and forgetfulness are not sufficient to invalidate a will if it appear that the testator's mind was capable of attention and exertion when roused, and was not imposed upon.[61] "The weak have the same rights with the prudent or strong-minded to dispose of their prop-

[55]*Delaney* v. *Selina*, 34 Kan. 534, 9 Pac. 271.

[56]*Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637. And see *Smith* v. *Smith*, 75 Ga. 477.

[57]*McTaggart* v. *Thompson*, 14 Pa. 149.

[58]*Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Lodge* v. *Lodge*, 2 Houst. (Del.) 419; *Terry* v. *Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Yoe* v. *McCord*, 74 Ill. 33; *Holloway* v. *Galloway*, 51 Ill. 159; *Godden* v. *Burke*, 35 La. Ann. 160; *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757; *Re Buchan*, 16 Misc. 204, 38 N. Y. Supp. 1124; *Re Blaker*, 12 N. Y. S. R. 741; *Clarke* v. *Davis*, 1 Redf. 249; *Clark* v. *Ellis*, 9 Or. 128; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432; *Thompson* v. *Kyner*, 65 Pa. 368; *Re McCullough*, 35 Pittsb. L. J. 169; *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 659, 680, 2 L. R. A. 668, 8 S. E. 493; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *White* v. *Wilson*, 13 Ves. Jr. 87. And see *Eastis* v. *Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204.

Where a testator was rational, intelligent, and understood what he was doing when his will was made, it is valid, however incompetent he may have been at other times. *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Claffey* v. *Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433.

Insanity and even partial aberration of the mind at other times will not affect testamentary capacity, where the testator is shown to have been of sound and disposing mind at the time of making his will, unless they are such as to indicate an inability to make a reasonable disposition of the property, and to understand the nature of the testamentary act. *Godden* v. *Burke*, 35 La. Ann. 160; *Wood* v. *Wood*, 4 Brewst. (Pa.) 75; *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

[59]*Brown* v. *Riggin*, 94 Ill. 560; *Mairs* v. *Freeman*, 3 Redf. 181.

[60]*Weems* v. *Weems*, 19 Md. 334. *Contra*, *James White Memorial Home* v. *Haeg*, 204 Ill. 422, 68 N. E. 568.

[61]*Tufnell* v. *Constable*, 3 Knapp, P. C. 122; *Nieman* v. *Schnitker*, 181 Ill. 400, 55 N. E. 151; *Newhouse* v. *Godwin*, 17 Barb. 236; *Mitchell* v. *Corpening*, 124 N. C. 472, 32 S. E. 798; *Re Royer*, 6

erty."[62] In general, so that capacity exists, courts will not undertake to measure the degree of that capacity, and they will protect those deficient in strong natural ability in the exercise of the powers they possess.[63] And mere imbecility or weakness of mind or mental impairment, however arising, will not defeat a will in the absence of fraud or undue influence, where it does not severely impair the reasoning faculties or memory,[64] though it unfits the testator for the management of his estate,[65] unless the indisposition itself shows a deranged understanding.[66]

72. Age, weakness, disease.—Great age alone does not constitute testamentary incapacity.[67] Nor does great age and disease.[68] And mere physical weakness, though it renders the testator unable to transact business, does not alone incapacitate him from making a will.[69]

Pa. Super. Ct. 401, 41 W. N. C. 428; *Stevenson* v. *Kingley*, 8 Pa. Dist. R. 245.

[62] Strong, J., in *Newhouse* v. *Godwin*, 17 Barb. 236.

[63] *Osmond* v. *Fitzroy*, 3 P. Wms. 129; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Duffield* v. *Robeson*, 2 Harr. 375; *Elliott's Will*, 2 J. J. Marsh. 340; *Tomkins* v. *Tomkins*, 1 Bail. L. 92.

[64] *Bulger* v. *Ross*, 98 Ala. 267, 12 So. 803; *Kramer* v. *Weinert*, 81 Ala. 414, 1 So. 26; *White* v. *Farley*, 81 Ala. 563, 8 So. 215; *St. Joseph's Convent* v. *Garner*, 66 Ark. 623, 53 S. W. 298; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Freeman* v. *Easly*, 117 Ill. 317, 7 N. E. 656; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Bundy* v. *McKnight*, 48 Ind. 502; *Re Convey*, 52 Iowa, 197, 2 N. W. 1084; *Com.* v. *Hughes*, 133 Mass. 496; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Waddington* v. *Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690; *Howell* v. *Taylor*, 50 N. J. Eq. 428, 26 Atl. 566; *Horn* v. *Pullman*, 72 N. Y. 269; *Re Pike*, 83 Hun, 327, 31 N. Y. Supp. 689; *Re Otis*, 1 Misc. 258, 22 N. Y. Supp. 1060; *Cheney* v. *Price*, 90 Hun, 238, 37 N. Y. Supp. 117; *Wade* v. *Holbrook*, 2 Redf. 378; *Re Soule*, 22 Abb. N. C. 236; *Barnhardt* v. *Smith*, 86 N. C. 473; *Zeltner* v. *Bodman German Protestant Widows' Home*, 1 Ohio Dec. 306; *Tenbrook* v. *Lee*, 5 Clark (Pa.) 37; *Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Trezevant* v. *Rains*, 85 Tex. 329, 25 S. W. 890. And see *Kinne* v. *Kinne* 9 Conn. 102, 21 Am. Dec. 732.

A person is not rendered incompetent to make a will by reason of the fact that he was in a feeble condition from a complication of diseases, and his ideas were confused, and his mind wandered while under the influence of opiates, where, when restored, which was readily done, his mind was clear, and he had possession of all his faculties. *Collins* v. *Brazill*, 63 Iowa, 432, 19 N. W. 338.

[65] *Dyre's Estate*, 12 Phila. 156.

[66] *Elliott's Will*, 2 J. J. Marsh. 340.

[67] *Maverick* v. *Reynolds*, 2 Bradf. 360; *Bleecker* v. *Lynch*, 1 Bradf. 458; *Cornwell* v. *Riker*, 2 Dem. 354; *Van Alst* v. *Hunter*, 5 Johns. Ch. 148; *Spencer* v. *Moore*, 4 Call (Va.) 423; *Kirkwood* v. *Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Ames's Will*, 40 Or. 495, 67 Pac. 737; *McIntosh* v. *Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Montague* v. *Allan*, 78 Va. 592, 49 Am. Rep. 384; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

Great age on the part of a testator whose mind is capable of acting rationally is a ground for protection and aid rather than for testamentary disqualification. *Maverick* v. *Reynolds*, 2 Bradf. 360; *Napfle's Estate*, 46 Phila. Leg. Int. 57.

[68] *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Rutherford* v. *Morris*, 77 Ill. 397; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Creely* v. *Ostrander*, 3 Bradf. 107; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6.

[69] *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Brown* v. *Riggin*, 94 Ill. 560; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589;

Nor does physical weakness accompanied by disease.[70] Infirmity of body and abatement of intellectual vigor usually attending old age and disease do not constitute testamentary incapacity, where the disease was not calculated directly to affect the mind.[71] It must amount to unsoundness of mind, which means a want of understanding.[72]

73. Failure of memory.—Failure of memory is not a ground of testamentary incapacity unless it be total, and extend to the testator's immediate family and property, and render him unable to recall the constituents of the business sufficiently long for the completion of his will.[73] Absolute loss of memory, however, destroys testamentary capacity.[74] But the jury in a will contest should not be restricted to

Thompson v. *Kyner*, 65 Pa. 368; *Stoutenburgh* v. *Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Re Henry*, 18 Misc. 149, 41 N. Y. Supp. 1096; *Re Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496; *Re Patterson*, 36 N. Y. S. R. 813, 13 N. Y. Supp. 463; *Re Connor*, 27 N. Y. S. R. 905, 7 N. Y. Supp. 855; *McIntosh* v. *Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

[70]*Re Motz*, 136 Cal. 558, 69 Pac. 294; *Runkle* v. *Gates*, 11 Ind. 95; *Hathorn* v. *King*, 8 Mass. 371, 5 Am. Dec. 106; *O'Brien* v. *Dwyer*, 45 N. J. Eq. 689, 17 Atl. 777; *Doyle's Estate*, 7 Pa. Co. Ct. 657.

[71]*Eastis* v. *Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204; *Leeper* v. *Taylor*, 47 Ala. 221; *Taylor* v. *Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Lodge* v. *Lodge*, 2 Houst. (Del.) 419; *Conway* v. *Vizzard*, 122 Ind. 266, 23 N. E. 771; *Watts* v. *Bullock*, 1 Litt. (Ky.) 252; *Sechrest* v. *Edwards*, 4 Met. (Ky.) 163; *Sehr* v. *Lindemann*, 153 Mo. 276, 54 S. W. 537; *Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Stull* v. *Stull* (Neb.) 96 N. W. 196; *Westcott* v. *Sheppard*, 51 N. J. Eq. 315, 30 Atl. 428; *Hampton* v. *Westcott*, 49 N. J. Eq. 522, 25 Atl. 254; *Wintermute* v. *Wilson*, 28 N. J. Eq. 437; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Re Carter* (N. J. Eq.) 51 Atl. 65; *Crolius* v. *Stark*, 7 Lans. 311; *Davis* v. *Culver*, 13 How. Pr. 68; *Re McGraw*, 9 App. Div. 372, 41 N. Y. Supp. 481; *Lawrence* v. *Lawrence*, 4 N. Y. Week. Dig. 299; *Re Blair*, 16 Daly, 540, 16 N. Y. Supp. 874; *Clarke* v. *Davis*, 1 Redf. 249; *Carroll* v. *Norton*, 3 Bradf. 291; *Re Gihon*, 44 App. Div. 621, 60 N. Y. Supp. 65, Affirmed in 163 N. Y. 595, 57 N. E. 1110; *Tawney* v. *Long*, 76 Pa. 106; *Re Woodfall*, 7 Phila. 528.

[72]*Davis* v. *Culver*, 13 How. Pr. 68; *Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Wintermute* v. *Wilson*, 28 N. J. Eq. 437; *Leeper* v. *Taylor*, 47 Ala. 221.

A testamentary disposition made by one who was in such a condition as to be unable to signify his wishes, however, or to dissent from the will if he desired to, is invalid. *Parish* v. *Parish*, 42 Barb. 274; *McSorley* v. *McSorley*, 2 Bradf. 188; *Knapp* v. *Reilly*, 3 Dem. 427; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

[73]*Kramer* v. *Weinert*, 81 Ala. 414, 1 So. 26; *Re Case* (Conn.) 52 Atl. 403; *Yoe* v. *McCord*, 74 Ill. 33; *Daly* v. *Daly*, 183 Ill. 269, 55 N. E. 671; *Re Storey*, 20 Ill. App. 183; *Lowder* v. *Lowder*, 58 Ind. 538; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Re Wintermute*, 27 N. J. Eq. 447; *Sibley* v. *Somers*, 62 N. J. Eq. 595, 50 Atl. 321; *Reynolds* v. *Root*, 62 Barb. 250; *Van Alst* v. *Hunter*, 5 Johns. Ch. 148; *Bleecker* v. *Lynch*, 1 Bradf. 458; *Lawrence* v. *Lawrence*, 4 N. Y. Week. Dig. 299; *Re Stewart*, 36 N. Y. S. R. 56, 13 N. Y. Supp. 219; *Re Woodfall*, 7 Phila. 528; *Wood's Estate*, 13 Phila. 236; *Hopple's Estate*, 7 W. N. C. 523; *Montague* v. *Allan*, 78 Va. 592, 49 Am. Rep. 384; *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489.

Mere inability on the part of a testator to remember the names of relatives not frequently seen, or the Christian name of a sister, who is the mother of some of the beneficiaries, does not incapacitate a party from making a will *Kramer* v. *Weinert*, 81 Ala. 414, 1 So. 26.

[74]*Lamb* v. *Lamb*, 105 Ind. 456, 5 N. E. 171.

Senile dementia indicates a breaking

inquiries involving memory alone, and not reason and a knowledge of the actual obligations to relatives.[75]

II. Monomania, or partial insanity.

74. Partial insanity defined.—Monomania, or partial insanity, is a perversion of the understanding in regard to a single object or a limited number of objects.[76] It is a morbid affection of the mind, consisting of a mental or moral perversion, or both, in regard to some particular subject or class of subjects.[77]

75. Legal existence and recognition.— The legal existence and recognition of partial insanity, or monomania, has been denied, but it was recognized as a ground for invalidating a will in an early leading case.[78] But the notion of partial insanity on one point, as consistent with testamentary capacity, was subsequently explicitly repudiated;[79] though the case was one in which the same result might have been reached on the reasoning of the former case. And, upon the other hand, the position has been taken that a collateral insane delusion invalidates a will though it was not directly the product of such delu-

down of the mental powers in most people in advance of bodily decay. *Pyott* v. *Pyott*, 90 Ill. App. 210.

And one who has lost the power of combining and arranging his ideas is incompetent to make a will. *Abraham* v. *Wilkins*, 17 Ark. 292.

[75]*Howard* v. *Coke*, 7 B. Mon. 655.

An instruction in a will contest that if the jury believe, from the testimony of the subscribing witness, that the testator was of unsound mind or memory, they should find against the will, is erroneous, in making an unwarrantable distinction between sound mind and sound memory. *Yoe* v. *McCord*, 74 Ill. 33.

[76]*Re Gannon*, 2 Misc. 329, 21 N. Y. Supp. 960.

[77]*Chaney* v. *Bryan*, 16 Lea, 67.

Monomania, or partial insanity, is not an intermediate stage in the development of mental derangement, but a disturbance of the mind at some particular point, not involving the mind at any other point. *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053.

Monomania and eccentricity differ from each other in that the monomaniac has become such by a change of the character; while the eccentric man always was singular in his ideas and actions, though eccentric habits suddenly acquired are presumptive evidence of insanity. *Ekin* v. *McCracken*, 11 Phila. 534.

[78]*Dew* v. *Clark*, 3 Addams Eccl. Rep. 79.

So in *Fowlis* v. *Davidson*, 6 Notes of Cases, 461, it was held that to establish unsoundness of mind it is not necessary that it should be general; it is sufficient if proved to exist on one or more subjects, though in all other respects the individual may conduct himself with propriety.

[79]*Waring* v. *Waring*, 6 Moore P. C. C. 341, 12 Jur. 947.

In the above case it was stated, as a reason for the repudiation of the doctrine of partial insanity, that when we speak of the different powers and faculties, as memory, consciousness, etc., we speak metaphorically, likening the mind to the body, as if it had members or compartments; whereas, in all accuracy of speech, we mean to speak of the mind as acting variously,—that is, remembering, fancying, reflecting,—the same mind in all of these operations being the agent. We, therefore, cannot, in all correctness of language, speak of general or partial insanity.

sion.[80] So far, indeed, has this doctrine been pushed that an extravagant and absurd passion for pets has been, in England, regarded as proof of incapacity. In one case this rule was applied to an unmarried woman who kept, in kennels in her drawing-room, fourteen dogs, of both sexes,[81] and to another, who kept in her house a great multitude of cats, which were provided with regular meals, and were furnished with plates and napkins.[82] But it has since been also expressly repudiated.[83]

76. Conflict in the decisions reconciled by theory of mental twilight.— We have, therefore, an apparent conflict in the English decisions. On the one hand, in the view of Sir J. Nicholl, Chief Justice Cockburn, and Sir James Hannen, "partial insanity," consisting of delusions and hallucinations not connected with the subject-matter of a will, does not invalidate such will. On the other hand, in the opinions of Lord Brougham and Lord Penzance, insanity or "mental disease," when it exists at all, destroys testamentary capacity, though it displays itself in delusions which in no way touch the subject-matter of the will. But this apparent conflict may be reconciled when we recollect that, as in sanity, so in insanity, there are various gradations, and that sanity and insanity therefore have a region in which they melt into each other imperceptibly.[84] And the legal bearing of mono-

[80] *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398, 16 L. T. N. S. 841, 16 Week. Rep. 18, 36 L. J. Prob. N. S. 97.

The earlier English rule was that the mind of man was to be regarded "as indivisible, and that a man was to be regarded as wholly sane or wholly insane," and that partial insanity was an incorrect phrase; that a mind which is actually insane upon one subject could not be deemed sane on other subjects, and that a will made by a person having such a mind, though apparently rational and proper, and though the infirmity had no bearing upon the testamentary disposition, was invalid. *Waring* v. *Waring*, 12 Jur. 947, 6 Moore P. C. C. 341; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398, 16 L. T. N. S. 841, 36 L. J. Prob. N. S. 97, 16 Week. Rep. 18.

So, the phrase "of unsound mind," in the Indiana statute with reference to testamentary capacity, includes every species of unsoundness of mind, whether partial or complete. *Willett* v. *Porter*, 42 Ind. 250; *Eggers* v. *Eggers*, 57 Ind. 461; *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118.

[81] *Yglesias* v. *Dyke*, Prerogative Court, May, 1852; Taylor, 2d. ed., ii. 556; 1 Redf. Wills, chap. 3, § 11.

[82] *Ibid.*

[83] *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813. This has been followed in *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562, and *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220. And also in *Re Blakely*, 48 Wis. 295, 4 N. W. 337, and numerous other cases.

[84] See The Borderlands of Insanity, by Andrew Wynter, M. D., N. Y. 1875.

The various phases of mental conditions defined by the terms insanity, mental derangement, unsoundness, and monomania, are of variable significance, and their value in any given case depends entirely upon the relation which they bear to the particular person in connection with the particular act under inquiry, and are all within the range of inquiry in determining, in a will contest, whether or not a person, at the time of executing an alleged will, was a person of unsound mind within the

mania or partial insanity upon the validity of wills and other instruments and acts is now universally recognized.[85]

77. Effect of monomania on capacity; modern rule.— The rule now is almost, if not quite, general that a testator possessing reason and capacity on the subject of disposing of his property by will is not incapacitated by reason of not having capacity on some other subjects.[86] A derangement of the faculties cannot operate to incapacitate a person to make a will where it does not render him incapable of acting rationally in the ordinary affairs of life, or manifest itself in the testamentary provisions.[87] To be invalidated by monomania or partial insanity, a will must have been directly produced by it.[88] But monomania, or partial insanity, invalidates a will which is its direct offspring,[89] or which was in any way the effect or result of it, though the testator's general capacity was good.[90] And where a testator was a monomaniac it must be made to appear that his will was in no way the result of, or connected with, the mania.[91]

78. Moral insanity.— Moral insanity is defined to be a disorder of the moral affections, feelings, and propensities.[92] Unless it is accom-

meaning of the New York statute of wills. *Cheney* v. *Price*, 90 Hun, 238, 37 N. Y. Supp. 117.

[85]See *infra*, § 77.

[86]*James* v. *Langdon*, 7 B. Mon. 193; *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Wetter* v. *Habersham*, 60 Ga. 194. And see *Rodger's Estate*, 19 W. N. C. 383; *Peninsular Trust Co.* v. *Barker*, 116 Mich. 333, 74 N. W. 508.

[87]*Re Evans*, 114 Iowa, 240, 86 N. W. 283; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Stackhouse* v. *Horton*, 15 N. J. Eq. 203; *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237.

Partial insanity or monomania which will invalidate a will must amount to such an insane delusion as renders the testator incapable of reasoning on that particular subject, and shows that he has assumed to believe to be true that which has no foundation in reason or fact. *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911. And it must have related to the person to be affected as well as to the subject-matter to be disposed of. *Gardner* v. *Lamback*, 47 Ga. 133. But an heir at law may complain of any mania on the part of his testator which diverts the inheritance from him, whether the mania was directed against him or another. *Wetter* v. *Habersham*, 60 Ga. 194.

[88]*Benoist* v. *Murrin*, 58 Mo. 307; *Owings' Case*, 1 Bland Ch. 370, 17 Am. Dec. 311; *Re Lang*, 9 Misc. 521, 30 N. Y. Supp. 388; *Young* v. *Miller*, 145 Ind. 652, 44 N. E. 757; *Powers* v. *Powers*, 21 Ky. L. Rep. 597, 52 S. W. 845.

The will of a testator who had self-possession and control, and the ability to understand the situation of his affairs, and the claims on his bounty of wife and children, is good notwithstanding an injury to the head and forgetfulness at times in his business plans, and discrepancies of conduct, and a morbid fear and apprehension of death. *Leslie* v. *Leslie*, 15 N. Y. Week. Dig. 56, Affirmed in 92 N. Y. 636.

[89]*Merrill* v. *Rolston*, 5 Redf. 220; *Cotton* v. *Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Thomas* v. *Carter*, 170 Pa. 272, 50 Am. St. Rep. 770, 33 Atl. 81; *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Dew* v. *Clark*, 1 Addams Eccl. Rep. 279; *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79; *Purycar* v. *Reese*, 6 Coldw. 21.

[90]*Gardner* v. *Lamback*, 47 Ga. 133.

[91]*Ibid.*

[92]*Re Forman*, 54 Barb. 274; *Boardman* v. *Woodman*, 47 N. H. 120.

panied by insane delusions, it is not sufficient to invalidate a will, or to incapacitate a person to make one.[93] The question in such case is not whether the feelings of the testator toward the natural objects of his bounty were unreasonable or unjust, or whether they showed moral insanity, but whether such feelings showed him to be insane.[94] And the question as to the extent to which moral debasement is evidence of insanity is one for the jury.[95]

79. Even morbid derangement need not incapacitate.— There are, however, other cases in which there is a general morbid derangement of all, or of a material portion, of the organs. With reference to all these, as well as to the great mass of instances where hallucination forms the groundwork, it may be asked whether, in the state of mind in which the patient was, he was capable of making a will. This is a very difficult question; but its solution is not an impossibility. When the conduct of the individual does not depart from received usages, when it is not controlled by one of those false ideas that make him hate his relations and friends without any motive, and when he regulates his expenses prudently, whimsical actions, or words, the results of an erroneous belief, but having no influence on the prominent acts of his life, should not deprive a person of his civil liberties, and of the power of making his will.

III. Delusions.

80. Definitions.— Delusions, in their legal relations, so far as concerns testamentary capacity, have been defined to be "a belief of facts which no rational person would have believed."[1] But this definition, though frequently and recently announced, has been criticised as begging the question at issue or arguing in a circle,—the question as to who is a rational person not being answered.[2] And insane delusions have also been defined to be a spontaneous conception and acceptance as a fact of that which has no real existence except in the

[93] *Re Forman*, 54 Barb. 274; *Boardman* v. *Woodman*, 47 N. H. 120. And see *Mayo* v. *Jones*, 78 N. C. 402.

[94] *Re Forman*, 54 Barb. 274.

[95] *Mayo* v. *Jones*, 78 N. C. 402.

[1] *Re Forman*, 54 Barb. 274; *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Hemingway's Estate*, 195 Pa. 291, 78 Am. St. Rep. 815, 45 Atl. 726; *Bennett's Estate*, 201 Pa. 485, 51 Atl. 336; *Hemingway's Estate*, 7 Northampton Co. Rep. 93; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220.

[2] See *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594, 15 Week. Rep. 562; *Waring* v. *Waring*, 12 Jur. 947, 6 Moore P. C. C. 341; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562.

imagination, and a persistent adherence to it against all evidence;[3] and as a conception originating spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from disease or a morbid condition of the mind.[4] Whenever a person believes something extravagant to exist, against all evidence,—which has no existence in fact except in his own imagination,—and he is incapable of being reasoned out of the reality of such conception, he will be held to have an insane delusion which will invalidate a will affected by such extravagant belief.[5] And this is true however logically and rationally he may conduct himself upon the assumption of its existence.[6]

81. Will void when the result of insane delusion.— In most of our American states, proof of insane delusions is insufficient to defeat a will, unless the will be the direct offspring of such insane delusions. Where the delusion thus operates, then the will is void.[7] The true

[3]*Re Scott*, 128 Cal. 57, 60 Pac. 527; *Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Medill* v. *Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962; *Smith* v. *Smith*, 48 N. J. Eq. 566, 25 Atl. 11; *Rush* v. *Megee*, 36 Ind. 69; *Waring* v. *Waring*, 12 Jur. 947, 6 Moore P. C. C. 341; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826.

[4]*Potter* v. *Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; *Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Re Merriman*, 108 Mich. 454, 66 N. W. 372.

[5]*Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Mullins* v. *Cottrell*, 41 Miss. 291; *Benoist* v. *Murrin*, 58 Mo. 307; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; *American Seamen's Friend Soc.* v. *Hopper*, 33 N. Y. 619; *Re Keeler*, 12 N. Y. S. R. 148; *Re White*, 121 N. Y. 406, 24 N. E. 935; *Re Henry*, 18 Misc. 149, 41 N. Y. Supp. 1096; *Stanton* v. *Wetherwax*, 16 Barb. 259; *Re Shaw*, 2 Redf. 107; *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562; *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79.

So, an insane delusion has been defined to be a belief in things impossible or in things so improbable under the surrounding circumstances that no person of sound mind would give them credit. *Prinsep* v. *Dyce Sombre*, 10 Moore P. C. C. 232; *Riggs* v. *American Home Missionary Soc.* 35 Hun, 656.

But the thing believed need not be an absolute physical impossibility. *Medill* v. *Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962.

[6]*American Seamen's Friend Soc.* v. *Hopper*, 33 N. Y. 619; *Re White*, 121 N. Y. 406, 24 N. E. 935; *Re Shaw*, 2 Redf. 107; *Potter* v. *Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769.

A delusion without foundation, that the testator's daughter was an inmate of a house of ill-fame, will invalidate a will disinheriting her, though he was entirely sane upon other subjects. *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

[7]The rule, which seems to be universal, that a will resulting from an insane delusion is void, is announced and supported by numerous cases, among which are: *Cotton* v. *Ulmer*, 45 Ala. 378, 6 Am. Rep. 706; *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101; *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Rush* v. *Megee*, 36 Ind. 69; *American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126; *Johnson* v. *Moore*, 1 Litt. (Ky.) 371; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Townshend* v. *Townshend*, 7 Gill. 10; *Brown* v. *Ward*, 53 Md. 376, 36 Am. Rep. 422; *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Benoist* v. *Murrin*, 58 Mo. 307; *Lee* v. *Scudder*, 31 N. J. Eq. 633; *Riggs* v. *American Tract Soc*

inquiry is whether the will was the result of the delusion, and whether the testator was the victim of such a delusion as controlled his actions and rendered him insensible to the ties of blood and kindred.[8] And the inquiry should not be confined to general insanity.[9] The burden rests with those alleging it to show that a will was the result of delusion.[10]

82. Not avoided by collateral delusion.— The rule that to invalidate a will there must be want of capacity preventing the testator from reasoning correctly and understanding the relation of cause and effect in ordinary business affairs applies to insanity and testamentary incapacity in general, and not to morbid or insane delusions on his part.[11] Delusions entertained by a testator do not affect the validity of his will unless they have controlled the disposition of his property.[12] An insane delusion will not affect the validity of a will

95 N. Y. 503; *Re Jenkins*, 39 Misc. 618, 80 N. Y. Supp. 664; *Tawney* v. *Long*, 76 Pa. 106; *Thomas* v. *Carter*, 170 Pa. 272, 50 Am. St. Rep. 770, 33 Atl. 81; *Gass* v. *Gass*, 3 Humph. 278; *Re Segur*, 71 Vt. 224, 44 Atl. 342; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Bell* v. *Lee*, 28 Grant Ch. (U. C.) 150; *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79. See also an essay by Dr. Ray on the *"Angel Will Case,"* 20 Am. Journal of Insanity, 145.

In Indiana, by statute, a person "who has become the victim of a mental derangement in any form" is incompetent to make a will. *Eggers* v. *Eggers*, 57 Ind. 461.

The fact that a testator is competent to transact complicated and important business, involving the exercise of suitable and adequate power, does not negative the existence of delusions which would deprive him of testamentary capacity. *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549; *Morse* v. *Scott*, 4 Dem. 507.

[8] *McClary* v. *Stull*, 44 Neb. 175, 62 Pac. 501; *Re Keeler*, 12 N. Y. S. R. 148; *Tawney* v. *Long*, 76 Pa. 106. And see *Roe* v. *Taylor*, 45 Ill. 485; *Whitney* v. *Twombly*, 136 Mass. 145; *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Ballantine* v. *Proudfoot*, 62 Wis. 216, 22 N. W. 392; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549.

A delusion upon the part of a testator that his son was not his son, whereby the provisions of his will were altered, defeats it. *Layer* v. *Layer*, 110 Ky. 542, 62 S. W. 15, 22.

And a mistaken idea upon the part of a woman that her only living daughter and her daughter's husband had ill-treated her, and purposely permitted their children to annoy her, and had attempted to poison her, is sufficient to invalidate her will. *Ballantine* v. *Proudfoot*, 62 Wis. 216, 22 N. W. 392.

So, a codicil made by an old man in favor of a woman whom he met while insane, and whom he desired to marry at sight, is invalid as having been made under the influence of an insane delusion; he having had no former knowledge of her. *Clarke* v. *Lear*, cited in 1 Phillim. Eccl. Rep. 119.

[9] *Petefish* v. *Becker*, 176 Ill. 448, 52 N. E. 71; *Re Segur*, 71 Vt. 224, 44 Atl. 342.

[10] *Hemingway's Estate*, 195 Pa. 291, 78 Am. St. Rep. 815, 45 Atl. 726. And see *infra*, § 299.

[11] *American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126; *Brinton's Estate*, 13 Phila. 234.

[12] *Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Brace* v. *Black*, 125 Ill. 33, 17 N. E. 66; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Wait* v. *Westfall* (Ind.) 68 N. E. 271; *Peninsular Trust Co.* v. *Barker*, 116 Mich. 333, 74 N. W. 508; *McClary* v. *Stull*, 44 Neb. 175, 62

where it is in no way connected with the subject or objects of the testamentary act;[13] or where it cannot be seen that it affected the testamentary act, though it related to the beneficiary;[14] and where a will is claimed to be invalid because of an insane delusion, the mental capacity of the testator is to be measured by the relation of the delusion to the testamentary act.[15]

83. Must be insane.—A delusion which will invalidate a will must be an insane delusion, as distinguished from a mere mistaken notion[16]

N. W. 501; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; *Re Henry*, 18 Misc. 149, 41 N. Y. Supp. 1096; *Re Iredale*, 53 App. Div. 45, 65 N. Y. Supp. 533; *Fowler* v. *Ramsdell*, 4 Alb. L. J. 94; *Potter* v. *Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769; *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; *Shreiner* v. *Shreiner*, 178 Pa. 57, 35 Atl. 974; *Murfett* v. *Smith*, L. R. 12 Prob. Div. 116, 57 L. T. N. S. 498, 51 J. P. 374.

[13]*Dunham's Appeal*, 27 Conn. 192; *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Boardman* v. *Woodman*, 47 N. H. 120; *Hollinger* v. *Syms*, 37 N. J. Eq. 221; *Lodge* v. *Hulings*, 63 N. J. Eq. 159, 51 Atl. 1015; *Potter* v. *McAlpine*, 3 Dem. 108; *Re Fricke*, 47 N. Y. S. R. 10, 19 N. Y. Supp. 315; *Thompson* v. *Thompson*, 21 Barb. 107; *Ames's Will*, 40 Or. 495, 67 Pac. 737; *Potter* v. *Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769; *McGovran's Estate*, 185 Pa. 203, 39 Atl. 816; *Puryear* v. *Reese*, 6 Coldw. 21; *Jones* v. *Goodrich*, 5 Moore, P. C. C. 16; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549.

An extreme fear of death and a belief on the part of a testator that he had Bright's disease, which belief was unfounded, are not of themselves sufficient to invalidate his will. *Leslie* v. *Leslie*, 15 N. Y. Week. Dig. 56, Affirmed in 92 N. Y. 636.

Nor is the validity of a will affected by the existence of a delusion upon the part of a testator as to the possession of a large amount of property. *Re Berrien*, 24 N. Y. S. R. 332, 5 N. Y. Supp. 37.

Or by one to the effect that his services were required by the government, and that he was likely to be appointed to office. *Rice* v. *Rice*, 53 Mich. 432, 19 N. W. 132.

[14]*Re McCue*, 17 N. Y. Week. Dig. 501; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

An insane delusion upon the part of a testator as to his sons-in-law will not invalidate his will, where he did not permit it to affect his judgment as to bequests made to his daughters, who were their wives. *Rush* v. *Megee*, 36 Ind. 69. See *Brace* v. *Black*, 125 Ill. 33, 17 N. E. 66.

And a will will not be set aside on the ground that the testator entertained a delusion as to his brothers and nephews and nieces which prevented him from giving them anything, where he had a wife living to whom he was greatly attached, since it will be inferred in such case that he acted from a sense of justice toward her rather than from a delusion toward them. *Re Keeler*, 20 N. Y. S. R. 439, 3 N. Y. Supp. 629.

[15]*Re Vedder*, 6 Dem. 92; *Nichols* v. *Binns*, 1 Swabey & T. 239.

In *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594, 15 Week. Rep. 562, however, the will of a woman was held invalid, though she was prudent and conducted herself properly in the ordinary affairs of life, where she believed herself to be a member of the Holy Trinity, and in direct communication with God, and that she was above God, and would sit in judgment on her fellow creatures with him on the Judgment Day, and held other similar delusions,—mistakenly believed that an attempt had been made to poison her, and that she was blind.

[16]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Turner* v. *Rusk*, 53 Md. 65; *Maynard* v. *Tyler*, 168 Mass. 107, 46 N. E. 413; *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118; *Re O'Dea*, 84 Hun, 591, 33 N. Y. Supp. 463; *Fulleck*

or prejudice.[17] Where a testator has actual grounds for supposition as to the existence of something in which he believes, though in fact not well founded, and disbelieved by others, the misapprehension is not an insane delusion which will affect his will.[18] A belief in something which no sane person would believe in, however, is unequivocal evidence of insanity, though there might be a shadow of evidence that the fact existed.[19] The test question is, Could any man in the possession of his senses believe in such a state of facts?[20] And to invali-

v. *Allinson*, 3 Hagg. Eccl. Rep. 527. And see *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387.

[17]*Schmidt* v. *Schmidt*, 201 Ill. 191, 66 N. E. 371.

The fact that a woman was a believer in Christian Science and that her sisters ridiculed her for her belief, in consequence of which she refused to live with them, and revoked her will in their favor, does not show an insane delusion on her part against them, affecting her testamentary capacity. *Re Brush*, 35 Misc. 689, 72 N. Y. Supp. 421.

[18]*Stackhouse* v. *Horton*, 15 N. J. Eq. 202; *Re Scott*, 128 Cal. 57, 60 Pac. 527; *Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Bradley* v. *Palmer*, 193 Ill. 15, 61 N. E. 856; *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Re Merriman*, 108 Mich. 454, 66 N. W. 372; *Jackson* v. *Hardin*, 83 Mo. 175; *Stull* v. *Stull* (Neb.) 96 N. W. 196; *Re Smith*, 53 N. Y. S. R. 658, 24 N. Y. Supp. 928; *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Re Keeler*, 20 N. Y. S. R. 439, 3 N. Y. Supp. 629; *Buchanan* v. *Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *Leslie* v. *Leslie*, 15 N. Y. Week. Dig. 56, Affirmed in 92 N. Y. 636; *Dobie* v. *Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44; *General Convention* v. *Crocker*, 7 Ohio C. C. 327; *Re Cline*, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542; *Skinner's Will*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Potter* v. *Jones*, 20 Or. 239, 12 L. R. A. 161, 25 Pac. 769; *Bennett's Estate*, 201 Pa. 485, 51 Atl. 336; *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489; *Mullins* v. *Cottrell*, 41 Miss. 291; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Fulleck* v. *Allinson*, 3 Hagg. Eccl. Rep. 527.

A statement by a testator who had disinherited a reputed son in favor of a niece, that he had no son, does not show an insane delusion invalidating his will, where there was evidence that the reputed son was only an adopted son. *Re Ziegler*, 47 N. Y. S. R. 491, 19 N. Y. Supp. 947.

And an opinion upon the part of a mother that she was morally indebted to a favorite daughter for protection and support is not a delusion destroying testamentary capacity, where controversy had existed in the family for years, and the daughter had taken her part. *Coit* v. *Patchen*, 77 N. Y. 533.

So, an erroneous opinion by a woman otherwise competent as to the conduct and affections of her husband and some of her children, is not an insane delusion affecting testamentary capacity, where she and her husband frequently quarreled, and a son had committed an assault upon her. *Ibid; Re Blakely*, 48 Wis. 294, 4 N. W. 337.

Where, upon a will contest, the testator is alleged to want testamentary capacity because he held the opinion that his daughter was insane, every kind of evidence relating to her condition which came to his knowledge is competent to show the basis of that opinion, and that his belief was not without some foundation and support. *Hoyt* v. *Hoyt*, 9 N. Y. S. R. 731.

[19]*Riggs* v. *American Home Missionary Soc.* 35 Hun, 656.

While the nonexistence of facts believed by a testator, claimed to be an insane delusion, should be put beyond doubt, the jury in a will contest may find an insane delusion where the testator believed what could not possibly be true, though no positive or direct evidence could be procured to show the falsity of the belief. *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473.

[20]*Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562.

It is of the essence of an insane delusion that it has no basis in reason, and cannot be disputed by a reason, and may, therefore, be cherished side by side

date a will it must appear that the testator was subject to a delusion as to facts within his own observation, in the existence of which he actually believed, which a rational man, from the use of his senses, under the same circumstances, would have known not to exist.[21]

84. Must actively exist.— To invalidate a will, a delusion upon the part of the testator must have been not only the inducing cause of it, but also an existing one at the time the will was made.[22]

A delusion which was intermittent, there being times when the testator was rational, will not invalidate his will, where it is not made to appear that he labored under it at the time the will was made.[23] Nor will it be affected by the existence of a delusion in the mind of the testator which at the time was latent, though it was capable of being revived at any moment, if anything should occur to call to his mind the subject.[24]

85. Prejudice, eccentricity.— A mere prejudice, though unfounded, and though the will in question is controlled thereby, does not *per se* destroy testamentary capacity.[25] There must be something more

with rational ideas. *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18.

And in determining as to the existence of a delusion on the part of a testatrix, and as to whether or not a belief on her part was a delusion, it is proper to consider her nature and temperament, the circumstances under which her statements were made, the habits of her life, and association with others, and also her conduct toward her next of kin, and the nature of her intercourse with them, during the period within which such statements were made. *Re Scott*, 128 Cal. 57, 60 Pac. 527.

[21] *Ditchburn* v. *Fearn*, 6 Jur. 201.

A delusion affecting testamentary capacity is not established in a will contest where the court is able to understand how a person so situated might believe in the truth of the mistaken supposition and still be in the possession of his senses. *Phillips* v. *Chater*, 1 Dem. 533.

A delusion, to affect testamentary capacity, must be one not only founded in error but also without evidence of its truth, entertained against clearest evidence to the contrary. *Potter* v. *McAlpine*, 3 Dem. 108; *Merrill* v. *Rolston*, 5 Redf. 220. See *Greenwood's Case*, 1 Addams Eccl. Rep. 279, note.

[22] *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23.

[23] *Lee* v. *Scudder*, 31 N. J. Eq. 634.

An instruction in a will contest with reference to an insane delusion, which ignores the contingency that the delusion might have wholly or permanently disappeared before the will was made, in which case the will should not be regarded with distrust, is erroneous. *Manley* v. *Staples*, 65 Vt. 370, 26 Atl. 630.

[24] *Ingoldsby* v. *Ingoldsby*, 20 Grant Ch. (U. C.) 131.

But a jury in a will contest would not generally be warranted in inferring that a delusion calculated to influence the testator in making his will was latent at the time so as to leave him free from its influence. *Banks* v. *Goodfellow*, 22 L. T. N. S. 813, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549.

[25] *Carter* v. *Dixon*, 69 Ga. 82; *Re Kendrick*, 130 Cal. 360, 62 Pac. 605; *Re Forman*, 54 Barb. 274; *Re Suydam*, 84 Hun, 514, 32 N. Y. Supp. 449; *Re Lang*, 9 Misc. 521, 30 N. Y. Supp. 388; *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44; *Hite* v. *Sims*, 94 Ind. 333; *Hemingway's Estate*, 195 Pa. 291, 78 Am. St. Rep. 815, 45 Atl. 726, Affirming 7 Northampton Co. Rep. 93; *Frere* v. *Peacocke*, 1 Rob. Eccl. Rep. 442.

A man moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh

than a mere mistaken notion as to the feelings, intentions, or behavior of relatives with reference to the testator or his property, where there is nothing irrational about it, and nothing to show that his notions might not have been changed by evidence.[26] Arbitrary and capricious likes and dislikes are not evidence of insanity.[27] And the question whether a prejudice on the part of a testator against the natural object of his bounty amounted to an insane delusion which will affect the validity of his will would seem to be one of fact, depending upon whether or not, under all the circumstances, it was such as might have resided in a sound mind.[28] Nor does mere eccentricity on the

view of the character and conduct of his children; but there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and then the repulsion which a parent exhibits to his children must be held to proceed from some mental defect. If such repulsion, amounting to delusion as to character, be shown, the burden will be cast on those propounding the will. *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562.

[26] *Hall* v. *Hall*, 38 Ala. 131; *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101; *Re Spencer*, 96 Cal. 448, 31 Pac. 453; *Re Caleb*, 139 Cal. 673, 73 Pac. 539; *Re Tracy*, 11 N. Y. S. R. 103; *Hoyt* v. *Hoyt*, 9 N. Y. S. R. 731; *Re Keeler*, 20 N. Y. S. R. 439, 3 N. Y. Supp. 629; *Coit* v. *Patchen*, 77 N. Y. 533; *Re White*, 121 N. Y. 406, 24 N. E. 935; *Bull* v. *Wheeler*, 6 Dem. 123; *Dobie* v. *Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801; *Re Bedlow*, 67 Hun, 408, 22 N. Y. Supp. 290; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267.

A mistaken notion on the part of a wife that her husband intended to convert her separate estates to his own use, under the influence of which she excluded him from participation in her property, does not invalidate her will. *Mosser* v. *Mosser*, 32 Ala. 551.

Nor does one upon the part of a wife as to a disease of which she supposed her husband was afflicted, under the influence of which she disinherited him. *Re Storey*, 20 Ill. App. 183.

[27] *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Re Spencer*, 96 Cal. 448, 31 Pac. 453; *Rush* v. *Mcgee*, 36 Ind. 69; *Gordon* v. *Morrow*, 10 Ky. L. Rep. 845, 10 S. W. 373; *Mullins* v. *Cottrell*, 41 Miss. 291; *Farnum* v. *Boyd*, 56 N. J. Eq. 766, 41 Atl. 422; *Sibley* v. *Somers*, 62 N. J. Eq. 595, 50 Atl. 321; *Re Gross*, 17 N. Y. S. R. 739; *American Seamen's Friend Soc.* v. *Hopper*, 33 N. Y. 619; *Re Suydam*, 84 Hun, 514, 32 N. Y. Supp. 449. Affirmed in 152 N. Y. 639, 46 N. E. 1152; *Elkin* v. *McGracken*, 11 Phila. 534; *Leech* v. *Leech*, 5 Clark (Pa.) 86; *Probst's Will*, 2 Lanc. L. Rev. 97; *Lee* v. *Lee*, 4 McCord L. 183, 17 Am. Dec. 722; *Mercer* v. *Kelso*, 4 Gratt. 106.

It cannot be held that because a man is ungenerous, unkind, and unjust, and misconceives the conduct of his fellows, that he is devoid of testamentary capacity. *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44.

And an insane delusion which will invalidate a will is not shown by evidence of a belief upon the part of the testatrix that she had been treated unjustly and harshly, and that advantage had been taken of her by her brothers and sisters, and that she was a woman of arbitrary temper, ignorant, suspicious, dull of comprehension, and without business ideas and habits, and difficult to get along with, though her will may have been influenced by her peculiarities. *Re Gross*, 14 N. Y. S. R. 429.

[28] See *Greenwood* v. *Greenwood*, 3 Curt. Eccl. Rep. 337.

A belief, or pretended belief, on the part of a testator, in the illegitimacy of a child whom he disinherited, will not be deemed an insane delusion which will affect the validity of his will, where he had previously acknowledged her legitimacy, and there is evidence that the doubts thrown upon it were for a sinister purpose of his own. *Ditchburn* v. *Fearn*, 6 Jur. 201.

But a will made by a man who had recently recovered from an illness which affected his mind, the symptoms of the mental disease taking the form of an unchangeable idea that he would be eternally damned for having received

part of a testator amount to an insane delusion which will affect the validity of a will.[29] A testator may have eccentricities and peculiarities and yet do as he pleases with his property, if he has judgment, discretion, and reason.[30] Eccentricities and belief in absurdities, however, furnish evidence of insanity.[31] The question as to when the bounds of eccentricity are passed and insanity commences depends upon the peculiar circumstances of each case, and is to be judged from the whole character of the person whose capacity is in question, and from his state and condition of mind, not only at the time in question, but at intermediate stages of his life.[32]

86. Speculative beliefs.—Opinions upon questions of mere specula-

communion unfitly, after which he was pronounced insane by a medical board, and died in a lunatic asylum, should be denied probate though it was sensible, and contained no indications of the delusion. *Symes* v. *Green*, 1 Swabey & T. 401, 5 Jur. N. S. 742, 28 L. J. Prob. N. S. 83.

[29]*Turner* v. *Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Re White*, 121 N. Y. 406, 24 N. E. 935; *Ditchburn* v. *Fearn*, 6 Jur. 201.

The question whether or not a man is different from other men, and whether he indulges his humors in unaccustomed ways, cannot be made a test of his sanity or insanity. *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562.

[30]*Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Wood* v. *Lane*, 102 Ga. 199, 29 S. E. 180; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Webber* v. *Sullivan*, 58 Iowa, 260, 12 N. W. 319; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Phillips* v. *Chater*, 1 Dem. 533; *Cornwell* v. *Riker*, 2 Dem. 354; *Leech* v. *Leech*, 5 Clark (Pa.) 86; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 28 L. T. N. S. 566, 42 L. J. Prob. N. S. 41; *Re Goodman*, 44 L. T. N. S. 527; *Ingoldsby* v. *Ingoldsby*, 20 Grant Ch. (U. C.) 131.

Nor are pessimistic beliefs insane delusions which will destroy testamentary capacity. *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44.

And oddities and apparent weaknesses of the mind do not affect testamentary capacity, where they are attributable to a physical condition. *Frost* v. *Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612.

And neither eccentricities of conduct nor partial aberration of mind at other times will affect testamentary capacity, where the testator is shown to have been of sound and disposing mind at the time of making his will, unless they evince an inability to make a reasonable disposition of property, and to understand the nature and solemnity of the testamentary act. *Godden* v. *Burke*, 35 La. Ann. 160; *Wood* v. *Wood*, 4 Brewst. (Pa.) 75; *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

[31]*Leech* v. *Leech*, 5 Clark (Pa.) 86; *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79.

The fact that a testatrix had been in a weak mental condition for years, and that she had once been taken to an insane asylum at her own request and a belief upon her part that there was an electric nerve which went through her body, which she could not control, together with the fact that she gave no instructions to the scrivener of the will as to its contents, and apparently took no interest in it, and that by it she disposed of her property in a manner contrary to previously expressed intentions, is sufficient to warrant a refusal to admit it to probate. *Re Rounds*, 25 Misc. 101, 54 N. Y. Supp. 710.

[32]*Mudway* v. *Croft*, 3 Curt. Eccl. Rep. 671.

No precise rule can be laid down by which testamentary capacity can be measured; eccentricities, religious beliefs, peculiarities, and even impairment of the mind, do not render one incompetent to execute a will; the expression "sound mind" does not mean, in the execution of a will, that one must possess a perfect intelligence; it is the degree of intelligence that determines and controls. *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757.

tive beliefs cannot be considered as delusions or insanity.[33] And no belief in religious creed or in the doctrine of any church can be regarded as an insane delusion which will invalidate a will.[34] Nor is a belief in spiritualism an insane delusion or mental unsoundness which will affect the validity of a will,[35] unless it appears that the will was the offspring of such belief.[36] But the influence that might be gained by a medium or by one practising on visionary and sentimental beliefs is to be jealously scrutinized.[37] Neither is a belief in Christian Science an insane delusion which will invalidate a will.[38] Nor is a belief in Mormonism.[39] Nor is a belief that secret societies are wrongful and injurious and opposed to the teachings of Christ.[40] Nor is a belief in witchcraft on the part of the testator, where the

[33]*Thompson* v. *Quimby*, 2 Bradf. 449. And see *Thompson* v. *Thompson*, 21 Barb. 107; *Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665; *Walcot* v. *Alleyn*, Milward, 65.

A belief in the doctrine that the souls of men after death pass into animals is not an insane delusion which will invalidate the will of a person entertaining it. *Bonard's Will*, 16 Abb. Pr. N. S. 128.

[34]*Newton* v. *Carbery*, 5 Cranch C. C. 626, Fed. Cas. No. 10,189; *Gass* v. *Gass*, 3 Humph. 278; *Mullins* v. *Cottrell*, 41 Miss. 291.

An opinion entertained by a testator as to a future state, concerning which no one has positive knowledge, and which is entirely within the dominion of opinion and faith, and not of knowledge, cannot be deemed evidence of insanity which will affect testamentary capacity. *Bonard's Will*, 16 Abb. Pr. N. S. 128; *Gass* v. *Gass*, 3 Humph. 278.

And religious apprehensions producing extreme anxiety and hopeless despair upon the part of a testator, because of a conviction that he had passed his day of grace, which rendered him unconcerned on all other subjects, do not show him incapable of making a valid will, where he was rational and sensible when his attention could be diverted. *Weir's Will*, 9 Dana, 434.

[35]*La Bau* v. *Vanderbilt*, 3 Redf. 385; *Re Rohe*, 22 Misc. 415, 50 N. Y. Supp. 392; *Fowler* v. *Ramsdell*, 4 Alb. L. J. 94; *Re Keller*, 12 N. Y. S. R. 148; *Bonard's Will*, 16 Abb. Pr. N. S. 128; *Re Spencer*, 96 Cal. 448, 31 Pac. 453; *Otto* v. *Doty*, 61 Iowa, 23, 15 N. W. 578; *Turner* v. *Rusk*, 53 Md. 65; *Brown* v. *Ward*, 53 Md. 376, 36 Am. Rep. 422; *Middleditch* v. *Williams*, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; *McClary* v. *Stull*, 44 Neb. 175, 62 N. W. 501; *Re Smith*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665; *Turner* v. *Hand*, 3 Wall. Jr. 120, Fed. Cas. No. 14,257; *Norton* v. *Relly*, 2 Eden, 286; *Whipple* v. *Eddy*, 161 Ill. 114, 43 N. E. 789; *Buchanan* v. *Pierie*, 205 Pa. 123, 54 Atl. 583.

[36]*La Bau* v. *Vanderbilt*, 3 Redf. 384; *Buchanan* v. *Pierie*, 205 Pa. 123, 54 Atl. 583. And see *Re Beach*, 23 App. Div. 411, 48 N. Y. Supp. 437.

[37]See *Lyon* v. *Home*, L. R. 6 Eq. 655, 37 L. J. Ch. N. S. 674, 18 L. T. N. S. 451, 16 Week. Rep. 824. In this case, wherein a deed of gift without consideration was given by an aged widow to a spiritualist, Giffard, V. C., spoke of spiritualism as being "as presented by the evidence" (at all events), "mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and, on the other, to assist the projects of the needy and of the adventurer." See also *Norton* v. *Relly*, 2 Eden, 286.

[38]*Re Brush*, 35 Misc. 689, 72 N. Y. Supp. 421.

[39]*Imes' Will*, 40 Or. 495, 67 Pac. 737.

[40]*Re Bissell*, 63 Neb. 595, 88 N. W. 683.

An instruction in a will contest that eccentricity or peculiarities or radical or extreme unsoundness of opinions upon general education or secret societies will not render a man incapable of making a will is not rendered erroneous by modification making it read, "not necessarily render him incapable." *American Bible Soc.* v. *Price*, 115 Ill. 632, 5 N. E. 126.

will does not appear to have had any connection with such belief.[41] An insane delusion may be established in a particular case, however, by proof of the surrender of the will to imaginary directions, regarded as directions from God, or of spirits speaking to the testator from another world, or the control of an impulse due to an imaginary state of facts.[42] And a belief in the possibility of cures as the result of the exercise of faith by the patient or the healer, or both, though held by many persons, is sufficient to constitute testamentary incapacity where it is such as to place the testator under the influence of a delusion that usurps the place of reason and controls his will.[43]

IV. Incapacity acted upon by fraud or undue influence.

87. Effect generally.— Weakness of mind, from whatever cause arising, though not sufficient to create testamentary incapacity, may form favorable conditions for the exercise of undue influence or the perpetration of fraud; and the condition of mind may be a proper subject of inquiry on such an issue,[44] since it requires less undue

[41] *Leech* v. *Leech*, 5 Clark (Pa.) 86; *Lee* v. *Lee*, 4 McCord L. 183, 17 Am. Dec. 722; *Jones* v. *Hughes*, 15 Abb. N. C. 141; *Addington* v. *Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Kelly* v. *Miller*, 39 Miss. 19; *Re Vedder*, 6 Dem. 92; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

A belief in witchcraft does not show testamentary incapacity, though connected with a belief that the testator's health had been permanently injured by slow poison, surreptitiously administered. *Leech* v. *Leech*, 5 Clark (Pa.) 86.

Nor does a belief upon the part of a testator that a daughter whom he disinherited was a witch render the will inoperative or invalid. *Schildnect* v. *Rompf*, 9 Ky. L. Rep. 121, 4 S. W. 235; *Addington* v. *Wilson*, 5 Ind. 137, 61 Am. Dec. 81.

And belief in the statements of clairvoyants, fortune tellers, and spiritual mediums, and in dreams and witchcraft, together with other wild and visionary ideas not connected with the testamentary act, will not invalidate a will, where the testator's judgment was sound as to matters of business, and he readily abandoned his opinions when they were demonstrated to be incorrect. *Chafin Will Case*, 32 Wis. 557; *Thompson* v. *Quimby*, 2 Bradf. 449.

[42] *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473. And see *Re Beach*, 23 App. Div. 411, 48 N. Y. Supp. 437.

A will in favor of a spiritualistic medium, made by one who embraced spiritualism as practised by that medium, permitting it to dominate his life, and to override every other consideration, which belief in spiritualism had been artfully used by the medium to get his property, is invalid. *Thompson* v. *Hawks*, 11 Biss. 440, 14 Fed. 902; *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197.

But the fact that a testator might be led to give credence to alleged communications from spirits, which were in fact impositions and delusions, contrived by designing persons, does not establish testamentary incapacity, though it is proper to be considered on the question of mental weakness. *Re Storey*, 20 Ill App. 183.

[43] *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053.

[44] *Hoban* v. *Campau*, 52 Mich. 347, 17 N. W. 797; *Myers* v. *Hauger*, 98 Mo. 433, 11 S. W. 974; *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432. And see *Wilson* v. *Mitchell*, 101 Pa. 495.

A will by an elderly woman of weak mind, though not imbecile or idiotic, in

influence and less fraud to procure the execution of a will by a person of weak or impaired intellect than by one of full mental power.[45] And the will of a person of weak or imbecile mind, which is induced by fraud or undue influence, so as to be different from what it would have been had the testator been in the full possession of his faculties, will be set aside.[46] And the questions of undue influence or fraud, and of mental capacity, should not be separated where the testator suffered from a disease affecting his brain and vital powers.[47] When the question of testamentary capacity is at issue in a will contest, and there is evidence of fraud or undue influence, the jury should be left free to consider it.[48]

88. Must amount to restraint.— Weakness of mind which will affect the validity of a will, in connection with undue influence or fraud, must be such as to render the testator incapable of resisting the influence used.[49] And the undue influence must amount to moral constraint, destroying free agency.[50] That is undue influence amounting to constraint, which substitutes the will of another for that of the

favor of a woman with whom she lodged and boarded, who was a person of strong mind, and had gained an ascendency over her, will not be admitted to probate, where there were discrepancies in the evidence with respect to its execution. *Cockcraft* v. *Rawles*, 4 Notes of Cases, 237.

An objection in a will contest that the testator was unduly influenced and restrained at the time of making the will implies that he had sufficient mental capacity to make it. *Kinne* v. *Johnson*, 60 Barb. 69.

[45]*Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432; *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197; *Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441.

[46]*Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Re Miller*, 36 Misc. 310, 73 N. Y. Supp. 508; *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211, 49 N. E. 197; *Sedgwick* v. *Jack*, 111 Iowa, 745, 82 N. W. 1027.

A person cannot be considered as having a disposing mind where such a dominion or influence was obtained as to prevent him from exercising his discretion in making his will, though his mind was of sufficient soundness and discretion to regulate his affairs in general. *Mountain* v. *Bennet*, 1 Cox. Ch. Cas. 356.

[47]*Wilson's Appeal*, 11 W. N. C. 333; *Gibson's Estate*, 11 W. N. C. 355; *Sherley* v. *Sherley*, 81 Ky. 240. And see *Armor's Estate*, 154 Pa. 517, 26 Atl. 619.

But a finding in a will contest of testamentary capacity is not inconsistent with a finding of undue influence, which is a distinct ground for objection. Either, when proved, is conclusive. *Marvin* v. *Marvin*, 4 Keyes, 9.

[48]*Tobin* v. *Jenkins*, 29 Ark. 151; *Armor's Estate*, 154 Pa. 517, 26 Atl. 619.

[49]*Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Baldwin* v. *Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387; *Floyd* v. *Floyd*, 3 Strobh. L. 44, 49 Am. Dec. 626; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449.

Undue influence cannot exist unless there is a person incapable of protecting himself, as well as the wrongdoer to be resisted. *Latham* v. *Udell*, 38 Mich. 238.

[50]*Barnes* v. *Barnes*, 66 Me. 286; *Breed* v. *Pratt*, 18 Pick. 115; *Shailer* v. *Bumstead*, 99 Mass. 112; *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Gardiner* v. *Gardiner*, 34 N. Y. 155; *Brick* v. *Brick*, 66 N. Y. 144; *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387; *Horn* v. *Pullman*, 72 N. Y. 269; *Kinne* v. *Johnson*, 60 Barb. 69; *Hazard* v. *Hefford*, 2 Hun, 445; *Snyder* v. *Sherman*, 23 Hun, 139; *Seguine* v. *Seguine*, 4 Abb. App. Dec. 191; *Marvin* v. *Marvin*, 3 Abb. App. Dec. 192; *Burk's Will*, 2 Redf. 239; *Booth* v. *Kitchen*, 3

testator; and it may be either through threats or fraud.[51] Mere mental debility, caused by sickness or extreme old age, does not itself justify the conclusion that undue influence has been submitted to. There must be some evidence of the influence, and of its improper exercise, to justify the rejection of a will on that ground.[52] And it must appear that the undue influence took effect.[53] The lower the degree of intellect, however, the less is the amount of proof of fraud or coercion required to set aside a will, since an amount of fraud or of coercion which a strong mind would at once repel may be yielded to by a weak mind.[54]

89. Effect of trust relations.—"The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent."[55] And the presence of children when a will was

Redf. 52; *Lynch* v. *Clements*, 24 N. J. Eq. 431; *Browne* v. *Molliston*, 3 Whart. 129; *McMahon* v. *Ryan*, 20 Pa. 329; *Eckert* v. *Flowry*, 43 Pa. 46; *Thompson* v. *Kyner*, 65 Pa. 368; *Tawney* v. *Long*, 76 Pa. 106; *Hopple's Estate*, 7 W. N. C. 523; *Chandler* v. *Ferris*, 1 Harr. (Del.) 454; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Tyson* v. *Tyson*, 37 Md. 567; *Griffith* v. *Diffenderfer*, 50 Md. 466; *Monroe* v. *Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620; *Rabb* v. *Graham*, 43 Ind. 1; *Harrington* v. *Stees*, 82 Ill. 50, 25 Am. Rep. 290; *Allmon* v. *Pigg*, 82 Ill. 149, 25 Am. Rep. 303; *Sechrest* v. *Edwards*, 4 Met. (Ky.) 163; *Marshall* v. *Flinn*, 49 N. C. (4 Jones L.) 199; *Wright* v. *Howe*, 52 N. C. (7 Jones L.) 412; *Lee* v. *Lee*, 71 N. C. 139; *O'Neall* v. *Farr*, 1 Rich. L. 80; *Harrel* v. *Harrel*, 1 Duv. 203; *Thompson* v. *Davitte*, 59 Ga. 472; *Leverett* v. *Carlisle*, 19 Ala. 80; *Pool* v. *Pool*, 35 Ala. 12; *Leeper* v. *Taylor*, 47 Ala. 221; *Rogers* v. *Diamond*, 13 Ark. 474; *McDaniel* v. *Crosby*, 19 Ark. 533; *Tobin* v. *Jenkins*, 29 Ark. 151; *Williams* v. *Goude*, 1 Hagg. Eccl. Rep. 577; *Parfitt* v. *Lawless*, L. R. 2 Prob. & Div. 462, 41 L. J. Prob. N. S. 68, 27 L. T. N. S. 215, 21 Week. Rep. 200; *Purdon* v. *Longford*, Ir. Rep. 11 C. L. 269; *Stulz* v. *Schaeffle*, 18 Eng. L. & Eq. Rep. 576, 16 Jur. 909. And it must be connected with the document. *Todd* v. *Fenton*, 66 Ind. 25.

[51] *Eckert* v. *Flowry*, 43 Pa. St. 46; *Hall* v. *Hall*, 38 Ala. 131; *Marshall* v. *Hanby*, 115 Iowa, 318, 88 N. W. 801.

[52] *Reynolds* v. *Root*, 62 Barb. 250; *Eckert* v. *Flowry*, 43 Pa. 46.

An instruction in a will contest that the fact that the testatrix may have had illness which affected her mind will not invalidate her will if she had mind and memory sufficient to make it at the time, and was not unduly influenced, is not objectionable as confining the undue influence which would invalidate the will to the very moment of signing it. *Overall* v. *Bland*, 11 Ky. L. Rep. 371, 12 S. W. 273.

[53] See Jarman, Wills, Randolph & T.'s note, 733, and cases there cited; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449; *Boyse* v. *Rossborough*, 6 H. L. Cas. 47, 26 L. J. Ch. N. S. 256, 3 Jur. N. S. 373, 5 Week. Rep. 414; *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; *Brick* v. *Brick*, 66 N. Y. 144; *Eckert* v. *Flowry*, 43 Pa. 46; *Leverett* v. *Carlisle*, 19 Ala. 80.

[54] *Reynolds* v. *Root*, 62 Barb. 250; *Dunaway* v. *Smoot*, 23 Ky. L. Rep. 2289, 67 S. W. 62.

[55] *Parfitt* v. *Lawless*, L. R. 2 Prob. & Div. 462, 41 L. J. Prob. N. S. 68, 27 L. T. N. S. 215, 21 Week. Rep. 200; *Bleecker* v. *Lynch*, 1 Bradf. 458.

Influence effected only by a universal course of kind treatment, in connection with the single fact of weakness of mind, raises no presumption of invalidity against a will. *Wood's Estate*, 13 Phila. 236.

executed, and the fact that they were the principal beneficiaries, cannot be held to raise a presumption of undue influence.[56] But gifts by will, as well as other gifts to guardians,[57] attorneys,[58] physicians,[59] and spiritual advisers,[60] will be most carefully scrutinized by the courts, and will raise an inference of undue influence which it will be relevant to support by any pertinent corroborative evidence. And in general, when the executor of the will, or the party by whom it was written or suggested, is a devisee to a large extent, though not a relative, the onus will lie heavily upon him to maintain the will.[61] In cases where the beneficiary is not a relative "stricter proof will be required of the testator's capacity, though

[56]*Bundy* v. *McKnight*, 48 Ind. 502; *Bleecker* v. *Lynch*, 1 Bradf. 458. And see *Tingley* v. *Cowgill*, 48 Mo. 291; *Coit* v. *Patchen*, 77 N. Y. 533.

But it has been held that the relation of parent and child is proper to be taken into consideration by the jury. *Gaither* v. *Gaither*, 20 Ga. 709.

[57]That such gifts are void, see *Breed* v. *Pratt*, 18 Pick. 115; *Garvin* v. *Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Meek* v. *Perry*, 36 Miss. 190; but that they only excite suspicion, see *Daniel* v. *Hill*, 52 Ala. 430.

[58]*St. Leger's Appeal*, 34 Conn. 450, 91 Am. Dec. 735; *Wilson* v. *Moran*, 3 Bradf. 172; *Boyd* v. *Boyd*, 66 Pa. 283; *Riddell* v. *Johnson*, 26 Gratt. 152. And see *Farnum* v. *Boyd*, 56 N. J. Eq. 766, 41 Atl. 422. *Contra*, *Griffith* v. *Diffenderffer*, 50 Md. 466, which follows *Parfitt* v. *Lawless*. There is no presumption against an agent. *Lee* v. *Lee*, 71 N. C. 139. *Contra*, where the agent was principal devisee and wrote the will himself, *Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491. See *Wright* v. *Howe*, 52 N. C. (7 Jones L.) 412.

But a gift to a legal adviser of one eighth of the testator's estate, and the residue in trust for certain relatives, does not shift the burden of proof from the party alleging fraud and undue influence. *Stokes* v. *Miller*, 10 W. N. C. 241. And see, to the same general effect, *Linton's Appeal*, 104 Pa. 228; *Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 637; *Butlin* v. *Barry*, 1 Curt. Eccl. Rep. 614.

[59]*Crispell* v. *Dubois*, 4 Barb. 393; *Colhoun* v. *Jones*, 2 Redf. 34; *Cadwallader* v. *West*, 48 Mo. 483. And see *Audenreid's Appeal*, 89 Pa. 114, 33 Am. Rep. 731.

And a will of a German woman seventy years of age, who was ignorant and without known relatives, made an hour before death, when too weak to sign her name, and when only prevented from collapse by stimulating hypodermic injections, which gave one dollar to a washerwoman and nurse, and the rest of her estate of $19,000 to a female doctor of shady reputation, who lived in the house with her, and whom she feared and disliked,—a will of twelve years earlier date, with bequests to a woman who treated her as a sister and had been kind to her, being revoked without reason,—should be denied probate. *Re Ehminne*, 30 Misc. 21, 62 N. Y. Supp. 1006.

[60]*St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735. See also *Drake's Appeal*, 45 Conn. 9. For a case where a bequest to a hospital was avoided, see *Muller* v. *St. Louis Hospital Asso.* 5 Mo. App. 390.

[61]*Paske* v. *Ollat*, 2 Phillim. Eccl. Rep. 323; *Durling* v. *Loveland*, 2 Curt. Eccl. Rep. 225; *Newhouse* v. *Godwin*, 17 Barb. 236; *Lee* v. *Dill*, 11 Abb. Pr. 214; *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Duffield* v. *Robeson*, 2 Harr. (Del.) 384; *Clark* v. *Stansbury*, 49 Md. 346; *Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491. And see *Ingram* v. *Wyatt*, 1 Hagg. Eccl. Rep. 384; *Carrico* v. *Neal*, 1 Dana, 163; *Billinghurst* v. *Vickers*, 1 Phillim. Eccl. Rep. 199; *Tribe* v. *Tribe*, 13 Jur. 733.

A will should be denied probate on the ground of undue influence exercised upon an enfeebled mind, where it appears by the weight of evidence that the testator's mind was not sane, and his property was given to a church, and the only person who knew of the preparation of the will were the clergyman and councilmen of the church, and it appeared that when sane the testator evinced a dislike for the church, and

not as to his knowledge of the contents of the will." [62] In short, whenever the provisions of a will are inconsistent with natural justice, it will require strong proof of capacity and volition to sustain it, and slight proof of undue influence or fraud to set it aside.[63] To authorize a will in favor of a wife, however, to be set aside, the influence alleged to have been exerted must be shown to have reached coercion, impairing the husband's free agency,[64] or fraud must be proved.[65]

90. Question is one of capacity to resist.— The question is not one of undue influence, for if so, there are few wills which would not be put in peril. A testator is naturally more or less influenced by those about him. Selfishness may lead them to attempt to influence him in their favor; or a feeling of chivalric generosity may induce those who are at home to unduly promote the interests of the absent. Rich men, also, are beset by numerous applicants for aid, some of whom are importunate, and often present their claims unfairly. If wills were set aside because such influences were applied, the privilege of testamentary disposition would be seriously impaired. The question is, therefore, not whether there were influences about the testator which, if not resisted, would unduly sway him, for there is no testator about whom there are no such influences; but whether the testator had

expressed affection for his wife, for whom no adequate provision was made. *Forman's Will*, Tucker, 205.

[62] 1 Jarman, Wills, 5th Am. ed.; Bigelow, *35, Randolph & T.'s ed. p. 68.

Persons occupying the same house with the testatrix, and caring for and nursing her in her illness, do not occupy a fiduciary relation to her which will cast upon them the burden of vindicating her will making them beneficiaries, against the imputation that it was procured by fraud or undue influence. *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

[63] *Brydges* v. *King*, 1 Hagg. Eccl. Rep. 256; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; *Kinne* v. *Johnson*, 60 Barb. 69; *Brick* v. *Brick*, 66 N. Y. 144; *Tyler* v. *Gardiner*, 35 N. Y. 559; *Snyder* v. *Sherman*, 23 Hun, 139; *Baker* v. *Lewis*, 4 Rawle, 356; *Bitner* v. *Bitner*, 65 Pa. 347; *Goble* v. *Grant*, 3 N. J. Eq. 629; *Lyons* v. *Van Riper*, 26 N. J. Eq. 337; *Cadwallader* v. *West*, 48 Mo. 483; *Tobin* v. *Jenkins*, 29 Ark. 151; *Drake's Appeal*, 45 Conn. 9.

[64] *Barnes* v. *Barnes*, 66 Me. 286; *Clark* v. *Sawyer*, 3 Sandf. Ch. 351; *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340. See *Rollwagen* v. *Rollwagen*, 63 N. Y. 504, for a case where there was such coercion and fraud; *Bicknell* v. *Bicknell*, 2 Thomp. & C. 96; *Zimmerman* v. *Zimmerman*, 23 Pa. 375; *Hopple's Estate*, 7 W. N. C. 523; *Pingree* v. *Jones*, 80 Ill. 177; *Tingley* v. *Cowgill*, 48 Mo. 291; *Rankin* v. *Rankin*, 61 Mo. 295; *Boyse* v. *Rossborough*, 6 H. L. Cas. 47, 26 L. J. Ch. N. S. 256, 3 Jur. N. S. 373, 5 Week. Rep. 414; 1 Redf. Wills, chap. 10, § 2; *Wisener* v. *Maupin*, 2 Baxt. 342. See also *Stulz* v. *Schaeffle*, 16 Jur. 909, 18 Eng. L. & Eq. Rep. 576.

A will making provision for the testator's wife and two children, one of whom was illegitimate, made upon instruction given by the testator's brother, who was one of the executors, will be sustained where it appears that the brother had done all in his power for the benefit of the illegitimate child, though the evidence as to capacity and knowledge of contents was slight. *Re Field*, 3 Curt. Eccl. Rep. 754.

[65] *Scribner* v. *Crane*, 2 Paige, 147, 21 Am. Dec. 81.

capacity to resist such influences. If he had not, then the will, supposing the influences to have been applied, must fail, at least *pro tanto*.[66]

V. Intoxication.

91. Degree of drunkenness affecting.— To avoid a will on the ground of intoxication it must be shown to have existed to such an extent as to have rendered the party unconscious of what he was doing.[67] If he knows what his estate consists of, and who are the proper objects of his bounty, the mere fact that he is under stimulants at the time of making his will does not affect its validity.[68] Nor is it enough that the testator was stimulated or excited by drink.[69] The rule that capacity requisite for the testamentary act is that the testator can comprehend the extent and condition of the property he is about to dispose of, the natural or other objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will,— is applicable to an allegation of incapacity from intoxication, as well as from insanity.[70] And in order to avoid a will of an intemperate person it must be proved that he was so excited by liquor or so conducted himself during the particular act, as to be at the moment legally disqualified from giving effect to it.[71]

[66] *Glover* v. *Hayden*, 4 Cush. 580; *Baldwin* v. *Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Nash* v. *Hunt*, 116 Mass. 237; *Davis* v. *Davis*, 123 Mass. 590; *May* v. *Bradlee*, 127 Mass. 414; *Wait* v. *Breeze*, 18 Hun, 403; *Hughes* v. *Murtha*, 32 N. J. Eq. 288; *Wainwright's Appeal*, 89 Pa. 220; *Clark* v. *Stansbury*, 49 Md. 346; *Pierce* v. *Pierce*, 38 Mich. 412; *Hubbard* v. *Hubbard*, 7 Or. 42.

[67] Shelford, Lunatics, 276; *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Peck* v. *Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989; *Starrett* v. *Douglass*, 2 Yeates, 48; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Pancoast* v. *Graham*, 15 N. J. Eq. 294; *Pierce* v. *Pierce*, 38 Mich. 412; *Temple* v. *Temple*, 1 Hen. & M. 476; *Hebert* v. *Winn*, 24 La. Ann. 385; *Key* v. *Holloway*, 7 Baxt. 575; *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140.

[68] *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Starrett* v. *Douglass*, 2 Yeates, 48; *Peck* v. *Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Re Reed*, 2 Connoly, 403; *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989; *Ball* v. *Kane*, 1 Penn. (Del.) 90, 39 Atl. 778. And see *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649.

[69] *Ayrey* v. *Hill*, 2 Addams Eccl. Rep. 206; *Key* v. *Holloway*, 7 Baxt. 575.

[70] *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525; *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757; *Pierce* v. *Pierce*, 38 Mich. 412.

A person, though under the influence of intoxicating liquors, is competent to execute a will, where he is capable of exercising judgment, reason, and deliberation, and of weighing to a reasonable degree the consequences of his act. *Convey's Will*, 52 Iowa, 197, 2 N. W. 1084.

[71] *Peck* v. *Cary*, 27 N. Y. 12, 84 Am. Dec. 220; *Re Watson*, 34 N. Y. S. R. 906, 12 N. Y. Supp. 115; *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989; *Ball* v. *Kane*, 1 Penn. (Del.) 90, 39 Atl. 778; *Tasker's Estate*, 205 Pa. 455, 55 Atl. 24; *Ayrey* v. *Hill*, 2 Addams Eccl. Rep. 206.

Occasional fits of intemperance are not evidence of want of capacity to make a will. *Violet's Will*, 1 Bibb, 617.

But evidence in a will contest tending

92. Exception in case of undue influence.—Where, however, in addition to the fact that the party was intoxicated at the time, he was then under the influence of others, a degree of intoxication sufficient merely to subject him to such influence may be ground for avoiding the will, although such intoxication, without such proof of undue influence, would not have that effect.[72] And where a will is executed under the influence of drink intentionally and fraudulently administered, it is invalid, by the operation of a rule already noticed with regard to contracts,[73] but where neither fraud nor undue influence is shown, actual derangement of the reasoning faculties, arising from undue excitement, must be established.

93. Habitual drunkard not necessarily incapacitated.—Not even long-continued habits of intoxication will of themselves afford a presumption of incapacity, unless the testator was proved to have been so drunk at the time as to be ignorant of what he was doing, or to have been under undue or fraudulent influence. Unless the latter conditions exist, there must be a downright incapacity, an entire loss of control over mind and body, in order to invalidate a will.[74] Habits of intemperance will not invalidate a will, where the testator's mind was not so affected thereby as to render him incapable of comprehending the condition of his property, and his relations to the objects of his bounty, and the scope and bearing of the provisions of his will, and the relation of each of these factors to the other.[75] The question is whether his mind was so affected that he was not suffi-

to show that at or near the time the will was made the testator was so drunk that he could neither stand up understand anything, nor talk, raises the question for the jury as to whether he was so drunk that he had not sufficient reason and understanding to know his property and dispose of it in a rational manner, according to a fixed purpose of his own. *Best* v. *Best*, 11 Ky. L. Rep. 215, 11 S. W. 810.

[72] Shelford, Lunatics, 274, 304.

[73] *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 602.

[74] *Truitt* v. *Cullen*, 3 Penn. (Del.) 311, 50 Atl. 174; *Pierce* v. *Pierce*, 38 Mich. 412; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Re Evans*, 37 Misc. 337, 75 N. Y. Supp. 491; *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Julke* v. *Adam*, 1 Redf. 454; *McLaughlin's Will*, 2 Redf. 504; *Haughian* v. *Conlan*, 86 App. Div. 290, 83 N. Y. Supp. 830; *Tasker's Estate*, 205 Pa. 455, 55 Atl. 24; *Ritter's Appeal*, 59 Pa. 9; *Thompson* v. *Kyner*, 65 Pa. 368; *Starrett* v. *Douglass*, 2 Yeates, 48; *Re Weisman*, 45 Phila. Leg. Int. 274; *Black* v. *Ellis*, 3 Hill, L. 68; *Belcher* v. *Belcher*, 10 Yerg. 121; *Ayrey* v. *Hill*, 2 Addams Eccl. Rep. 206.

[75] *Bannister* v. *Jackson*, 45 N. J. Eq. 702, 17 Atl. 692; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Re Gilham*, 64 N. J. Eq. 715, 52 Atl. 690; *McLaughlin's Will*, 2 Redf. 504; *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Schusler's Estate*, 198 Pa. 81, 47 Atl. 966. And see *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574; *Handley* v. *Stacey*, 1 Fost. & F. 574.

Nervousness and mental and physical prostration at the time of making a will, due to drink, will not justify the submission of the issue of testamentary capacity to a jury, in the absence of anything to show inability to comprehend the nature and character of the testamentary power or of its exer-

ciently master of himself to give expression to his real wishes.[76] Such habits do not affect a man's capacity where he was not intoxicated at the time, unless his judgment was perverted,[77] though such habits were the cause of disease of which the testator died.[78] Weakness of intellect from habitual intemperance to the extent of disqualifying a testator from knowing and comprehending the nature, effect, and consequences of his act, however, deprives him of testamentary capacity;[79] though it cannot be said, as a rule of law, that because a man is a drunkard he is of insane mind.[80]

94. Drunkenness is evidence only.— Drunkenness and habits of intoxication, as has been seen, do not, as a matter of law, destroy testamentary capacity; they are mere matters of evidence upon the question of its existence or nonexistence.[81] Unsoundness is the ultimate fact to be found, and acts of inebriety go to the jury as evidence from which unsoundness may be found,[82] the question being one of fact for the jury.[83]

cise, where the testator had made a statement that he had changed his will, stating the change accurately. *Harmony Lodge, I. O. O. F.'s Appeal,* 127 Pa. 269, 18 Atl. 10.

[76]*Re Johnson,* 7 Misc. 220, 27 N. Y. Supp. 649; *Gardner* v. *Gardner,* 22 Wend. 526, 34 Am. Dec. 340; *Re Halbert,* 15 Misc. 308, 37 N. Y. Supp. 757.

There is no standard of drunkenness which will defeat testamentary capacity short of downright imbecility. *Dimond's Estate,* 3 Pa. Dist. R. 554.

And the will of an habitual drunkard, judicially adjudged to be such, and deprived of the control of his property, and consigned to an inebriate asylum, where he died, is not necessarily invalid for want of testamentary capacity, though the testator also had epilepsy, provided he was sober at the time of executing the will. *Re Johnson,* 7 Misc. 220, 27 N. Y. Supp. 649.

[77]*Hebert* v. *Winn,* 24 La. Ann. 385; *Kahl* v. *Schober,* 35 N. J. Eq. 461; *Ayrey* v. *Hill,* 2 Addams Eccl. Rep. 206; *Peck* v. *Cary,* 27 N. Y. 9, 84 Am. Dec. 220; *Houser* v. *Lightner,* 42 Phila. Leg. Int. 289; *Levis's Estate,* 140 Pa. 179, 21 Atl. 242; *Re Halbert,* 15 Misc. 308, 37 N. Y. Supp. 757.

To defeat testamentary capacity habits of intoxication must have been carried to the extent of intoxication generally, or intoxication at the time of making the will. *O'Neil* v. *Murray,* 4 Bradf. 311.

And the submission of the issue of testamentary capacity to a jury is not sufficiently sustained by evidence that the testator originally possessed a strong will, but that it might have been weakened by disease and dissipation, and that he was frequently drunk and generally ill-natured and stubborn. *McPherson's Appeal* (Pa.) 9 Cent. Rep. 408, 11 Atl. 205. And see *Hubbard's Will,* 6 J. J. Marsh. 59.

[78]*Kahl* v. *Schober,* 35 N. J. Eq. 461.

[79]*Leech* v. *Leech,* 5 Clark (Pa.) 86. And see *Dufficld* v. *Robeson,* 2 Harr. (Del.) 375; *Howe* v. *Richards,* 112 Iowa, 220, 83 N. W. 909; *Kingsbury* v. *Whitaker,* 32 La. Ann. 1055, 36 Am. Rep. 278; *Gardner* v. *Gardner,* 22 Wend. 526, 34 Am. Dec. 340; *Julke* v. *Adam,* 1 Redf. 454; *McSorley* v. *McSorley,* 2 Bradf. 188; *Starrett* v. *Douglass,* 2 Yeates, 48; *Barrett* v. *Buxton,* 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Temple* v. *Temple,* 1 Hen. & M. 476; *Handley* v. *Stacey,* 1 Fost. & F. 574.

[80]*Re Johnson,* 57 Cal. 529; *Weisman's Estate,* 5 Pa. Co. Ct. 561.

The effect of habitual drunkenness with relation to testamentary capacity rests upon the presumption that at the time of the testamentary act the inebriate was intoxicated. *Re Sutherland,* 28 Misc. 424, 59 N. Y. Supp. 989.

[81]*Re Harrigan,* Myriek Prob. (Cal.) 135.

[82]*Re Gharky,* 57 Cal. 274.

[83]*Re Johnson,* 57 Cal. 529.

And the effect of intoxication upon the capacity of an intoxicated person to

95. Use of medicines may produce incapacity.— In analogy with the principles stated above, it has been held that mental incapacity on the part of the testator, when produced by the use of medicines, is sufficient to invalidate his will.[84]

VI. Methods of determining capacity or incapacity.

96. Questions of law for the court.— The degree of mental capacity necessary to enable a testator to make a will, and the extent and degree of understanding of the will and persons and property affected by it, and the extent to which the mind of the testator must have been impaired to incapacitate him, are questions of law, exclusively for the court.[85] And the question as to what constitutes an unreasonable and irrational bias or insane delusion upon the part of the testator is also one for the court;[86] and so is one as to the sufficiency of evidence adduced to show testamentary capacity.[87]

97. Questions of fact for the jury.— Whether a testator had the degree of mental capacity necessary to enable him to make a valid will, however, is a question of fact for the jury, to be determined upon a consideration of all the circumstances of the particular case.[88] And it is for the jury to determine as to the weight of any particular proof, whether it consists of matters of fact or of opinion;[89] and questions

make a will is not a scientific question to be determined by experts, but one of common observation, depending upon the facts of each case, and to be determined from such facts. *Pierce* v. *Pierce*, 38 Mich. 412.

[84]*Stedham* v. *Stedham*, 32 Ala. 525; *Garrison* v. *Blanton*, 48 Tex. 299; *Scanlan* v. *Cobb*, 85 Ill. 296. See article in Am. Journal of Insanity for 1872, p. 13.

[85]*Kempsey* v. *McGinniss*, 21 Mich. 123; *Overton* v. *Overton*, 18 B. Mon. 61.

Whether unsoundness of mind amounts to incapacity to make a will is to be ascertained by the court, by application of rules of law, in the exercise of a sound discretion regulated thereby. *Stackhouse* v. *Horton*, 15 N. J. Eq. 202.

[86]*Williams* v. *Williams*, 90 Ky. 28, 13 S. W. 250; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543.

[87]*Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *Lowder* v. *Lowder*, 58 Ind. 538; *Shailer* v. *Bumstead*, 99 Mass. 112.

[88]*Campbell* v. *Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620; *Meeker* v. *Meeker*, 75 Ill. 260; *Harp* v. *Parr*, 168 Ill. 459, 48 N. E. 113; *Hill* v. *Nash*, 41 Me. 585, 66 Am. Dec. 266; *Ware* v. *Ware*, 8 Me. 42; *Re Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Re Dixon*, 42 App. Div. 482, 59 N. Y. Supp. 421; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Rees* v. *Stille*, 38 Pa. 138; *Lewis* v. *Lewis*, 6 Serg. & R. 496; *Tillman* v. *Hatcher*, 1 Rice, L. 271; *Gass* v. *Gass*, 3 Humph. 278; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Minard* v. *Minard*, Brayton (Vt.) 231; *Den ex dem. Stevens* v. *Vanclève*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

A finding of soundness of mind in a will contest is not a conclusion of law, but an ultimate fact. *Clements* v. *McGinn* (Cal.) 33 Pac. 920.

[89]*Gardner* v. *Lamback*, 47 Ga. 133; *Wise* v. *Foote*, 81 Ky. 10; *Newhard* v. *Yundt*, 132 Pa. 324, 19 Atl. 288; *Trezevant* v. *Rains*, 85 Tex. 329, 23 S. W. 890.

So, the reasonableness or unreasonableness of the disposition of a will is a question for consideration of the jury in a will contest. *Evans* v. *Arnold*, 52 Ga. 169; *Re Carpenter*, 79 Cal. 382, 21 Pac. 835.

with relation to undue influence with respect to the execution of a will in connection with incapacity are also ones of fact, to be determined by the trial court.[90] So, whether or not the condition of a testator falls within the legal definition of delusion is one of fact for the jury upon the evidence.[91] And so is the question whether a prejudice against a natural object of the testator's bounty is evidence of derangement or not.[92] Doubtful and unsatisfactory evidence of incapacity, however, will not warrant the submission of an issue to a jury,[93] nor will evidence which is insufficient to overcome the pre-

[90]*Re Colcman*, 111 N. Y. 220, 19 N. E. 71; *Re Dixon*, 42 App. Div. 481, 59 N. Y. Supp. 421; *Re Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Prather* v. *McClelland*, 76 Tex. 578, 13 S. W. 543.

And an instruction in a will contest in which undue influence is alleged that, if the testator was of sound mind and knew the contents of his will, it should be sustained, is erroneous unless so qualified as to leave the question of free will to the jury. *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765.

[91]*Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Duggan* v. *McBreen*, 78 Iowa, 591, 43 N. W. 547; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Banks* v. *Goodfellow*, 22 L. T. N. S. 813, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549.

And it is not proper for the court to declare as matter of law that certain facts and matters are not of themselves insane delusions rendering a will invalid; it should require the jury to determine, after a full and fair consideration of the evidence, whether or not the facts proved show the existence of such a delusion. *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473.

And the fact that the proof on the question of delusion in a will contest is all upon one side does not authorize the court to direct the jury to find in accordance therewith, since the jury has the right to discredit it. *Townshend* v. *Townshend*, 7 Gill, 10.

But the issue in a will contest as to insanity should be taken from the jury where there are no facts in the case showing that the testator was afflicted with what in law amounts to an insane delusion. *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543.

[92]*Greenwood* v. *Greenwood*, 3 Curt. Eccl. Rep. 337.

The attention of the jury in a will contest in which a special delusion against the contestant is alleged should be specially called to that issue. *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

But the court in a will contest should not separate certain supposed delusions from a large bulk of evidence, and instruct the jury that they alone are sufficient to show insanity. *Turner* v. *Rusk*, 53 Md. 65.

[93]*Foster's Estate*, 142 Pa. 62, 21 Atl. 798; *Schwilke's Appeal*, 100 Pa. 628; *Rowson's Estate*, 4 Pa. Dist. R. 91, Affirmed in 175 Pa. 154, 34 Atl. 433; *Eddey's Appeal*, 109 Pa. 406, 1 Atl. 425; *Loeser's Estate*, 3 Pa. Dist. R. 817; *Doyle's Estate*, 7 Pa. Co. Ct. 657; *McKim's Estate*, 27 W. N. C. 110; *Depuy's Estate*, 1 W. N. C. 212; *Keating's Appeal*, 36 Pittsb. L. J. 283; *Wilson* v. *Mitchell*, 101 Pa. 495. See also *Pensyl's Estate*, 157 Pa. 465, 27 Atl. 669; *Napfle's Estate*, 134 Pa. 492, 19 Atl. 679.

Evidence of bad health and slight insomnia and occasional forgetfulness and absent-mindedness does not warrant an issue as to capacity, as against proof of business ability and knowledge by a testator of his own affairs. *Douglass's Estate*, 162 Pa. 567, 29 Atl. 715.

And testimony of persons who visited the testator, that they found him asleep, and that he seemed to be in a stupor, and muttered incoherently, will not warrent the submission of an issue as to his testamentary capacity, where he had taken chloral by order of his physician, and the lawyer who drew the will and the attesting witnesses testify that he was of sound mind. *Hamilton's Estate*, 16 Pa. Co. Ct. 303.

And evidence of trifling acts on the part of a testator, indicating incapacity, and the testimony of a physician that he was a little peculiar, and had symptoms of softening of the brain, and was childish, do not warrant sending an issue to the jury as to testamentary

sumption of capacity,[94] nor evidence which would not justify finding a verdict against the will.[95] But it should be granted where the evidence is such that if believed by the jury, a verdict against a will would be sustained,[96] and a finding of the jury upon the question of testamentary capacity is conclusive unless clearly against the weight of evidence.[97] And a verdict or finding either for or against a will will not be set aside on appeal, where there was a conflict of the evidence as to capacity.[98]

98. Equity cases.— Likewise in equity cases involving questions of

capacity, where another physician, with better opportunities for judging, testifies to the contrary, and there was other overwhelming proof of capacity. *Newlin's Estate*, 7 Pa. Co. Ct. 648.

[94]*Hazzard's Estate*, 7 Pa. Co. Ct. 56. And see *Dobie* v. *Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801.

[95]*Lillibridge's Estate*, 133 Pa. 211, 19 Atl. 352; *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Knauss's Appeal*, 114 Pa. 10, 6 Atl. 394; *Eddey's Appeal*, 109 Pa. 406, 1 Atl. 425; *Comb's Appeal*, 105 Pa. 155; *Wilson* v. *Mitchell*, 101 Pa. 495; *Cauffman* v. *Long*, 82 Pa. 72; *De Haven's Appeal*, 75 Pa. 337; *Taylor's Estate*, 16 Phila. 274; *Newlin's Estate*, 7 Pa. Co. Ct. 648; *Loeser's Estate*, 3 Pa. Dist. R. 817; *Colgate's Estate*, 5 W. N. C. 170; *Frowert's Estate*, 2 W. N. C. 588; *Depuy's Estate*, 1 W. N. C. 212; *Boyer's Estate*, 166 Pa. 630, 31 Atl. 359; *Stokes* v. *Miller*, 10 W. N. C. 241; *Tallman's Estate*, 31 Pa. 359, 23 Atl. 986.

Evidence of forgetfulness upon the part of a testator, and inability to speak except in monosyllables, or to tell the time, and that he was avoided by his wife, and spoke of shoes as coffins, does not warrant an issue as to testamentary capacity, as against proof that his eyesight was weak and his hand paralyzed and that he came from a place where a certain kind of shoes were called coffins. *Gatley's Estate*, 4 Pa. Dist. R. 52.

[96]*Colgate's Estate*, 5 W. N. C. 170; *Schwilke's Appeal*, 100 Pa. 628; *Palmer's Estate*, 24 W. N. C. 159. And see *Ulmer's Appeal* (Pa.) 11 Cent. Rep. 403, 12 Atl. 686; *Fulbright* v. *Perry County*, 145 Mo. 432, 46 S. W. 955; *Schr* v. *Lindemann*, 153 Mo. 276, 54 S. W. 537; *Southworth* v. *Southworth*, 173 Mo. 59, 73 S. W. 129.

Proof in a will contest that a testator had been in the habit for years of dosing himself with morphine, opium, and other drugs, and that he believed that his family were conspired against him, and that, if not watched, his wife might poison him, justifies the submission of an issue to a jury, where the will disinherited two of his daughters because of the marriage of one of them to a man against whom he conceived a groundless antipathy, and of the presence of the other at the marriage. *Carter's Estate*, 11 Pa. Co. Ct. 140.

The validity of a will must be determined by a jury in England where the heir insists upon an issue, though all the attesting witnesses testify to the sanity of the testator. *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper Ch. 136, 15 Revised Rep. 93.

[97]*American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126; *Brown* v. *Bruce*, 19 U. C. Q. B. 35.

The question as to whether refusal to instruct the jury in a will contest that there was not sufficient legal evidence before them of mental incapacity was erroneous or not will not be considered on appeal, where the verdict was in favor of the proponent. *Moore* v. *McDonald*, 68 Md. 321, 12 Atl. 117.

[98]*Rogers* v. *Diamond*, 13 Ark. 475; *McDaniel* v. *Crosby*, 19 Ark. 533; *Petefish* v. *Becker*, 176 Ill. 448, 52 N. E. 71; *Smith* v. *James*, 72 Iowa, 515, 34 N. W. 309; *Hill* v. *Nash*, 41 Me. 585, 66 Am. Dec. 266; *Moyer* v. *Swygart*, 125 Ill. 267, 17 N. E. 450; *Harper* v. *Harper*, 1 Thomp. & C. 351; *Tillman* v. *Hatcher*, Rice L. 271.

Unless the preponderance of evidence is strongly against the finding. *Harper* v. *Harper*, 1 Thomp. & C. 351.

A determination against a will on the ground of testamentary incapacity will not be reversed though the testimony in its favor preponderates, where the court cannot say that the finding was so palpably against the weight of evidence

testamentary capacity it is proper that an issue should be framed and tried by a jury.[99] But the court has power to try the question without directing an issue,[100] or to set aside a verdict of a jury and grant a new trial if, in its opinion, the verdict ought not to stand.[101]

VII. Proof of incompetency,—weight, sufficiency.

a. General rules.

99. General insanity.—In order to defeat a will on the ground of incapacity of the testator, general insanity must be made out, or partial insanity, at the very time of executing it.[1] And the usual methods of testing the mental condition of a testator are by a review of his life, habits, and opinions, and a consideration of his recollection of past events, and his reason in regard to them, and by an examination of the particular circumstances of each case.[2] And it may be shown by evidence of physical or mental manifestations, and the opinions of professional witnesses as inferences of fact therefrom, the subject being partly within the range of common observation and partly within that of special medical experience.[3] And the number,

as to indicate opposition and prejudice. *Newcomb* v. *Newcomb*, 96 Ky. 120, 27 S. W. 997; *Brace* v. *Black*, 125 Ill. 33, 17 N. E. 66. But see *Bradley* v. *Palmer*, 193 Ill. 15, 61 N. E. 856.

But the fact that there was evidence on both sides in a will contest in which the question of testamentary capacity arose does not prevent the granting of a new trial on appeal, where the verdict was manifestly against the weight of evidence. *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732.

[99]*Guild* v. *Hull*, 127 Ill. 523, 20 N. E. 665; *Myatt* v. *Walker*, 44 Ill. 485.

[100]*Alexander* v. *Alexander*, 5 Ala. 517.

[101]*McElroy* v. *McElroy*, 5 Ala. 81.

An inquisition of lunacy, finding a testator a lunatic at the time of the execution of his will, is not conclusive as to the right to the submission of the question of testamentary capacity to a jury, where the inquisition was traversed, but the issue was never tried by reason of his death. *Dyre's Estate*, 12 Phila. 156.

[1]*Lee* v. *Lee*, 4 McCord L. 183, 17 Am. Dec. 722.

[2]*Davis* v. *Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Beaubien* v. *Cicotte* 12 Mich. 459; *Young* v. *Ridenbaugh*, 67 Mo. 574; *Young* v. *Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Austen* v. *Graham*, 29 Eng. L. & Eq. Rep. 38, 8 Moore P. C. C. 493; *Nichols* v. *Binns*, 1 Swabey & T. 239. And see *Sanders* v. *Blakley*, 21 Ky. L. Rep. 1321, 55 S. W. 10; *Stebbins* v. *Hart*, 4 Dem. 501.

So, insanity or weakness of mind over which undue influence was exerted must be affirmatively proved in a will contest, and cannot be established by surmise or supposition. *Allen* v. *Public Administrator*, 1 Bradf. 378.

[3]*Kempsey* v. *McGinniss*, 21 Mich. 123; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18.

To invalidate a will, proof of incompetency or of undue influence need not be positive as distinguished from circumstantial. *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432.

Nor is it necessary that insanity should appear on the face of a will in order to invalidate it on that ground. *Fowlis* v. *Davidson*, 6 Notes of Cases, 461.

intelligence, and character of the witnesses should have great weight with the jury.[4]

100. Partial insanity and delusion.— Proof as to partial insanity or delusion, to invalidate a will, must, in general, be more clear and satisfactory and direct and full than is required of proof of general insanity.[5] Delusive ideas, however, which ought to receive their condemnation and expulsion at once from the simple action of the senses, and those opposed to the simple, ordinary, and universal action of reason in healthy minds, are of themselves proof of insanity.[6] And a delusion, though insufficient to establish testamentary incapacity, is proper to be considered with reference to the question of mental weakness.[7] And in determining as to the continued existence of a delusion, the contents of the will and the circumstances under which it was executed may be taken into consideration.[8] The mere nonmanifestation at any particular time of a delusion previously existing will not show its nonexistence.[9] But delusion, though in connection with the subject-matter, and though combined with habits of intoxication, does not necessarily show incompetency;[10]

[4]*Lee* v. *Lee*, 4 McCord L. 183, 17 Am. Dec. 722.

Where the evidence is conflicting in a will contest as to the sanity of a testator, the question is not whether the facts adduced in support of the sanity are not, in general, indications of sanity, but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced by the other side. *Steed* v. *Calley*, 1 Keen, 620.

Instructions as to mental capacity should be based on the evidence. *Powers* v. *Powers*, 21 Ky. L. Rep. 597, 52 S. W. 845.

[5]*Mullins* v. *Cottrell*, 41 Miss. 291.

Mental unsoundness cannot be inferred from an apparently careless assertion by a testator that he had been robbed and was destitute. *Rodger's Estate*, 19 W. N. C. 383.

And an opinion held by a testator that his daughter had misused and mistreated him, though shown in connection with her opinion that she had not done so, does not justify an instruction in a will contest as to the fact of an insane delusion. *Shorb* v. *Brubaker*, 94 Ind. 165.

[6]*Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18.

Insane jealousy on the part of a husband, without cause, and evidence that he frequently denied the paternity of his children, and abused his wife, and finally shot her, and then committed suicide, are sufficient to show testamentary incapacity. *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118.

[7]*Re Storey*, 20 Ill. App. 183.

Evidence that a testatrix sought to escape an imaginary robber and believed that her brother had killed seven men and cut them up and then threw them into a well, and that she destroyed her bed and clothing, and that she told one of the witnesses that her son and a young lady had procured a large kettle for the purpose of boiling her in it, and that she was very miserly, and feared that her son would poison her, does not show habitual insanity which will shift the burden of proof that her will was made during a lucid interval, where such occasions were far apart and remote from the will. *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701.

[8]*Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562.

[9]*Grimani* v. *Draper*, 6 Notes of Cases, 418.

[10]*Re Smith*, 53 N. Y. S. R. 658, 24 N. Y. Supp. 928.

A belief upon the part of a testator that his only son was illegitimate, based upon reports and stories he had heard

though the rule is different when the delusion is likely to affect the testamentary provision.[11]

b. By attesting witnesses and others present.

101. Cogency and necessity of.— The testimony of subscribing witnesses to a will concerning the testator's mental condition and the attendant circumstances is entitled to great weight upon the question of testamentary capacity, where they are truthful and intelligent.[12] And so is that of the attending physician.[13] And the rule has been laid down that subscribing as a witness to a will is an assertion by the subscriber that the testator was of sound mind at the time,[14] and that proof of his signature is prima facie evidence of competency,[15] though this has been denied.[16] Proof by only one of two or more subscribing witnesses has usually been held insufficient to establish sanity or capacity where proof of that fact is required to be made.[17] In the

a short time after marriage, but which had never been communicated to any one excepting his priest and to his wife while he was intoxicated, is not such an insane delusion as will invalidate a will made by him disinheriting such son. *Ibid.*

[11]*Waters* v. *Cullen*, 2 Bradf. 354. And see *Edge* v. *Edge*, 38 N. J. Eq. 211.

[12]*Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Sheldon* v. *Dow*, 1 Dem. 503; *Clark* v. *Ellis*, 9 Or. 128; *Cornelius* v. *Cornelius*, 52 N. C. (7 Jones L.) 593; *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412. And see *Savage* v. *Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361; *Richmond's Estate*, 206 Pa. 219, 55 Atl. 970.

Where a will appears to be fair, and the subscribing witnesses who testified to capacity were above suspicion, and aware of, and competent to perform, their duty, an incapacity which will invalidate the will should be established by facts showing a defect of mind existing in a form that might not have been detected. *Means* v. *Means*, 5 Strobh. L. 167. And see also *Chaney* v. *Price*, 90 Hun, 238, 37 N. Y. Supp. 117.

And evidence that a testator was afflicted with the delirium of typhoid fever, which was intermittent, approaching very near to the time of the execution of his will, will not invalidate it, as against evidence of consciousness and rationality given by subscribing witnesses and others present at the time. *Re Bush*, 1 Connoly, 403, 5 N. Y. Supp. 23.

[13]*Cornelius* v. *Cornelius*, 52 N. C. (7 Jones L.) 593. And see *Savage* v. *Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361.

Evidence of other persons present at the execution of a will is to be chiefly relied upon, on the question of testamentary capacity, next after that of the attesting witnesses. *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

[14]*Egbert* v. *Egbert*, 78 Pa. 326; *Harden* v. *Hays*, 9 Pa. 151; *Sellars* v. *Sellars*, 2 Heisk. 430. And see *Scribner* v. *Crane*, 2 Paige, 147, 21 Am. Dec. 81.

[15]*Harden* v. *Hays*, 9 Pa. 151; *Heyward* v. *Hazard*, 1 Bay, 335; *Evans* v. *Arnold*, 52 Ga. 169.

But an instruction in a will contest that it is presumed from the oath of the subscribing witnesses that the testator was of sound mind and memory is erroneous as tending to lead the jury to belief that the presumption is conclusive. *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740.

[16]*Baxter* v. *Abbott*, 7 Gray, 71.

Where the attesting witnesses to a will are dead, there is no presumption that, if living, they would testify that the testator was of sound mind when he made his will. *Boardman* v. *Woodman*, 47 N. H. 120; *Flanders* v. *Davis*, 19 N. H. 139.

[17]See *Allison* v. *Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Weld* v. *Sweeney*, 85 Ill.

absence of such requirement, however, the contestant of a will is not limited to the testimony of the subscribed witnesses of the will, but is entitled to introduce any competent testimony as to mental capacity of the testator.[18]

102. Value.— But while evidence as to testamentary capacity by the subscribing witnesses satisfies the burden of proof resting upon the proponent of a will, making it the duty of the jury to determine the question of capacity from the weight of all the evidence,[19] such evidence is not invested with any fictitious value beyond what it is worth under the usual rules governing the value of other testimony.[20] And it is not entitled to greater weight than that of other persons having equal opportunities.[21]

50; *Withinton* v. *Withinton*, 7 Mo. 589; *Ramsdell* v. *Viele*, 6 Dem. 244; *Swenarton* v. *Hancock*, 9 Abb. N. C. 326.

The subscribing witnesses to a will are deemed, as a general rule, to have been placed around the testator to ascertain and judge as to his capacity, and are required to be produced, if living, and subjected to the process of the court. *Chase* v. *Lincoln*, 3 Mass. 237; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper, Ch. 136, 15 Revised Rep. 93.

And a failure to examine a scrivener who wrote a will, and the subscribing witnesses, to uphold it in a doubtful case on the question of testamentary capacity, is a material and damaging circumstance against its validity. *Ulmer's Appeal* (Pa.) 11 Cent. Rep. 403, 12 Atl. 686.

And a will should not be admitted to probate where the attesting witnesses testify merely to the signature of the testator, and it is proved that he had previously been a person of imbecile mind. *Starnes* v. *Marten*, 1 Curt. Eccl. Rep. 294; *Evans* v. *Arnold*, 52 Ga. 169.

But where a will is merely required to be attested by two witnesses, it may be proved by one of them testifying to the attestation by the other and the competency of the testator, though the other does not testify. *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

So, in *Huff* v. *Huff*, 41 Ga. 696, it was held that the inability of the subscribing witnesses to a will to testify as to testamentary capacity does not invalidate the will, but goes only to the credibility of the witnesses.

And in *Cilley* v. *Cilley*, 34 Me. 162, it was held to be unnecessary that the subscribing witnesses to a will should state their opinions as to the testator's mental capacity, since such opinions are necessarily mere inferences drawn from facts observed; and the same was held in *Re Wells*, 96 Me. 161, 51 Atl. 868.

[18] *Ashworth* v. *McNamee* (Colo. App.) 70 Pac. 156; *Re D'Avignon*, 12 Colo. App. 489, 55 Pac. 936.

[19] *Pendlay* v. *Eaton*, 130 Ill. 69, 22 N. E. 853; *Wilbur* v. *Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Gavitt* v. *Moulton*, (Wis.) 96 N. W. 395.

The burden of proof is not shifted in a will contest by evidence of subscribing witnesses of testamentary capacity, under a statutory provision that every person of sound mind may make a will. *Crowninshield* v. *Crowninshield*, 2 Gray, 524.

[20] *Thornton* v. *Thornton*, 39 Vt. 132; *McTaggart* v. *Thompson*, 14 Pa. 149.

Refusal to instruct the jury in a will contest that certain testimony against sanity creates a strong presumption against the validity of the will is not erroneous, though the testimony was that of an attesting witness, and though he was also the testator's attending physician. *Thornton* v. *Thornton*, 39 Vt. 132.

But the fact that the attesting witnesses to the will are the witnesses of the court, and not of either party, is to be taken into consideration on the question of testamentary capacity in a will contest. *Bootle* v. *Blundell*, 9 Ves. Jr. 494, Cooper, Ch. 136, 15 Revised Rep. 93.

[21] *King* v. *Rowan* (Miss.) 34 So. 325.

But an instruction in a will contest that ordinarily those witnesses who

103. Denial of competency; self-contradiction.— A will may be established against the testimony of a subscribing witness who testifies to the testator's incapacity,[22] such witness not being debarred by any rule of law from so testifying.[23] But when subscribing witnesses testify to the want of testamentary capacity in opposition to the fair significance and import of their act of attestation, it detracts largely from the weight which would otherwise be given to their opinions.[24] And such evidence, though admissible, will be received with the most scrupulous jealousy,[25] though it is sufficient as against weak evidence of competency.[26]

c. The act itself.

104. Preparation of instrument.— The fact that a sensible and judicious will was written by the testator himself is strong evidence of

come nearest to the very time of making the will would be most valuable if they seem worthy of credit, and that, therefore, the testimony of the subscribing witnesses is to be carefully considered, is not objectionable as telling the jury that their testimony was entitled to greater weight than that of other witnesses having the same means of knowledge. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[22]*Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Maupin* v. *Wools*, 1 Duv. 223; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Seehrest* v. *Edwards*, 4 Met. (Ky.) 163; *Jenkins's Will*, 43 Wis. 610; *Le Breton* v. *Fletcher*, 2 Hagg. Eccl. Rep. 558; *Lowe* v. *Jolliffe*, 1 W. Bl. 365; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper, Ch. 136, 15 Revised Rep. 93.

A subscribing witness to a will, testifying against sanity, may be contradicted by the party calling him, by reading his evidence at a former trial, or by proof of declarations made by him at other times. *Harden* v. *Hays*, 9 Pa. 151.

And evidence of one attesting witness that the testator was incompetent will not affect the validity of the will as against testimony of the other in favor of capacity, where the testimony of the former was at variance with previous statements made by him. *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

[23]*Garrison* v. *Blanton*, 48 Tex. 299; *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

So, in *Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419, it was held that it is not necessary that the attesting witnesses to a will should be called, or that, when called, they should concur in their testimony.

[24]*Re Storey*, 20 Ill. App. 183; *McMeekin* v. *McMeekin*, 2 Bush, 79; *Garrison* v. *Garrison*, 15 N. J. Eq. 266; *Cook's Estate*, 16 Phila. 322; *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Re Lewis*, 51 Wis. 101, 7 N. W. 829; *Jones* v. *Goodrich*, 5 Moore P. C. C. 16.

[25]*Hoerth* v. *Zable*, 92 Ky. 202, 17 S. W. 360; *Cook's Estate*, 41 Phila. Leg. Int. 6; *Lambert* v. *Cooper*, 29 Gratt. 61; *Young* v. *Barner*, 27 Gratt. 96; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper, Ch. 136, 15 Revised Rep. 93; *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

Where the subscribing witnesses to a will disagree as to the testator's capacity, other proof may be given, leaving the jury to decide upon the whole evidence. *Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419.

And a subscribing witness who contradicts his own attestation by statement that the testator was incompetent may be a good witness to support another witness with reference to other matters *Broome* v. *Ellis*, 2 Lee, Eccl. Rep. 523.

[26]*James White Memorial Home* v. *Haeg*, 204 Ill. 422, 68 N. E. 568.

testamentary capacity at the time of making it.[27] It is prima facie evidence of competency, casting the burden of proof upon those alleging incapacity, to repel the presumption of capacity.[28] And the fact that the testator procured an attorney to prepare his will, and dictated its terms and provisions, is also cogent evidence of capacity.[29] And the evidence of unsoundness to defeat a will written or dictated by the testator without prompting, which is in itself intelligent and consistent, disposing of all his property, must be very strong and convincing.[30] A will not shown to have been written by the testator,

[27]*Overton* v. *Overton*, 18 B. Mon. 61; *Weir's Will*, 9 Dana, 434; *Violet's Will*, 1 Bibb. 617; *M'Daniel's Will*, 2 J. J. Marsh. 331; *Coghlan* v. *Coghlan*, cited in 1 Phillim. Eccl. Rep. 120; *Fulleck* v. *Allinson*, 3 Hagg. Eccl. Rep. 527; *Singer* v. *Isbey*, 4 Lanc. L. Rev. 193; *Berrien's Will*, 35 N. Y. S. R. 255, 12 N. Y. Supp. 585; *Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. Rep. 415. And see *Pencoast* v. *Graham*, 15 N. J. Eq. 294; *Kinne* v. *Johnson*, 60 Barb. 69; *Cutler* v. *Cutler*, 103 Wis. 258, 79 N. W. 240.

An instruction in a will contest that, unless the evidence shows that the testator was of sound mind, the will cannot be regarded as his will, however drawn, is not objectionable as withdrawing it from the consideration of the jury as evidence of testamentary capacity. *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179.

[28]*Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489. And see *Barry* v. *Butlin*, 2 Moore, P. C. C. 482.

[29]*Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627; *Wood* v. *Carpenter*, 166 Mo. 465, 66 S. W. 172; *Fulleck* v. *Allinson*, 3 Hagg. Eccl. Rep. 527; *White* v. *Ross*, 48 N. Y. S. R. 599, 20 N. Y. Supp. 520.

The accurate recollection of a testator of instruction given for the preparation of his will until some time afterwards is cogent evidence of capacity, though his mind was impaired. *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Napfle's Estate*, 134 Pa. 492, 19 Atl. 679.

And a testator will not be held incompetent, where, after his will was read over to him, he objected to it as not being as he wanted it, and directed that it be drafted differently. *Stuyvesant* v. *Wilcox*, 92 Mich. 228, 52 N. W. 617.

But mere proof that a testator answered questions relating to his will at the time of its execution is not sufficient to establish testamentary capacity. *Goldie* v. *Murray*, 6 Jur. 608.

[30]*Singer* v. *Isbey*, 4 Lanc. L. Rev. 193. And see *Wright's Estate*, 202 Pa. 395, 51 Atl. 1031; *Gavitt* v. *Moulton* (Wis.) 96 N. W. 395.

The fact that a testator either wrote or dictated his will shows his mental and physical capability of doing whatever the instrument shows was done, leaving only the question whether or not the will on its face indicated that it emanated from an unsound mind. *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627.

And a will made by the testator himself, making just disposition of his property, which was not procured by duress or undue influence, will be sustained as against evidence of age and its attending infirmities. *Watson* v. *Watson*, 2 B. Mon. 74; *Coghlan* v. *Coghlan*, cited in 1 Phillim. Eccl. Rep. 120; *Pensyl's Estate*, 157 Pa. 465, 27 Atl. 669.

Or as against evidence of forgetfulness, incoherency, unreasonableness, and inability to understand. *Pilling* v. *Pilling*, 45 Barb. 86.

Or as against evidence that he was weak-minded, and spoke disconnectedly, and talked to himself, and never attended to business. *Errickson* v. *Fields*, 30 N. J. Eq. 634.

Or as against a strong array of medical and other testimony against sanity. *Pancoast* v. *Graham*, 15 N. J. Eq. 294; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627.

And the facts that a will was dictated to a strange attorney, who knew nothing of the testator's property, family, or testamentary purposes, and that the will itself evidenced an intelligent understanding of its terms and knowledge of the claims upon his bounty, are sufficient to show that the will represent-

however, or in pursuance of suggestions given by him, is not of itself evidence of testamentary capacity.[31]

105. Rationality of the will.— It is permissible to inquire on the question of testamentary capacity whether a will is just and reasonable and consonant with the state of the testator's family relations.[32] The rationality of the will is a circumstance in favor of capacity where capacity is doubtful.[33] And the production of a will executed according to law, which is rational on its face, furnishes a prima facie case of testamentary capacity.[34] And rationality and equality in a will made without dictation from others have been held to be conclusive evidence of sanity.[35] So, a much greater degree of evidence is

ed his intentions. *Dickie* v. *Van Vleck*, 5 Redf. 284.

[31]*Singer* v. *Isbey*, 4 Lane. L. Rev. 193.

A will cannot be deemed the act of a testator, where he was very old and infirm and deaf, and almost blind, and it was drawn from directions given by the executor, and no instructions are proved to have been given by him. *Sankey* v. *Lilley*, 1 Curt. Eccl. Rep. 391.

And a will of a woman, made on her dying bed the day before death, when she could neither speak nor sign her name, and after she had, when in health, expressed a determination to make no will, and her principal beneficiary, who had no special place in her affections, listened to her supposed whispered instructions and reported them to the draftsman, and remained present while the paper was read over and executed, and when she answered the question whether she acknowledged the mark as her signature by saying she did not know whether she did or not, should not be admitted to probate. *Re Hopkins*, 26 N. Y. Week. Dig. 97.

So, the fact that the name of a testator, signed to his will, is written and spelled differently from his usual mode, is a circumstance for the consideration of the jury on the question of testamentary capacity. *McMeechen* v. *McMeechen*, 17 W. Va. 683, 41 Am. Rep. 682.

[32]*Fountain* v. *Brown*, 38 Ala. 72; *Denison's Appeal*, 29 Conn. 399; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Evans* v. *Arnold*, 52 Ga. 169; *Gombault* v. *Public Administrator*, 4 Bradf. 226; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Scruby* v. *Fordham*, 1 Addams Eccl. Rep. 90.

But a bequest in a will exceeding the amount of the testator's estate, though it may be a circumstance which would aid a case of doubtful capacity, is not in itself sufficient to impeach a will. *Tunison* v. *Tunison*, 4 Bradf. 138.

And a will giving a legacy to a dead sister of the testatrix does not tend to show want of testamentary capacity, where it does not appear that she knew of her death when she made the will. *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

And a mistake in a will, as to the testator's age, and as to the order in which his daughters were born, and in calling adopted children grandchildren, will not invalidate it as against direct evidence of vigor of mind. *Mairs* v. *Freeman*, 3 Redf. 181.

[33]*Griffin* v. *Griffin*, R. M. Charlt. (Ga.) 217; *Weir's Will*, 9 Dana, 434; *Kinne* v *Johnson*, 60 Barb. 69; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. Rep. 415.

[34]*McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Chandler* v. *Barrett*, 21 La. Ann. 58. 99 Am. Dec. 701; *Savage* v. *Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361; *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577, 15 So. 297; *Pancoast* v. *Graham*, 15 N. J. Eq. 294; *Symes* v. *Green*, 5 Jur. N. S. 742, 1 Swabey & T. 401, 28 L. J. Prob. N. S. 83.

But an inquiry as to the validity of a will on the question of testamentary capacity is not cut off by proof of facts tending to vindicate the wisdom and fitness of the appointment of an executor. *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543.

[35]*M'Daniel's Will*, 2 J. J. Marsh. 331. And see *Kempsey* v. *McGinniss*, 21 Mich. 141; *Spencer* v. *Terry*, 127 Mich. 420,

required to support a will showing folly or frenzy than one purporting to give effect to probable and rational intentions.[36] And a will will not be upheld where it appears that the testator had been afflicted with a delusion affecting its provisions, the continued existence of which he was instructed to conceal, though the will was rational and properly executed.[37] Irrationality in a will, at least when it is of so extreme a character as to indicate the existence of an insane delusion affecting its provisions, is sufficient to avoid it,[38] though the mere exclusion of heirs will not;[39] and the presumption of incapacity and insanity arising from the existence of a previous delusion is not overcome by the opinion of the testator's medical attendant, that she had recovered, and evidence that her will contained a probable disposition, and was made under instructions favoring capacity.[40] Due allowance, however, must be made for caprice in judging of the reasonableness of a will.[41] And mere obscurity of language in a will is not

86 N. W. 998; *Spencer* v. *Terry* (Mich.) 94 N. W. 372; *Re Lawrence*, 48 App. Div. 83, 62 N. Y. Supp. 673.

But a charge in a will contest to the effect that the will itself is the best evidence of sanity is objectionable as an instruction upon the weight of evidence. *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179.

[36] *Evans* v. *Knight*, 1 Addams Eccl. Rep. 229.

But while a state of mind unfavorable to capacity might be inferred from a bequest of property which the testator did not own, it ought not to prevail against positive testimony showing capacity. *Marks* v. *Bryant*, 4 Hen. & M. 91.

[37] *Prinsep* v. *Dyce Sombre*, 10 Moore P. C. C. 232; *Dyce Sombre* v. *Troup*, Deane & S. 22. And see *Symes* v. *Green*, 5 Jur. N. S. 742, 1 Swabey & T. 401, 28 L. J. Prob. N. S. 83.

[38] See *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Re Ramsdell*, 20 N. Y. S. R. 466, 3 N. Y. Supp. 499; *Cooper* v. *Benedict*, 3 Dem. 136; *Re Lockwood*, 2 Connoly, 118, 8 N. Y. Supp. 345.

A declaration on the part of a testator of considerable wealth, that he wished to put it where it would roll up to the day of judgment, pursuant to which he willed it to an association, is evidence of an insane delusion which will invalidate his will. *American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126.

And a will disinheriting a sister, nieces, and nephews, for all of whom the testator entertained a friendly feeling, giving his property to a church association, not to advance the cause of religion, but with the idea that his body would be preserved to the end of time by means of a metallic coffin, or otherwise, is invalid. *Morse* v. *Scott*, 4 Dem. 507.

[39] *Perkins* v. *Perkins*, 116 Iowa, 253, 90 N. W. 55; *Spencer* v. *Terry*, 127 Mich. 420, 86 N. W. 998; *Spencer* v. *Terry* (Mich.) 94 N. W. 372.

And the jury in a will contest should not be so instructed as to permit them to make rationality or disposition a test of competency. *Warren* v. *O'Connell*, 23 Ky. L. Rep. 262, 62 S. W. 890; *Woodford* v. *Buckner*, 23 Ky. L. Rep. 627, 63 S. W. 617.

[40] *Johnson* v. *Blane*, 6 Notes of Cases, 442.

The fact that the provisions of a will were wise and judicious does not prevent the shifting to the proponent of the burden of proof to show sanity, upon a showing of previous habitual insanity. *Chandler* v. *Barrett*, 21 La. Ann. 58.

[41] *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 14 Am. Dec. 656.

The act of a testator in placing speculative values upon his property, though perhaps a slight circumstance, when connected with other facts tending to show testamentary incapacity, does not show an imbecile mind. *Stokes* v. *Shippen*, 13 Bush, 183.

And a will giving various legacies and leaving the residue of the testator's es-

evidence of testamentary incapacity, where the testator comprehended its meaning and expressed his ideas correctly.[42] And a testamentary disposition which is indefinite should not be construed so as to be so absurd as to indicate unsoundness of mind, where it is capable of a construction which would be more reasonable.[43]

106. Equality and justice of the provisions.—The reasonableness, equality, and consistency of the dispositions of a will are a proper subject for consideration on the question of testamentary capacity, particularly when the evidence is conflicting.[44] The evidence offered by the fact that a will was apparently rational, just, and prudent, and dictated by a testator of self-poised mind, outweighs the mere opinions of witnesses that he was incompetent.[45] And the unequal distribution of a testator's estate among the different persons who should have been the objects of his bounty is a suspicious circumstance, and should go to the jury on the question of mental incapacity,[46] and undue influence.[47] A testator of sound mind, however, may dispose

tate to the poor of a designated city, for the erection of a cenotaph therein, inscribed with his name, is not so absurd and irrational as to invalidate the will, where the testator was familiar with the beliefs, habits, and superstitions existing in that place. *Austen* v. *Graham*, 29 Eng. L. & Eq. Rep. 38, 8 Moore P. C. C. 493.

[42]*Re Soule*, 1 Connoly, 18, 3 N. Y. Supp. 259; *Temple* v. *Temple*, 1 Hen. & M. 476.

[43]*Weir's Will*, 9 Dana, 434.

But a will devising land for homesteads, describing it in such a manner as to be about a mile long and only a few rods wide, and entirely worthless for homestead purposes, furnishes cogent evidence that the testator did not know what he was doing. *Lawrence* v. *Steel*, 66 N. C. 584.

[44]*Young* v. *Barner*, 27 Gratt. 96; *Sim* v. *Russell*, 90 Iowa, 656, 57 N. W. 601; *Gombault* v. *Public Administrator*, 4 Bradf. 226; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Frazer* v. *Frazer*, 2 Del. Ch. 260. And see *Howard's Will*, 5 T. B. Mon. 190, 17 Am. Dec. 60.

But the will of a person who is *non compos mentis* is invalid, however just and prudent its provisions are. *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329.

[45]*McMeekin* v. *McMeekin*, 2 Bush, 79; *Griffin* v. *Griffin*, R. M. Charlt. (Ga.) 217. And see *Singer* v. *Isbey*, 4 Lanc. L. Rev. 193.

[46]*Tobin* v. *Jenkins*, 29 Ark. 151; *Hughes* v. *Hughes*, 31 Ala. 519; *Knox* v. *Knox*, 95 Ala. 495, 36 Am. St. Rep. 235, 11 So. 125; *Coleman* v. *Robertson*, 17 Ala. 84; *Roberts* v. *Trawick*, 13 Ala. 68; *Salisbury* v. *Aldrich*, 118 Ill. 199, 8 N. E. 777; *Conway* v. *Vizzard*, 122 Ind. 266, 23 N. E. 771; *Lamb* v. *Lamb*, 105 Ind. 456, 5 N. E. 171; *Addington* v. *Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Broaddus* v. *Broaddus*, 10 Bush, 299; *Davis* v. *Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Gamble* v. *Gamble*, 39 Barb. 373; *Esterbrook* v. *Gardner*, 2 Dem. 543; *Thompson* v. *Kyner*, 65 Pa. 368; *Thomas* v. *Carter*, 170 Pa. 272, 50 Am. St. Rep. 770, 33 Atl. 81. And see *Re Rounds*, 25 Misc. 101, 54 N. Y. Supp. 710; *Re Weil*, 16 N. Y. S. R. 1, 1 N. Y. Supp. 91; *Re Dorman*, 5 Dem. 112.

Gross inequality, without reason therefor appearing in the will itself, renders necessary satisfactory evidence that the will was the free and deliberate offspring of a disposing mind. *Harrel* v. *Harrel*, 1 Duv. 203.

And while the omission of a testator to provide for part of his children in his will is not alone sufficient to establish testamentary incapacity, it is entitled to great consideration on that question when not satisfactorily accounted for. *Gobel* v. *Grant*, 3 N. J. Eq. 629; *Colhoun* v. *Jones*, 2 Redf. 34.

[47]*Bledsoe* v. *Bledsoe*, 8 Ky. L. Rep. 55, 1 S. W. 10; *Reynolds* v. *Root*, 62 Barb. 250. And see *Muller* v. *St. Louis Hospital Asso.* 73 Mo. 242.

Inequality is entitled to weight in a

of his property contrary to the dictates of duty and natural and moral obligations if he chooses.[48] And the fact that a will was harsh, capricious, and unjust will not affect its validity.[49] Nor will the fact that its provisions are imprudent, and not to be accounted for;[50] or that it was not such a will as was to be expected from one in the testator's situation,[51] or because its provisions were not to be regarded as morally right,[52] or because of the exhibition in the will of moral

will contest on the question of testamentary capacity, fraud, or controlling influence, in proportion to its degree of flagrancy; and, unexplained, and combined with other corroborating evidence, it may be of some weight. *Kevil* v. *Kevil*, 2 Bush, 614.

[48]*Bulger* v. *Ross*, 98 Ala. 267, 12 So. 803; *Hoerth* v. *Zable*, 92 Ky. 202, 17 S. W. 360; *King* v. *Rowan* (Miss.) 34 So. 325; *Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Re Dietz*, 41 N. J. Eq. 284, 7 Atl. 443; *Boylan* v. *Meeker*, 28 N. J. L. 274; *Van Pelt* v. *Van Pelt*, 30 Barb. 134; *Re Liddy*, 2 Silv. Sup. Ct. 223, 5 N. Y. Supp. 636; *Hazard* v. *Hazard*, 5 Thomp. & C. 79; *La Bau* v. *Vanderbilt*, 3 Redf. 384; *Lee* v. *Lee*, 4 McCord L. 183, 17 Am. Dec. 722; *Couch* v. *Eastham*, 29 W. Va. 784, 3 S. E. 23. And see *Re Gleespin*, 26 N. J. Eq. 523; *Wintermute* v. *Wilson*, 28 N. J. Eq. 437; *Coleman* v. *Robertson*, 17 Ala. 84; *Rutherford* v. *Morris*, 77 Ill. 397.

The affections of a testator, rather than the apparent equality or justice of the distribution, are the true test of a natural will. *Lucas* v. *Parsons*, 27 Ga. 595.

[49]*Sefton* v. *Hopwood*, 1 Fost. & F. 578; *Gamble* v. *Gamble*, 39 Barb. 373; *Seguine* v. *Seguine*, 3 Keyes, 663; *Clapp* v. *Fullerton*, 34 N. Y. 196, 90 Am. Dec. 681; *Re Otis*, 1 Misc. 258, 22 N. Y. Supp. 1060; *Hoyt* v. *Hoyt*, 9 N. Y. S. R. 731; *Boylan* v. *Meeker*, 28 N. J. L. 274; *Sanderson* v. *Sanderson*, 52 N. J. Eq. 243, 30 Atl. 326; *Nicholas* v. *Kershner*, 20 W. Va. 251.

[50]*Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Burr* v. *Davall*, 8 Mod. 59; *Davis* v. *Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282.

A will is not invalidated by the fact that the testator omitted to mention some of his children in it. *Snow* v. *Benton*, 28 Ill. 306; *Addington* v. *Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Bledsoe* v. *Bledsoe*, 8 Ky. L. Rep. 55, 1 S. W. 10; *Re Springstead*, 28 N. Y. S. R. 186, 8 N. Y. Supp. 596; *Clark* v. *Ellis*, 9 Or. 128; *Cook's Estate*, 16 Phila. 322; *Kirkwood* v. *Gordon*, 7 Rich. L. 478, 62 Am. Dec. 418.

And the fact that a testator distributes his property among certain of his relatives, entirely omitting others, does not tend to show testamentary incapacity. *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627. And see *Morris* v. *Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287.

And bequeathing one's property to strangers instead of to relatives raises no inference of testamentary incapacity, where it was done from motives of gratitude or personal attachment. *Re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *Re Finn*, 1 Misc. 280, 22 N. Y. Supp. 1066; *Smith* v. *James*, 72 Iowa, 514, 34 N. W. 309; *Collins* v. *Brazill*, 63 Iowa, 434, 19 N. W. 338; *Lucas* v. *Parsons*, 27 Ga. 595.

[51]*Watson* v. *Donnelly*, 28 Barb. 653; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132. And see *Riggin* v. *Westminster College*, 160 Mo. 570, 61 S. W. 803.

A will devoting a large portion of the testator's estate to the purpose of aiding in the payment of debt incurred in subduing the Rebellion is not so unreasonable as to furnish evidence of testamentary incapacity. *Re Lewis*, 33 N. J. Eq. 219.

And the fact that a woman gave her property to her paramour, whom she seriously thought of marrying, and her nurse who had been kind to her, is not such an unnatural disposition as would indicate testamentary incapacity, where it appears that she had entered into an irregular and dissolute life, and striven to cut loose from her kindred, and concealed her origin even from her intimates. *Re Hewitt*, 31 Misc. 81, 64 N. Y. Supp. 571. And see *Re Evans*, 37 Misc. 337, 75 N. Y. Supp. 491.

[52]*Martin* v. *Mitchell*, 28 Ga. 382; *Ross*

obliquity or prejudice,[53] or because of an unnatural or unequal disposition of property, where the testator was apparently of sound mind,[54] and not subject to undue influence.[55] And such circumstances, though evidence of incapacity, are not sufficient to raise a presumption thereof.[56] It is sufficient reason for setting aside a will, however, that it contains provisions whose monstrosity can only be explained on the hypothesis of insanity, or of submission to undue influence.[57] But unless a will carries clear marks upon its face of being the product of a diseased mind, its injustice or unreasonable-

v. *Christman*, 23 N. C. (1 Ired. L.) 209; *Thompson* v. *Kyner*, 65 Pa. 368. And see *Deas* v. *Wandell*, 3 Thomp. & C. 128.

And a will making no provision for the testator's wife is not subject to attack on the ground of testamentary incapacity, where she had been cruel, and driven him from her house. *Re Wintermute*, 27 N. J. Eq. 447.

And the act of a mother in disinheriting her child does not show testamentary incapacity, where she gave her property to another, expecting, as she stated, that he would care for the child. *Re Walther*, 26 N. Y. S. R. 427, 7 N. Y. Supp. 417; *Munday* v. *Taylor*, 7 Bush, 491.

[53]*Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253. And see *Rankin* v. *Rankin*, 61 Mo. 295; *Clarke* v. *Davis*, 1 Redf. 249; *Barker* v. *Comins*, 110 Mass. 477.

[54]*Mosser* v. *Mosser*, 32 Ala. 551; *Blakey* v. *Blakey*, 33 Ala. 611; *Hughes* v. *Hughes*, 31 Ala. 519; *Coleman* v. *Robertson*, 17 Ala. 84; *Potts* v. *House*, 6 Ga. 328, 50 Am. Dec. 329; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Salisbury* v. *Aldrich*, 118 Ill. 199, 8 N. E. 777; *Meeker* v. *Meeker*, 75 Ill. 260; *Conway* v. *Vizzard*, 122 Ind. 266, 23 N. E. 771; *Kevil* v. *Kevil*, 2 Bush, 614; *Re Dietz*, 41 N. J. Eq. 284, 7 Atl. 443; *Boylan* v. *Meeker*, 28 N. J. L. 274; *Re Humphrey*, 26 N. J. Eq. 513; *Re Gleespin*, 26 N. J. Eq. 523; *Re Gross*, 25 N. Y. Week. Dig. 305; *Re Tracy*, 27 N. Y. Week. Dig. 280; *La Bau* v. *Vanderbilt*, 3 Redf. 284; *Van Pelt* v. *Van Pelt*, 30 Barb. 134; *Rowland* v. *Sullivan*, 4 Desauss. Eq. 518; *Nailing* v. *Nailing*, 2 Sneed, 630; *Couch* v. *Eastham*, 29 W. Va. 784, 3 S. E. 23.

The will of a woman sixty-seven years of age, though in feeble health, and though she once suffered a sunstroke that made her flighty for a time, will not be denied probate because it left half her small estate of $8,000 to religious bodies, when her sisters were indigent. *Wightman* v. *Stoddard*, 3 Bradf. 393.

[55]*Trezevant* v. *Rains*, 85 Tex. 329, 23 S. W. 890; *Ross* v. *Christman*, 23 N. C. (1 Ired. L.) 209.

Mere inequality, however great, though accompanied by evidence of impaired mind, is not evidence of undue influence. *Re Storer*, 28 Minn. 9, 8 N. W. 827.

And family differences, and likes and dislikes, are not to be considered in a will contest excepting as they bear upon the testator's mental capacity at the time of the execution of his will. *Lang's Estate*, 65 Cal. 19, 2 Pac. 491.

[56]*Knox* v. *Knox*, 95 Ala. 495, 36 Am. St. Rep. 235, 11 So. 125; *Shaw's Will*, 2 Redf. 107.

[57] See *Parfitt* v. *Lawless*, L. R. 2 Prob. 462, 41 L. J. Prob. N. S. 68, 27 L. T. N. S. 215, 21 Week. Rep. 200; *Horn* v. *Pullman*, 72 N. Y. 269; *Cudney* v. *Cudney*, 68 N. Y. 148; *Booth* v. *Kitchen*, 3 Redf. 52; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Kevil* v. *Kevil*, 2 Bush, 614; *Carpenter* v. *Calvert*, 83 Ill. 62; *Tingley* v. *Cowgill*, 48 Mo. 290; *Thomas* v. *Stump*, 62 Mo. 275; *Convey's Will*, 52 Iowa, 197, 2 N. W. 1084. But see *Fulton* v. *Andrew*, L. R. 7 H. L. Cas. 448, 44 L. J. Prob. N. S. 17, 32 L. T. N. S. 209, 23 Week. Rep. 566; *May* v. *Bradlee*, 127 Mass. 414; *Canada's Appeal*, 47 Conn. 450; *Griffith* v. *Diffenderffer*, 50 Md. 466; *Dennis* v. *Weekes*, 51 Ga. 24; *Lucas* v. *Cannon*, 13 Bush, 650; *Reynolds* v. *Adams*, 90 Ill. 134, 32 Am. Rep. 15; *Todd* v. *Fenton*, 66 Ind. 25; *Convey's Will*, 52 Iowa, 197, 2 N. W. 1084; *Muller* v. *St. Louis Hospital Asso.* 5 Mo. App. 390; *Mooney* v. *Olsen*, 22 Kan. 69.

And an unequal disposition of property, when there was other evidence of undue influence and mental incapacity, may be considered with such other evi-

ness ought not to be a foundation for a verdict against it.[58] It is improper, however, for the court to single out inequality of disposition in a will contest and tell the jury that the testator had a right to make such distribution as he chose, without also telling them that any gross inequality requires evidence that it was the act of a rational mind.[59]

107. Conformity to previous intentions.—Conformity of a will with previously-formed intentions when the testator was unquestionably sane constitutes an important item of evidence to be considered in determining the validity of a will.[60] And declarations of a testator with reference to the intended disposition of his estate, corresponding with the provisions of his will, are strong evidence in support of it;[61] especially when taken in connection with other testimony as to sanity

dence in a will contest, in determining as to their existence. *Schieffelin* v. *Schieffelin*, 127 Ala. 14, 28 So. 687.

[58]*Boylan* v. *Meeker*, 28 N. J. L. 274; *Collins* v. *Osborn*, 34 N. J. Eq. 511; *La Bau* v. *Vanderbilt*, 3 Redf. 384; *Spencer* v. *Terry*, 127 Mich. 420, 86 N. W. 998; *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 902. And see *Means* v. *Means*, 5 Strobh. L. 167.

An unequal disposition of her property by a testatrix does not *per se* authorize an inference that she was of insane mind. *Schieffelin* v. *Schieffelin*, 127 Ala. 14, 28 So. 687.

An injudicious will, though it will be regarded with suspicion, will not be regarded as evidence of testamentary incapacity where it can be accounted for on any other reasonable hypothesis. *Smith* v. *Smith*, 48 N. J. Eq. 566, 25 Atl. 11.

[59]*Sherley* v. *Sherley*, 81 Ky. 240; *Bledsoe* v. *Bledsoe*, 8 Ky. L. Rep. 55, 1 S. W. 10; *Carpenter* v. *Calvert*, 83 Ill. 62. And see *Baker* v. *Lewis*, 4 Rawle, 356; *Evans* v. *Arrold*, 52 Ga. 169.

So, a charge that an unequal distribution requires strict proof of fairness is erroneous in a will contest, as tending to influence the jury to attach too much importance to it. *Tobin* v. *Jenkins*, 29 Ark. 151.

And an instruction in a will contest that gross inequality, without reason, requires satisfactory evidence that the will was the offspring of a rational mind, is misleading and erroneous, as calculated to divert the minds of the jury from the issue of testamentary capacity to that of inequality. *Broaddus* v. *Broaddus*, 10 Bush, 299.

Error in instructing in a will contest, however, that no weight is to be given to the injustice in a will unless the will is actually invalid because of unsoundness of mind is not harmless where there is evidence of unsoundness, though the will appears to be much as the testator intended to make it. *Sim* v. *Russell*, 90 Iowa, 656, 57 N. W. 601.

[60]*Frazer* v. *Frazer*, 2 Del. Ch. 260; *Conway* v. *Vizzard*, 122 Ind. 266, 23 N. E. 771; *Campbell* v. *Carnahan* (Ark.) 13 S. W. 1098; *Weir's Will*, 9 Dana, 434; *Exum* v. *Canty*, 34 Miss. 533; *Re Berrien*, 35 N. Y. S. R. 255, 12 N. Y. Supp. 585; *Re Pendleton*, 1 Connoly, 480, 5 N. Y. Supp. 849; *Re Comstock*, 26 N. Y. S. R. 292, 7 N. Y. Supp. 334; *Brush* v. *Holland*, 3 Bradf. 461; *Re Dunham*, 15 N. Y. S. R. 869, 1 N. Y. Supp. 120; *Re Mahoney*, 34 N. Y. S. R. 183, 12 N. Y. Supp. 122; *Re Wilde*, 38 Misc. 149, 77 N. Y. Supp. 164; *Goodacre* v. *Smith*, 15 Week. Rep. 561, 36 L. J. Prob. N. S. 43, 15 L. T. N. S. 511, L. R. 1 Prob. & Div. 359; *Coghlan* v. *Coghlan*, cited in 1 Phillim. Eccl. Rep. 120; *Re Blakely*, 48 Wis. 294, 4 N. W. 337; *Evans* v. *Knight*, 1 Addams Eccl. Rep. 229. And see *Cutler* v. *Cutler*, 103 Wis. 258, 79 N. W. 240.

But an inference in favor of a will arising from the fact that its provisions are similar to those of a former will executed when the testator was sane is sufficiently rebutted by the fact that it bears a still closer resemblance to another will made when he was clearly insane. *Carrico* v. *Neal*, 1 Dana, 163.

[61]*Starrett* v. *Douglass*, 2 Yeates, 46; *Pancoast* v. *Graham*, 15 N. J. Eq. 294.

Subsequent recollection of the pro-

at the time of the publication of the will.[62] So, a will making a disposition which is a total departure from former testamentary intentions long adhered to is to be closely scrutinized;[63] especially when capacity is doubtful.[64] Evidence of a change by a testator of his will, however, is not alone sufficient to show incapacity,[65] though supported by evidence of forgetfulness and unreasonable fear of personal violence.[66] But a will does not derive strength from a fixed purpose to make it where it is not shown to have been a reasonable act.[67] And one who is easily influenced and made to believe things incredible and impossible, and whose purposes frequently change with changes of scene, association, or company, is not competent to make a will.[68]

visions of a will is strong evidence of capacity to make it. *Hathorn* v. *King*, 8 Mass. 371, 5 Am. Dec. 106.

[62]*Starrett* v. *Douglass*, 2 Yeates, 46. And see *Moore* v. *Moore*, 2 Bradf. 265.

Evidence that a testator was old, intemperate, and irascible does not establish testamentary incapacity against evidence of rationality and business capacity; and that he contemplated the execution of the will for some time, and made inquiries as to the names of some persons mentioned in it. *Keating's Appeal*, 2 Monaghan (Pa.) 4, 17 Atl. 207.

And the fact that a testator was *in extremis* at the time his will was made will not vitiate it as against evidence of volition and capacity, and that it was in accordance with previous affections and intentions. *Ross* v. *Chester*, 1 Hagg. Eccl. Rep. 227.

[63]*Marsh* v. *Tyrrell*, 2 Hagg. Eccl. Rep. 84; *King* v. *Farley*, 1 Hagg. Eccl. Rep. 502; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449; *Esterbrook* v. *Gardner*, 2 Dem. 543; *Horne* v. *Horne*, 31 N. C. (9 Ired. L.) 99. And see *Peninsular Trust Co.* v. *Barker*, 116 Mich. 33, 74 N. W. 508.

[64]*Marsh* v. *Tyrrell*, 2 Hagg. Eccl. Rep. 84. And see *Re Liddington*, 20 N. Y. S. R. 610, 4 N. Y. Supp. 648; *Alston* v. *Jones*, 17 Barb. 276.

A will should not be admitted to probate where it appears that a change was made in it at a time when the testator was in such an enfeebled condition as to be incapable of dictating the change. *Rollwagen* v. *Rollwagen*, 5 Thomp. & C. 402.

And a will the disposition of which is a total departure from previous testamentary intentions will be set aside where the person in whose favor the change is made possessed great influence and authority over the testator, and originated and conducted the whole transaction. *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. Rep. 84; *Dodge* v. *Meech*, 1 Hagg. Eccl. Rep. 612.

[65]*Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Jacobs's Succession*, 109 La. 1012, 34 So. 59; *Newton* v. *Carbery*, 5 Cranch C. C. 626, Fed. Cas. No. 10,189. And see *Rutherford* v. *Morris*, 77 Ill. 397; *Irvin* v. *Deschamps*, 11 W. N. C. 365.

The question of the competency of a testator to change his will involves the inquiry as to whether he was of sufficient mental soundness to change any previously existing purpose he might have formed, and the mere fact that a will is not in the direction of a preconceived purpose is of no weight unless the testator was of unsound mind. *Re Hoover*, 8 Mackey, 495.

And a variation in a will from the previous intentions, accounted for by a change of circumstances, does not warrant setting the will aside on the ground of testamentary incapacity. *Williams* v. *Goude*, 1 Hagg. Eccl. Rep. 577; *McDonald's Estate*, 130 Pa. 480, 18 Atl. 617; *Re Shotwell*, 1 Pa. Dist. R. 257.

[66]*Potter* v. *McAlpine*, 3 Dem. 108.

[67]*Frazer* v. *Frazer*, 2 Del. Ch. 260.

While mere proof of the intention of a testator to make a will different from the one made will not defeat it where he appears to have been of sound mind, if he dispose of all his property to a stranger, proof of affection on his part for his relatives tends to increase the probability that his will was not the result of his deliberate judgment. *Norris* v. *Sheppard*, 20 Pa. 475.

[68]*Shropshire* v. *Reno*, 5 J. J. Marsh.

108. The act itself in case of intoxication.— The character of the will itself is also a subject for consideration on the claim that the testator was intoxicated when making it, in determining whether or not it departed from what would be considered natural to such an extent as to be referable to no other cause than a disordered intellect.[69] And reasonableness of a will will support it though the testator was a man of intemperate habits, or suffering from the effect of such habits when he made it;[70] especially where the will conformed to previous intentions.[71]

d. Conduct and behavior.

109. Of testator.— An inference on the question of testamentary capacity may be legitimately based upon the acts and language of the party; rational and sensible discourse indicating capability to perform a rational act; and the language of insanity indicating incapacity.[72] But mere evidence of occasions when the conversation and

91; *Farnsworth's Will*, 62 Wis. 474, 22 N. W. 523.

An instruction in a will contest that a declaration by the testator of an intention to make a different will is a circumstance entitled to consideration on the question of competency and undue influence is erroneous in the absence of qualification, as authorizing a controlling effect to be given to a single item of evidence, without regard to others. *Quisenberry* v. *Quisenberry*, 14 B. Mon. 481.

[69]*Peck* v. *Cary*, 27 N. Y. 9, 84 Am. Dec. 220. And see *Re Ely*, 16 Misc. 228, 39 N. Y. Supp. 177.

[70]*Re Peck*, 42 N. Y. S. R. 898, 17 N. Y. Supp. 248; *Hubbard's Will*, 6 J. J. Marsh. 59.

Proof of habits of excessive drinking which were periodical does not warrant an issue *devisavit vel non* in a will contest, where the fact of even ordinary intoxication at the time of the execution of the will was not proved, and it was proved without contradiction that it was dictated by himself and perfectly well understood by him. *Harmony Lodge, I. O. O. F.'s Appeal*, 127 Pa. 269, 18 Atl. 10.

[71]*Wilie* v. *Ewalt*, 66 Ill. 26; *Hubbard's Will*, 6 J. J. Marsh. 59. And see *Re Schreiber*, 22 N. Y. S. R. 892, 5 N. Y. Supp. 47; *Belcher* v. *Belcher*, 10 Yerg. 121.

So, in *Ritter's Appeal*, 59 Pa. 9, a deed, in the nature of a testamentary disposition, by a man of intemperate habits who was aware of his tendencies to drink to excess, made for the benefit of his family, under the fear that he would squander his property, was upheld, where he was perfectly sober and in full possession of his faculties, and thoroughly understood the nature and character of the act at the time.

[72]*Kingsley* v. *Blanchard*, 66 Barb. 317; *Dufficld* v. *Robeson*, 2 Harr. (Del.) 375; *Hoskins* v. *Hoskins*, 9 Ky. L. Rep. 915, 7 S. W. 546; *Re Well*, 96 Me. 161, 51 Atl. 868; *Williams* v. *Lee*, 47 Md. 321; *Haviland* v. *Hayes*, 37 N. Y. 25. And see *Brock* v. *Luckett*, 4 How. (Miss) 459; *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881; *Boyd* v. *Eby*, 8 Watts, 66.

What a testator said and did at the time of making his will is the best evidence of what he was capable of doing, on the question of testamentary capacity. *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489.

And acts and declarations showing that the testator was affectionate toward his relatives may tend to defeat a will giving his property to a stranger; since it would tend to increase the improbability that the will was a result of deliberate judgment. *Norris* v. *Sheppard*, 20 Pa. 475.

The declarations of an insane person, however, do not tend to establish his sanity. *Lang's Estate*, 65 Cal. 19, 2 Pac. 491.

conduct of a testator were inconsistent with what might have been expected of a man of sound intellect is not alone sufficient to invalidate his will.[73] And slowness, feebleness, eccentricity, and nervousness do not show insanity,[74] though combined with filthy habits;[75] nor do fickleness and childish tastes.[76] Nor do excitability and quarrelsomeness,[77] or miserliness,[78] or lavishness.[79] Even suicide is not conclusive evidence of insanity in respect of a will, though executed immediately previous.[80] But the suicide of a testator is

[73]*Boylan* v. *Meeker*, 15 N. J. Eq. 310; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701. And see *Scarborough* v. *Bashin*, 65 S. C. 558, 44 S. E. 63; *Irvin* v. *Deschamps*, 11 W. N. C. 365; *Re Dwyer*, 29 Misc. 382, 61 N. Y. Supp. 903.

A mere mistake in arithmetic by a testator does not prove testamentary incapacity. *Berry* v. *Safe Deposit & T. Co.* 96 Md. 45, 53 Atl. 720.

And a claim of owning more property than she in fact does does not show a testatrix to be incompetent to make a will. *Waugh* v. *Moan*, 200 Ill. 298, 65 N. E. 713.

So, the remarriage of a man at sixty-nine years of age is not evidence of testamentary incapacity. *Perkins* v. *Perkins*, 116 Iowa, 253, 90 N. W. 55.

[74]*Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549; *Mercer* v. *Kelso*, 4 Gratt. 106; *Rush* v. *Mcgee*, 36 Ind. 69; *Re Murphy*, 41 App. Div. 153, 58 N. Y. Supp. 450; *Kettemann* v. *Metzger*, 23 Ohio C. C. 61; *Ekin* v. *McCracken*, 11 Phila. 534; *Hartwell* v. *McMaster*, 4 Redf. 393; *Fulleck* v. *Allinson*, 3 Hagg. Eccl. Rep. 527. And see *Reed* v. *McIntyre*, 86 Minn. 163, 90 N. W. 319; *Cash* v. *Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724; *Fulbright* v. *Perry County*, 145 Mo. 432, 46 S. W. 955; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627.

The fact that a testator was sixty-eight years old when he married, and his wife about eighteen, is not proof *per se* of insanity or imbecility. *Thomas* v. *Stump*, 62 Mo. 275.

Nor is the fact that a white man wished to marry a negro girl, or maintain unlawful relations with her. *Patton* v. *Patton*, 5 J. J. Marsh. 389.

[75]*Bennett* v. *Hibbert*, 88 Iowa, 154, 55 N. W. 93; *Pilkington* v. *Gray*, 68 L. J. P. C. N. S. 63 [1899] A. C. 401. And see *Wright's Estate*, 202 Pa. 395, 51 Atl. 1031.

But profanity, and irreverence, and disbelief in the existence of God, and filthy habits upon the part of a testator, generally show a mind wanting in testamentary capacity. *Bennett* v. *Hibbert*, 88 Iowa, 154, 55 N. W. 93.

[76]*Re Merriam*, 42 N. Y. S. R. 619, 16 N. Y. Supp. 738; *Jackson* v. *Hardin*, 83 Mo. 175; *Sehr* v. *Lindemann*, 153 Mo. 276, 54 S. W. 537. And see *Voglesong's Estate*, 196 Pa. 194, 46 Atl. 424.

Childishness and lack of coherency in conversation and forgetfulness and the fact that the testator made different provisions from those contained in former wills do not alone suffice to show testamentary incapacity. *Re Clearwater*, 17 N. Y. S. R. 794, 2 N. Y. Supp. 99.

Nor do fond recollections of childhood days and scenes. *Riley* v. *Sherwood*, 144 Mo. 354, 45 S. W. 1077.

[77]See *Re Woolsey*, 17 Misc. 548, 41 N. Y. Supp. 263; *Dobie* v. *Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44; *Spence* v. *Spence*, 4 Watts, 165.

[78]*Newton* v. *Carbery*, 5 Cranch C. C. 626, Fed. Cas. No. 10,189.

Nor does the fact that a testator was miserly, eccentric, and irrational on some subjects. *Ivison* v. *Ivison*, 80 App. Div. 599, 80 N. Y. Supp. 1011.

[79]*Miller* v. *Oestrich*, 157 Pa. 270, 27 Atl. 742.

[80]*Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. Rep. 415; *Burrows* v. *Burrows*, 1 Hagg. Eccl. Rep. 109; *Wolff* v. *Connecticut Mut. L. Ins. Co.* 2 Flipp. 355, Fed. Cas. No. 17,929; *Brooks* v. *Barrett*, 7 Pick. 94; *Coffey* v. *Home L. Ins. Co.* 44 How. Pr. 481; *Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 561; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *McElwee* v. *Ferguson*, 43 Md. 479; *Merritt* v. *Cotton States L. Ins. Co.* 55 Ga. 103; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *Crum* v. *Thornley*, 47 Ill. 192; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 335.

evidence tending to show want of testamentary capacity,[81] though it is not conclusive,[82] and does not raise a presumption of insanity at the time the will was made;[83] but it is to be considered as a circumstance in connection with others.[84] In judging of the soundness of a testator's mind, however, he is to be compared with himself, and not with others.[85] And the conduct of an aged testator a long time after making his will, while he was gradually sinking, is of little weight.[86]

110. Conduct of others.—The conduct of parties surrounding the testator is of like influence in determining his condition as opinions of witnesses on the trial.[87] A mere agreement made years before, however, with reference to the care of a testator's estate, reciting his age and incapacity, is an expression of opinion only, and not evidence of mental incapacity.[88]

111. Change of character or disposition.— A marked change in a man's habits and thought is strong evidence of mental unsoundness, and absence of such change is evidence of capacity.[89] Insanity is indicated by proof of acts, declarations, and conduct inconsistent with the character and previous habits of the party.[90] The inquiry, however, is not whether there was good reason for the change, but as

[81] *Pettitt* v. *Pettitt*, 4 Humph. 191; *Re Card*, 28 N. Y. S. R. 528, 8 N. Y. Supp. 297; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375.

[82] *Brooks* v. *Barrett*, 7 Pick. 94; *Pettitt* v. *Pettitt*, 4 Humph. 191; *McElwee* v. *Ferguson*, 43 Md. 479.

The acts of a testator in committing suicide will not invalidate his will, where it was reasonable, and such as a man in his senses might be supposed to make. *Levy* v. *Lindo*, 3 Meriv. 85; *Re Bailey*, 7 Jur. N. S. 712.

[83] *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577, 15 So. 297; *Re Card*, 28 N. Y. S. R. 528, 8 N. Y. Supp. 297; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

[84] *Re Card*, 28 N. Y. S. R. 528, 8 N. Y. Supp. 297.

Suicide should go to the jury in a will contest in connection with the other facts for consideration, in determining the question of testamentary capacity, not as of the time of the commission of the suicide, but as of the time of the execution of the will. *McElwee* v. *Ferguson*, 43 Md. 479.

[85] *Aikin* v. *Weckerly*, 19 Mich. 482.

[86] *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732.

[87] *Stebbins* v. *Hart*, 4 Dem. 501; *Irwin* v. *West*, 81* Pa. 157.

[88] *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

Power to make a testamentary disposition, under certain restrictions, given by a father in his will to a weak-minded son, of the property given him by the will, furnishes no evidence of the testamentary capacity of the son. *Re Alexander*, 27 N. J. Eq. 463.

So, suggestions made to a testator at the time of making his will, not to forget certain persons, though proper to be considered, raise no presumption that someone would have been forgotten but for such suggestions, thus raising an inference against capacity. *Thornton* v. *Thornton*, 39 Vt. 122.

[89] *McCurry* v. *Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Re Carpenter*, 79 Cal. 382, 21 Pac. 835; *Pclamourges* v. *Clark*, 9 Iowa, 1; *Conely* v. *McDonald*, 40 Mich. 150; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433.

[90] *McCurry* v. *Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 432. And see *Re Kahn*, 1 Connoly, 510, 5 N. Y. Supp. 556.

to whether it was caused by insanity or a delusion.[91] And while prejudice, hatred, or ill will, or violence by a person usually pleasant and agreeable, do not of themselves constitute insanity, they may indicate mental derangement, and evidence of their existence with reference to persons actually entitled to the testator's bounty, which might affect the disposition of his property, should be left to the jury.[92] But a mere loss of affection for persons whose conduct had been offensive is not evidence of incapacity.[93]

112. Intoxication in connection with conduct and circumstances.—Occasional or habitual fits of intemperance, though combined with general bad conduct on the part of the testator, do not show testamentary incapacity.[94] Nor does intoxication, either occasional or habitual, together with drunken actions and pranks ordinarily indulged in by drunken persons;[95] or habitual drunkenness together with old age, shortness of memory, and irascible temper;[96] or frequent sleepiness, flightiness, and violent outbreaks of passion.[97] Nor does intemperance combined with disease indicate testamentary incapacity, as against evidence of business capacity.[98] So, inebriety accom-

[91] *Carpenter's Estate*, 94 Cal. 416, 29 Pac. 1101. And see *Miller* v. *White*, 5 Redf. 321.

But no period of a designated number of days can be stated as a positive limit within which a radical change of mental condition can take place which would warrant a finding of testamentary incapacity, where there is abundant testimony as to the testator's actual condition during the time. *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432.

And testamentary incapacity is not sufficiently established by evidence that the testatrix became estranged from her adopted son, of whom she had been very fond, and refused to permit him to be known by her name and destroyed her will, and made baseless charges against him, and mutilated his portrait to indicate her displeasure. *Merrill* v. *Rolston*, 5 Redf. 220.

And proof that a husband, after the death of his wife, began to pay more attention to his dress and tried to look youthful, and took an interest in the opposite sex, not comporting with his former dignity, and that he lost interest in his business, and became forgetful and despondent, and suddenly commenced to drink to excess, does not alone show want of testamentary capacity. *Sanderson* v. *Sanderson*, 52 N. J. Eq. 243, 30 Atl. 326.

[92] *Sherley* v. *Sherley*, 81 Ky. 240. And see *Re Lewis*, 33 N. J. Eq. 219.

And evidence that a testator suddenly conceived the idea that a person whom he had treated as his son for thirty-five years was illegitimate, and that he told his confidential adviser so under circumstances justifying the inference that he did so in explanation of his purpose to disinherit him, is admissible on the question of testamentary capacity, as tending to show an insane delusion. *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

[93] *Riley* v. *Sherwood*, 144 Mo. 354, 45 S. W. 1077.

[94] *Harper's Will*, 4 Bibb, 244.

[95] *Billinghurst* v. *Vickers*, 1 Phillim. Eccl. Rep. 193; *Peck* v. *Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

[96] *Hight* v. *Wilson*, 1 Dall. 94, 1 L. ed. 51; *Keating's Appeal*, 2 Monaghan (Pa.) 4, 17 Atl. 207; *Julke* v. *Adam*, 1 Redf. 454. And see *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8.

[97] *McCullough's Will*, 35 Pittsb. L. J. 169.

[98] *McIntyre* v. *McConn*, 28 Iowa, 483; *Re Schreiber*, 22 N. Y. S. R. 892, 5 N. Y. Supp. 47; *Re Tacke*, 17 N. Y. S. R. 805, 3 N. Y. Supp. 198.

Proof that a testator had spells of intemperance and spells of sobriety, and

panied either by attempted or accomplished suicide, does not necessarily show incapacity to make a will.[99]

c. Conditions, circumstances, and surroundings.

113. Business acts and capacity.— That a testator possessed capacity to make money and take care of property, though not conclusive, is evidence of sanity and testamentary capacity.[1] And that a testator was capable of transacting business, and was shrewd and firm in his bargains, is sufficient to establish such capacity.[2] Such evidence is good as against proof of folly and eccentricity;[3] or of weakness of mind;[4] or as against proof of old age and failing memory;[5] or of occasional epileptic fits;[6] or as against evidence of failure to make provision for a person having a natural claim upon the testator's

that whenever he drank for some time he became crazy, foolish, and delirious, is insufficient to invalidate his will, as against evidence that he was rational when sober, and proof by subscribing witnesses that he was sober and rational when he made it. *Hart* v. *Thompson*, 15 La. 88.

[99]*Koegel* v. *Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *McElwee* v. *Ferguson*, 43 Md. 479.

[1]*Gass* v. *Gass*, 3 Humph. 278.

Substantial business acts upon the part of a testator are of more weight on the question of his testamentary capacity than mere conversations or occasional doings. *Turner* v. *Hand*, 3 Wall. Jr. 120, Fed. Cas. No. 14,257. Or than the opinions of witnesses against testamentary capacity. *Messner* v. *Elliott*, 184 Pa. 41, 39 Atl. 46.

But entries made by a testator in his business books are not conclusive of sanity, the weight to which they are entitled being a question for the jury. *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

[2]*Re Glcespin*, 26 N. J. Eq. 523; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Coit* v. *Patchen*, 77 N. Y. 533.

A person of common sense must be deemed to have testamentary capacity. *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60.

And the fact that a testator has sufficient capacity to acquire a fortune will prevail upon the question of testamentary capacity, as against the opinions of a large number of ignorant witnesses that he did not have testamentary capacity. *Eddey's Appeal*, 109 Pa. 406, 1 Atl. 425. And see *Comb's Appeal*, 105 Pa. 155.

[3]*Arbery* v. *Ashe*, 1 Hagg. Eccl. Rep. 214; *White* v. *Driver*, 1 Phillim. Eccl. Rep. 84; *Turner* v. *Hand*, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; *Brick* v. *Brick*, 6 N. Y. 144; *Ean* v. *Snyder*, 46 Barb. 230; *Re Merriam*, 42 N. Y. S. R. 619, 16 N. Y. Supp. 738, Affirmed in 136 N. Y. 58, 32 N. E. 621; *Skinner's Will*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

[4]*White* v. *Farley*, 81 Ala. 563, 8 So. 215; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656.

[5]*Gardiner* v. *Gardiner*, 34 N. Y. 155; *Re Stewart*, 39 N. Y. S. R. 801, 15 N. Y. Supp. 601; *Re Bartholick*, 1 Connoly, 373, 5 N. Y. Supp. 842; *Re Cline*, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542.

Proof that a testator was incoherent in speech will not affect his testamentary capacity, as against evidence of ability to transact business, where the will was reasonable. *Re Buckley*, 16 N. Y. S. R. 983, 2 N. Y. Supp. 24.

[6]*Brown* v. *Torrey*, 24 Barb. 583.

So, proof of ability to transact business is not overcome in a will contest, on the question of testamentary capacity, by evidence drawn from the autopsy, that the testator had tumors in his brain, which could not exist without serious mental weakness. *Re Fricke*, 47 N. Y. S. R. 10, 19 N. Y. Supp. 315. And so also with reference to paralysis. *Re Iredale*, 53 App. Div. 45, 65 N. Y. Supp. 533.

And sensible and coherent letters, written to the relatives about business

bounty, where reasons are given for the omission.[7] Evidence of great derangement causing foolish actions and forgetfulness of friends and relatives, however, may be such as to invalidate a will even as against evidence of ability to conduct private business matters.[8] And where evidence shows incapacity to transact ordinary business, testamentary incapacity is usually sufficiently shown.[9] Proof of business capacity in ordinary transactions will not sustain a will as against evidence of the existence of insane delusions with reference to the subject-matter and object of the disposition itself.[10]

114. Business acts by drunkard.— The fact that a testator managed his business affairs properly will sustain his will even against proof of excessive drinking, and that he totally excluded some of his next of kin with whom he had quarreled.[11]

115. Previous and subsequent insanity.— The jury in a will contest may consider the question of sanity or insanity of the testator both before and after the execution of the will, as tending to show the state of his mind at that time.[12] And where habitual insanity is estab-

matters, shortly before the execution of a will, are of great weight upon the question of testamentary capacity, where it is claimed that the testator was afflicted with chronic dementia, which is of slow progress, marked in its regular stages by general impairment of the mental faculties, ending in idiocy. *Re Blakely*, 48 Wis. 298, 4 N. W. 337.

[7]*Re Ogden*, 2 N. Y. Supp. 345; *Re Gray*, 1 Silv. Sup. Ct. 338, 5 N. Y. Supp. 464.

[8]*Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Yglesias* v. *Dyke*, Prerogative Court (1852) cited in 2 Taylor, Principles of Med. Jur. 556.

The rule that affirmative testimony should outweigh negative testimony does not apply in a will contest, on the ground of mental incapacity, where some of the witnesses swore that the testator could do business, and others that he could not. *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329.

[9]*Minor* v. *Thomas*, 12 B. Mon. 106; *Townsend* v. *Bogart*, 5 Redf. 93.

[10]*Morse* v. *Scott*, 4 Dem. 507; *Re Shaw*, 2 Redf. 107; *Banks* v. *Goodfellow*, 22 L. T. N. S. 819, 39 L. J. Q. B. N. S. 237, L. R. 5 Q. B. 549; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220.

But proof of business capacity in ordinary transactions tends to rebut a presumption raised by proof that a delusion existed a short time before; its sufficiency for that purpose being a question for the jury. *Wood* v. *Sawyer*, 61 N. C. (Phill. L.) 251.

[11]*Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574.

Evidence that a testator was of intemperate habits and sometimes became insensible with intoxication, and that his death was probably caused by exposure while intoxicated and by effects of intoxication, together with the opinion of experts that he was insane, is not sufficient to invalidate his will, as against evidence that he would remain sober for a considerable length of time, and was considered a man of good judgment when sober, and that of parties with whom he lived and at whose house he died that his mind was not impaired, where the opinions of experts were given without personal examination. *McIntire* v. *McConn*, 28 Iowa, 483.

[12]*Moore* v. *Heinecke*, 119 Ala. 627, 24 So. 374; *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Terry* v. *Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Re Bull*, 14 Daly, 510, 2 N. Y. Supp. 52; *Mitchell* v. *Corpening*, 124 N. C. 472, 32 S. E. 798; *Thompson* v. *Kyner*, 65 Pa. 368; *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141. And see *Eastis*

lished preceding and following the making of a will, the burden is shifted to the proponent to show sanity at the time of its execution.[13] But the weight and value of such evidence is usually regarded as diminishing in proportion to the remoteness from the date of making the will.[14] And proof of insanity at one period as an independent fact will not impeach a will made at another period.[15] And prior or subsequent insanity is only important as showing the actual condition of the testator's mind when the will was executed;[16] evidence of such insanity being liable to be overcome by the evidence of competency at the time the will was made.[17]

v. *Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204; *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432; *Burton* v. *Scott*, 3 Rand. (Va.) 399.

The fact that evidence in a will contest relates to a period prior and subsequent to the execution of the will goes to the effect or weight and importance to be attached to it rather than to its admissibility. *Conely* v. *McDonald*, 40 Mich. 150.

[13]*Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Ford* v. *Ford*, 7 Humph. 92; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391.

Acts of an habitual character are of much force in proof of the existence of insanity, where insanity has been clearly established, existing at a prior time; and a subsequent insane act may reflect back on acts otherwise equivocal. *Wheeler* v. *Anderson*, 3 Hagg. Eccl. Rep. 574.

And evidence tending to show that a testatrix was of unsound mind shortly prior to, and shortly after, the execution of her will, and that she died of acute mania about three weeks thereafter, is sufficient to justify the submission of the issues in a contest of her will to the jury, though the unsoundness of mind was not shown to have been of a permanent character. *Moore* v. *Heineke*, 119 Ala. 627, 24 So. 374.

[14]*Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510. And see *Davis* v. *Latta*, 94 Iowa, 727, 62 N. W. 17; *Lillibridge's Estate*, 133 Pa. 211, 19 Atl. 352; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Hoban* v. *Campau*, 52 Mich. 346, 50 Am. Rep. 253, 17 N. W. 797.

But flightiness or wandering of intellect on the part of a testator during his last sickness furnishes very slight, if any, evidence at all that that state of mind continued so as to affect the validity of a will subsequently executed. *McMasters* v. *Blair*, 29 Pa. 298.

And a jury in a will contest is not bound to find that the testator was insane because he had been found so at the time of making a subsequent will, a few weeks later, by another jury, though they find that there had been no material change in his mental condition between the times at which the wills were made. *Sewall* v. *Robbins*, 139 Mass. 164, 29 N. E. 650.

[15]*Terry* v. *Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Holloway* v. *Galloway*, 51 Ill. 159; *Brown* v. *Torrey*, 24 Barb. 583; *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432.

Where the evidence in a will contest tends to show, on the one hand, that the testatrix was almost an idiot, and, on the other hand, that she retained her mental faculties, the controversy is narrowed to the time of the execution of the will. *Sheldon* v. *Dow*, 1 Dem. 503.

[16]*Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6.

The testimony adduced in a will contest on the question of testamentary capacity must speak as of the time when the will was made. *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649.

[17]*Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. Rep. 415; *Davis* v. *Latta*, 94 Iowa, 727, 62 N. W. 17; *Jacobs's Succession*, 109 La. 1012, 34 So. 59; *Re Davis*, 91 Hun, 209, 36 N. Y. Supp. 822; *Re Hewitt*, 31 Misc. 81, 64 N. Y. Supp. 571; *Higgins* v. *Nethery*, 30 Wash. 239, 70 Pac. 489.

But the presumption of incapacity arising from insanity of a testator before the execution of his will is not rebutted by proof of calmness on his part, and of his transacting formal matters of business under the sanction of his

116. Previous and subsequent intoxication.— Intoxication is a temporary condition and the point of time under investigation in an inquiry into testamentary capacity as affected by intoxication is that at which the will was made.[18] And to avoid a will on that ground it must be proved that the testator was so excited by liquor, or so conducted himself at the time, as to be at that moment legally disqualified from giving effect to it.[19]

All that is necessary to establish a will questioned on that ground is the absence of the excitement of liquor at the time, in a degree which would affect the testator's judgment.[20] And proof of a long-continued habit of intoxication, and the fact that such habit tends to impair the intellect and moral sense, is not enough to invalidate a will, unless it appears that the testator was so enfeebled in mind as to be incapable of making a will.[21] The legal presumption of the testator's capacity is not destroyed by proof of the existence of longer

family. *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433.

And evidence of the acts and conduct of a testator tending to show soundness of mind at or near the time of the execution of his will is entitled to more weight than the opinions of witnesses, based upon his erratic conduct and eccentricities. *Ward* v. *Brown* (W. Va.) 44 S. E. 488.

The question as to how far acts of a testator before and after the execution of his will tend to throw light upon his actual condition at the date of the will is one for the determination of the presiding judge. *Shailer* v. *Bumstead*, 99 Mass. 112.

But the weight to be given evidence in a will contest, to previous or subsequent insanity with respect to the length of the time elapsing, is for the determination of the jury. *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

[18] *Hennessey* v. *Woulfe*, 49 La. Ann. 1376, 22 So. 394; *Pierce* v. *Pierce*, 38 Mich. 412; *Dimond's Estate*, 3 Pa. Dist. R. 554; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574.

[19] *Peck* v. *Carey*, 27 N. Y. 9, 84 Am. Dec. 220; *Re Tracy*, 27 N. Y. Week. Dig. 280, 11 N. Y. S. R. 103; *Re Woolsey*, 17 Misc. 547, 41 N. Y. Supp. 263; *Re Sutherland*, 28 Misc. 424, 59 N. Y. Supp. 989; *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Fluck* v. *Rea*, 51 N. J. Eq. 233, 27 Atl. 636; *Sanderson* v. *Sanderson*, 52 N. J. Eq. 243, 30 Atl. 326; *Bannister* v. *Jackson*, 45 N. J. Eq. 702, 17 Atl. 692; *Hebert* v. *Winn*, 24 La. Ann. 385; *Hennessey* v. *Woulfe*, 49 La. Ann. 1376, 22 So. 394.

The presumption of sanity of a testator is not rebutted by proof that his intellect was greatly impaired by the use of opium and ardent spirits, and in consequence thereof he was frequently incapable of transacting business, in the absence of proof that such was his condition at the time the will was executed. *Temple* v. *Temple*, 1 Hen. & M. 476.

[20] *Ayrey* v. *Hill*, 2 Addams Eccl. Rep. 206; *Dimond's Estate*, 3 Pa. Dist. R. 554.

A will prepared at the request of the testator, which was his voluntary act, without force or fraud or imposition or importunity, is valid, though the testator was addicted to drink and had delirium tremens a few days before, and though it was drawn up by one of the devisees, at his own house. *Handley* v. *Stacey*, 1 Fost. & F. 574.

And proof that a testator at times acted with whimsical and ridiculous levity does not warrant setting aside his will, where this was accounted for and attributable to fits of intemperance, and he acted with firm, collected, and efficient mind in framing and executing it. *Violet's Will*, 1 Bibb. 617.

[21] *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Grubbs* v. *McDonald*, 91 Pa. 236; *Cheney* v. *Price*, 90 Hun, 238, 37 N. Y. Supp. 117; *Re Liddy*, 2 Silv. Sup. Ct. 223, 5 N. Y. Supp. 636.

or shorter incapacity from drunkenness.[22] And the burden of showing the want of testamentary capacity because of drunkenness at the time of the execution of the will rests with the party contesting it.[23] Nor does habitual intoxication raise a presumption of incapacity or drunkenness at the time of making the will; such condition must be affirmatively proved, or the assumption of capacity will prevail.[24] And long-continued inebriety, though resulting in fits of insanity, does not require proof of a lucid interval to uphold the will of a drunkard, as is required where insanity is proved.[25] Where the mind of a testator was generally in a state of derangement, however, produced by the habitual and intemperate use of liquor, though he enjoyed some intervals in which he might be deemed competent, it should be shown by clear and satisfactory evidence that his will was made in one of such intervals.[26]

117. Hereditary tendency.— As a general rule, insanity which will invalidate a will cannot be established by mere proof of hereditary or constitutional insanity on the part of collateral kinsmen.[27] And no presumption that a testator was insane arises from proof that his mother had been so, as against clear proof of sanity.[28] But while

[22]*Black* v. *Ellis*, 3 Hill L. 68. And see *Re Hewitt*, 31 Misc. 81, 64 N. Y. Supp. 571; *Goble* v. *Grant*, 3 N. J. Eq. 629.

Mere vague statements to the effect that the testator was more or less under the influence of liquor at an early hour on the morning of the day on which his will was executed are insufficient to destroy the presumption of testamentary capacity. *Dimond's Estate*, 3 Pa. Dist. R. 554.

And a finding that a testator was of sound mind will not be disturbed on appeal where there was some evidence to sustain it, though there was other evidence tending to show that for twenty years he had been addicted to the use of intoxicating liquors, and had been for years a drunkard. *Re Johnson*, 57 Cal. 529.

[23]*Harper's Will*, 4 Bibb, 244; *Starrett* v. *Douglass*, 2 Yeates, 48.

[24]*Koegel* v. *Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525; *Re Halbert*, 15 Misc. 308, 37 N. Y. Supp. 757; *Re Woolsey*, 17 Misc. 547, 41 N. Y. Supp. 263.

[25]*Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Koegel* v. *Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525.

To insanity from intemperance the usual presumption of continuance does not apply. *Duffield* v. *Robeson*, 2 Harr. (Del.) 375.

[26]*Cochran's Will*, 1 T. B. Mon. 264, 15 Am. Dec. 116.

The legal presumption that a testator understood the contents of his will, which had been read over to him, is prima facie only, where he was of great age and addicted to the use of opiates and ardent spirits to such an extent as to enfeeble and impair his faculties. *Rutland* v. *Gleavens*, 1 Swan, 198.

[27]*Frere* v. *Peacocke*, 3 Curt. Eccl. Rep. 664.

[28]*Snow* v. *Benton*, 28 Ill. 306.

So, the insanity of a sister and niece does not tend to prove hereditary insanity which will affect testamentary capacity, where their malady was attributed to disease, and its characteristics were not similar to those exhibited by the testator. *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637, Affirmed in 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

evidence of hereditary insanity will not of itself make out a case, it is admissible as tending to corroborate direct proof of insanity.[29]

118. Insanity, fraud, and incapacity combined.—Much less evidence is required to invalidate a will on the ground of undue influence or fraud when it is doubtful whether the testator was sane than when he is in full possession of his faculties.[30] And the condition of the testator's mind at the time of executing his will may be considered in determining whether fraud or undue influence had been used, in view of the relative situation of the testator and the beneficiaries, and the surroundings and conditions and all the other circumstances under which the will was made, as well as the provisions of the will itself.[31] But though a person of weak intellect may more readily become a victim of undue influence than one of mental strength, there must be other evidence aside from that of mere intellectual weakness.[32] Where inequality of provision is not so monstrous as to be only explainable on the hypothesis of insanity or undue influence, there must be independent proof that such influence has been applied.[33] And the physical condition and age of a testator are not proper to be considered apart from the condition of his mind and memory in determining as to undue influence,[34] though a less amount of mental incapacity would be required to be proved in case of a very old person.[35] The fact that a person acting as spiritual adviser of a testator, however, uses his advantage to become the agent and manager of his temporal affairs, and, acting in both capacities, becomes a donee of large gifts under his will, furnishes strong evidence of undue influence.[36] And evidence of the employment of interested per-

[29] *Smith* v. *Kramer*, 5 Clark (Pa.) 226.

[30] *Coghill* v. *Kennedy*, 119 Ala. 641, 24 So. 459; *Dennis* v. *Weekes*, 46 Ga. 514; *Kates's Estate*, 16 W. N. C. 100.

[31] *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432.

Probate will be refused a will though instructions for it were given, where the testator was in a very weak condition of mind at the time, and a testamentary disposition in favor of his wife had been overruled in favor of a third person, who had acquired influence over him. *Darley* v. *Darley*, 3 Bradf. 481.

[32] *Reynolds* v. *Root*, 62 Barb. 250; *Thompson* v. *Kyner*, 65 Pa. 368.

Though the feeble condition of a testatrix renders her more susceptible to artifice, fraud, and undue influence, that condition alone does not shift the burden of proof of undue influence from the contestants. *Re Pike*, 83 Hun, 327, 31 N. Y. Supp. 689.

[33] *Cudney* v. *Cudney*, 68 N. Y. 148. But see *Fulton* v. *Andrew*, L. R. 7 H. L. 448, 44 L. J. Prob. N. S. 17, 32 L. T. N. S. 209, 23 Week. Rep. 566, *contra*.

[34] *Muir* v. *Miller*, 72 Iowa, 585, 34 N. W. 429.

Where the competency of a testator making a will is established, the burden of showing that it was procured by undue influence rests with the party alleging it. *Marvin* v. *Marvin*, 4 Keyes, 9.

[35] *Smith* v. *Smith*, 60 Wis. 329, 19 N. W. 47.

[36] *Middleton* v. *Sherburne*, 4 Younge & C. 358. And see *Parfitt* v. *Lawless*, L. R. 2 Prob. & Div. 462, 41 L. J. Prob. N. S. 68, 27 L. T. N. S. 215, 21 Week. Rep. 200.

But the facts that a person directing the preparation of a will had been the testator's attorney, and that there were slight discrepancies in the evidence as to execution, are not material to affect

sons about the drawing of a will when disinterested persons were near at hand, in connection with weakness and imbecility incapacitating the testator from attending to ordinary business, should be considered in determining as to the existence of undue influence.[37] And any circumstances may be considered which lead to the inference of undue influence,[38] though they must be such as to lead logically to it.[39]

119. Drunkenness in connection with undue influence and fraud.—Evidence of intoxication tending to show testamentary incapacity, though it may be insufficient to show want of capacity to make a will, is admissible, and to be considered upon the question of undue influence in procuring it.[40] And the will of an aged testator is not entitled to probate, where his mental capacity was greatly impaired by habitual intemperance, and the beneficiaries under it directed his intentions and controlled his acts.[41] So, a will prepared by an attor-

the validity of the will, as against proof of capacity, volition, and free agency, and that the will conformed to the testator's affections and previous declarations. *Bird* v. *Bird*, 2 Hagg. Eccl. Rep. 142.

[37] *Jenkins* v. *Tobin*, 31 Ark. 306.

[38] *Barnes* v. *Barnes*, 66 Me. 286; *Rutherford* v. *Morris*, 77 Ill. 397; *Mooney* v. *Olsen*, 22 Kan. 69; *Clark* v. *Stansbury*, 49 Md. 346; *Cadwallader* v. *West*, 48 Mo. 483; *Marvin* v. *Marvin*, 3 Abb. App. Dec. 192.

Illicit cohabitation is not enough of itself to raise a presumption of undue influence. *Rudy* v. *Ulrich*, 69 Pa. 177, 8 Am. Rep. 238; *Wainwright's Appeal*, 89 Pa. 220. But it may be taken into consideration with other circumstances tending to produce undue influence. *Dean* v. *Negley*, 41 Pa. 317, 80 Am. Dec. 620; *Main* v. *Ryder*, 84 Pa. 217; *Kessinger* v. *Kessinger*, 37 Ind. 341.

[39] *Brick* v. *Brick*, 66 N. Y. 144; *Snyder* v. *Sherman*, 23 Hun, 139.

And it is said that wherever suspicious circumstances, pointing to undue influence, exist, it is due to the parties to frame an issue for a jury. *Reynolds* v. *Root*, 62 Barb. 250.

[40] *Re Miller*, 179 Pa. 645, 39 L. R. A. 220, 36 Atl. 139.

Evidence of the bad character of women who had combined with others to impose upon a testator after he had lost the use of his rational faculties is admissible upon an issue of *devisavit vel non*, where it appears that they kept him in a state of intoxication, and had represented each other to him as persons of virtue and good character, and urged him to make a will in their favor, to the exclusion of his relatives. *Nussear* v. *Arnold*, 13 Serg. & R. 323.

But declarations made by a testator to the effect that he had never made the will in question, and if he signed it they got him drunk and made him do it, for he had no recollection of it, are inadmissible in evidence in a proceeding to invalidate the will on the ground of undue influence and unsoundness of mind by reason of intoxication, since such declarations are not evidence of the truth of the facts stated. *Gibson* v. *Gibson*, 24 Mo. 227.

[41] *Julke* v. *Adam*, 1 Redf. 454.

Evidence that a testator was about seventy years old, and had been an habitual drunkard for fifty years, and that his appetite for drink was uncontrollable, and that he went to live with his brother, a saloon keeper, who offered him a home with free opportunity to drink when and what he pleased, and that the brother resisted the efforts of the testator's guardians to take him away, and that he had been drinking to some extent on the day he made his will, which made such brother his sole legatee, warrants a finding of undue influence, invalidating it. *Slinger's Will*, 72 Wis. 22, 37 N. W. 236.

And a will in English, drawn for a German who possessed little familiarity with the English language, and was habitually intoxicated, by his partner, who supervised its execution and took substantial benefits under it, will be looked upon by the court upon an allegation of

ney, who takes a large part of the estate thereunder to the exclusion of the testator's own family, will be viewed with suspicion, where the testator was a person of slender capacity, addicted to drink.[42] But the will of a person of intemperate habits will not be invalidated on the ground of undue influence exercised by members of his family, where the influence arose from kind offices and acts occasioned by attachment or affection.[43] And a will by a testator of slender capacity, addicted to drink, giving a large part of his estate to his attorney to the exclusion of a son and heir, is valid, where a complete alienation appears between him and his son.[44] And the mere fact that a testator had become weak in will and impaired in memory, and was, therefore, an easy prey to fraud, will not warrant setting aside his will, in the absence of anything to show fraud.[45]

120. Instructions, knowledge, and intent.— Where the capacity of a testator is doubtful at the time of the execution of his will, proof of instruction or of knowledge of its contents, and of his intent to make the disposition therein provided for, is generally necessary,[46] particularly where the will is drawn or procured through an agent or the principal legatee or a party interested.[47] And a codicil varying from

fraud or undue influence as an indication of fraud, and will at least induce a suspicious scrutiny, if it is not sufficient to raise a presumption against the instrument. *Koegel* v. *Egner*, 54 N. J. Eq. 623. 35 Atl. 394.

[42]*Barry* v. *Butlin*, 2 Moore P. C. C. 482.

In *M'Diarmid* v. *M'Diarmid*, 3 Bligh N. R. 374, a deed by an old man eighty-three years old, by which he relinquished his interest in a fund of £6,000, assigning it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of £40 a year for life and his funeral expenses, was held to be void upon evidence that he was weak and infirm and addicted to intoxication, and that the deed was drawn by agents of the daughter and her husband, and that no one was employed on the part of the father.

[43]*Re Johnson*, 7 Misc. 220. 27 N. Y. Supp. 649; *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340.

[44]*Barry* v. *Butlin*, 2 Moore P. C. C. 482.

So, a will in favor of a legatee who had treated the testator kindly and had furnished him with a home and cared for him, which he declared conformed with his wishes, will not be denied probate upon the ground of mental incapacity and undue influence, upon proof that he was addicted to drink and had been found an habitual drunkard, and had been such for two years, and had been committed to the penitentiary for drunkenness, where a similar will had previously been made, and the persons who otherwise would have been entitled to his bounty had attempted to restrain his appetite for liquor, and had refused him admission into their homes. *Re Reed*, 2 Connoly, 403, 20 N. Y. Supp. 91.

[45]*Re Storey*, 20 Ill. App. 183.

[46]*McSorley* v. *McSorley*, 2 Bradf. 188; *Hyatt* v. *Lunnin*, 1 Dem. 14; *Mowry* v. *Silber*, 2 Bradf. 133; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Key* v. *Holloway*, 7 Baxt. 576; *Billinghurst* v. *Vickers*, 1 Phillim. Eccl. Rep. 199. And see *Burger* v. *Hill*, 1 Bradf. 360.

[47]*Renn* v. *Samos*, 33 Tex. 760; *Billinghurst* v. *Vickers*, 1 Phillim. Eccl. Rep. 199; *Mitchell* v. *Thomas*, 6 Moore P. C. C. 137, 12 Jur. 967, 5 Notes of Cases, 600; *Mackenzie* v. *Handasyde*, 2 Hagg. Eccl. Rep. 211. And see *Wilson* v. *Mitchell*, 101 Pa. 495.

But a will may be established by evidence other than of instructions affecting its execution, though the testator's

the original will to the advantage of the drawer, executed when the testator's capacity was doubtful, will only be admitted on proof of knowledge of its contents.[48] The presumption of law is against a will made by a testator of uncertain capacity, which was prepared by a legatee, in his own favor; and the burden of overcoming the presumption rests with the party claiming under it.[49] And proof of knowledge of contents and approval, to meet and overcome the burden thus imposed, must be strong and satisfactory.[50] Mere proof of the execution is not sufficient; there must also be proof of free will,[51] and of soundness of mind,[52] and knowledge of the contents.[53] A will in accordance with the previous intentions, however, will be admitted to probate though prepared without instructions, by an interested party, and not read to the testator, and though made in favor of a stranger.[54] And the presumption arising where a stranger prepares a will under which he receives a large legacy does not apply where the party preparing it was a near relative, who would have inherited a large portion of the estate had the testator died intestate.[55] No definite rule as to the amount of mental incapacity which will impose the duty of explanation upon a beneficiary can be laid down.[56] This must be governed by the character and circumstances of each particular case.[57] And proof of knowledge of contents of a will, and of in-

capacity was doubtful and the will was drawn by a person taking an interest under it. *Davis* v. *Rogers*, 1 Houst. (Del.) 44.

[48] *Mitchell* v. *Thomas*, 6 Moore, P. C. C. 137, 12 Jur. 967, 5 Notes of Cases, 600.

[49] *Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Whelpley* v. *Loder*, 1 Dem. 368; *Weir* v. *Fitzgerald*, 2 Bradf. 42; *Gombault* v. *Public Administrator*, 4 Bradf. 226; *Mowry* v. *Silber*, 2 Bradf. 133; *Caldwell* v. *Anderson*, 104 Pa. 199; *Cuthbertson's Appeal*, 97 Pa. 163; *Croft* v. *Day*, 1 Curt. Eccl. Rep. 782; *Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 637.

[50] *McKnight* v. *Wright*, 12 Rich. L. 232; *McDaniel* v. *Crosby*, 19 Ark. 533; *Butlin* v. *Barry*, 1 Curt. Eccl. Rep. 614; *Durnell* v. *Corfield*, 8 Jur. 915.

[51] *Breed* v. *Pratt*, 18 Pick. 115; *Boyd* v. *Boyd*, 66 Pa. 283; *McKnight* v. *Wright*, 12 Rich. L. 232.

[52] *Morrison* v. *Smith*, 3 Bradf. 209.

[53] *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Breed* v. *Pratt*, 18 Pick. 115.

[54] *Goodacre* v. *Smith*, 15 Week. Rep. 561, 36 L. J. Prob. N. S. 43, L. R. 1 Prob. & Div. 359, 15 L. T. N. S. 511.

[55] *Caldwell* v. *Anderson*, 104 Pa. 199; *Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441; *Reece* v. *Pressey*, 2 Jur. N. S. 380. And see *Cramer* v. *Crumbaugh*, 3 Md. 491; *Bonner* v. *Matthews*, cited in Shelford on Lunatics, 327.

[56] *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765.

[57] Trivial and inconsequent declarations of a testator, and slight evidence of mental impairment, do not establish the operation of undue influence upon him in making his will, as against overwhelming evidence that he retained business capacity, especially where such declarations were made several years after the will was executed. *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342.

But knowledge upon the part of a testator of the contents of his will, and assent to its provisions, are not established so as to uphold it by evidence that he intended that what was left after three annuities were provided for should go to the executors as therein provided, where he believed this to be a small amount, when in reality it was large. *Durling* v. *Loveland*, 2 Curt. Eccl. Rep. 225.

tention to make it, may be made either by the subscribing witnesses or other persons.[58] So, the nature, as to simplicity or complexity, of a will, is material to be considered on the question of the knowledge of the testator of its contents, where his capacity is questioned, and the party who drew it took a benefit under it.[59]

121. Knowledge of contents in case of drunkenness.— Proof that a testator knew the contents of his will is also imperatively demanded where it appears that his mental faculties were seriously impaired by the use of drink and opiates, and there is nothing to show that he had anything to do with its preparation, or ever read it or heard it read.[60]

122. Ratification or subsequent recognition.— A subsequent recognition by a testator, either in conversation or action, of his will, affords strong evidence of consciousness and mental capacity, and of the absense of imposition at the time it was made.[61] And where a codicil is added to a will the will is to be regarded as valid if the testator had testamentary capacity at the time of the execution of the codicil, without reference to his condition at the time of making the original will.[62] But if a person who places a holographic will among his papers was insane at the time, it would require clear proof of retaining it there during a lucid interval with knowledge of the facts, to give effect to it as a valid disposition of his property, and its mere retention during a period when he was of disposing mind is not conclusive.[63]

f. Old age.

123. Old age does not per se incapacitate.— Testamentary incapacity does not necessarily presuppose the existence of insanity, in its technical sense. Weakness of intellect from extreme old age, whether arising from great bodily infirmity or from intemperance, when it disqualifies the testator from knowing or appreciating the nature, effect, or consequences of the act he is engaged in, works a similar disability.[64] But extreme age on the part of a testator is not alone

[58] *Key* v. *Holloway*, 7 Baxt. 576.

So, knowledge of the contents of a will by the testator may be established by evidence of knowledge and assent to the disposition contained in it; proof of instructions or of reading it over is not indispensable. *McNinch* v. *Charles*, 2 Rich. L. 229.

[59] *Durnell* v. *Corfield*, 8 Jur. 915.

[60] *Burritt* v. *Silliman*, 16 Barb. 198; *Durling* v. *Loveland*, 2 Curt. Eccl. Rep 225.

[61] *Jones* v. *Harris*, 3 Rich. L. 14.

Keeping a will uncanceled raises a presumption that it was not procured against the testator's consent, whether fraud, undue influence, or mental incapacity is set up. *Pierce* v. *Pierce*, 38 Mich. 412.

[62] *Brown* v. *Riggin*, 94 Ill. 560.

[63] *Porter* v. *Campbell*, 2 Baxt. 81.

[64] *Leech* v. *Leech*, 21 Pa. 67. See, in this connection, Dr. Day's "Practical Treatise on the Domestic Management of the Most Important Diseases of Advanced Life." T. & W. Boone, London, 1849.

sufficient to prove incapacity to make a will,[65] and raises no presumption against capacity.[66] Great caution, indeed, should be used, lest the existence of extreme old age should lead the medical witness to presume consequent imbecility. Against such a sequence the policy of the law and the interests of humanity unite in protesting. The will of an aged man ought to be regarded with great tenderness when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated.[67]

124. So of partial loss of faculties.—In harmony with these views, wills have been sustained when the testator was eighty years of age, very deaf, and partially blind;[68] where he was of the same age, and was afflicted with a palsy, so that he could neither write nor feed himself;[69] and when he was between ninety and a hundred, and greatly debilitated.[70] Probate will not be refused because the powers of a man's mind were somewhat impaired by age, in the absence of traces of fraud, where the provisions of the will are consonant with the state of the testator's affections;[71] or where it was plain that the testator

[65] *Spencer* v. *Moore*, 4 Call (Va.) 423; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Riley* v. *Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Lingle* v. *Lingle* (Iowa) 96 N. W. 708; *Van Alst* v. *Hunter*, 5 Johns. Ch. 148; *Maverick* v. *Reynolds*, 2 Bradf. 260; *Re Iredale*, 53 App. Div. 45, 65 N. Y. Supp. 533; *Re Journeay*, 80 Hun, 315, 30 N. Y. Supp. 80; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *Nicholas* v. *Kershner*, 20 W. Va. 251.

[66] *Bleecker* v. *Lynch*, 1 Bradf. 458; *Cornwell* v. *Riker*, 2 Dem. 354; *Horn* v. *Pullman*, 72 N. Y. 269; *Re Otis*, 1 Misc. 258, 22 N. Y. Supp. 1060; *Re Rohe*, 22 Misc. 415, 50 N. Y. Supp. 392; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Re Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Re Dixon*, 42 App. Div. 481, 59 N. Y. Supp. 421; *Stevenson* v. *Kingsley*, 8 Pa. Dist. R. 245.

[67] *Van Alst* v. *Hunter*, 5 Johns. Ch. 148.

[68] *Lowe* v. *Williamson*, 2 N. J. Eq. 82; *Davis* v. *Rogers*, 1 Houst. (Del.) 44; *Ray* v. *Hill*, 3 Strobh. L. 297, 49 Am. Dec. 647.

Blindness, however, or other incapacity which renders the testator unable to read his will, shifts the burden of proof of capacity to the proponent. *Day* v. *Day*, 3 N. J. Eq. 549.

And to sustain the will of a blind testator it must be read over to him or he must otherwise be made acquainted with its contents. *Fincham* v. *Edwards*, 3 Curt. Eccl. Rep. 63; *Barton* v. *Robins*, 3 Phillim. Eccl. Rep. 442, note.

But a blind man's will need not be read over to him in the presence of the witnesses thereto. *Longchamp ex dem. Goodfellow* v. *Fish*, 2 Bos. & P. N. R. 415, 9 Revised Rep. 670.

And it is sufficient if the jury is satisfied by other means that it was his will. *Clifton* v. *Murray*, 7 Ga. 564, 50 Am. Dec. 411.

[69] *Reed's Will*, 2 B. Mon. 79.

[70] *Van Alst* v. *Hunter*, 5 Johns. Ch. 148. See *Collins* v. *Townley*, 21 N. J. Eq. 353.

[71] *Carroll* v. *Norton*, 3 Bradf. 291; *Re Blaker*, 27 Week. Dig. 486; *Re Wheeler*, 5 Misc. 279, 25 N. Y. Supp. 313; *Collins* v. *Townley*, 21 N. J. Eq. 353; *Lyons* v. *Van Riper*, 26 N. J. Eq. 337.

The fact that a testator was seventy years old and had had an epileptic attack a few days before making his will does not invalidate it as against evidence that he was able to recognize his attendants and visitors and remembered the existence of a former will, and conversed intelligently with reference to the new one, and expressed satisfaction with it when read over to him. *Harris* v. *Betson*, 28 N. J. Eq. 213.

And evidence that a testator was ex-

understood the will and knew the disposition he was making.[72] And old age combined with declining health and failing memory,[73] or with defective eyesight, hearing, and memory,[74] or the fact that an aged person is forgetful and at times labors under slight delusions,[75] does not *per se* establish want of testamentary capacity.

125. And bodily infirmities.—The same view is to be taken of the bodily infirmities peculiar to old age. If they produce mental impotence, of course they work incapacity.[76] But their mere existence will not be sufficient to produce this result,[77] though the disposition

citable and sickly, and went into fits of passion on slight provocation, and displayed many symptoms of a diseased mind, will not invalidate a will according with previous affections and intentions. *Re Macpherson*, 1 Connoly, 223, 4 N. Y. Supp. 181. And see *Blakely's Will*, 48 Wis. 294, 4 N. W. 337.

[72]*Re Snelling*, 44 N. Y. S. R. 477, 17 N. Y. Supp. 683; *Lawrence* v. *Lawrence*, 4 N. Y. Week. Dig. 299; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Woodfall's Will*, 7 Phila. 528; *Taylor* v. *Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Lodge* v. *Lodge*, 2 Houst. (Del.) 419; *Riley* v. *Sherwood*, 144 Mo. 354, 45 S. W. 1077. And see *Re Bartholick*, 1 Connoly, 373, 5 N. Y. Supp. 842; *Riggin* v. *Westminster College*, 160 Mo. 570, 61 S. W. 803.

The fact that a testator was of weak understanding is not alone sufficient to require the courts to examine into the wisdom or prudence of the dispositions in his will. *Hill* v. *Nash*, 41 Me. 585, 66 Am. Dec. 266.

[73]*Clarke* v. *Davis*, 1 Redf. 249; *Re Stewart*, 36 N. Y. S. R. 56, 13 N. Y. Supp. 219; *Creely* v. *Ostrander*, 3 Bradf. 107; *Watson* v. *Donnelly*, 28 Barb. 653; *Fox's Estate*, 147 Pa. 264, 23 Atl. 447; *Montague* v. *Allan*, 78 Va. 592, 49 Am. Rep. 384; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Re Eddy*, 32 N. J. Eq. 701. And see *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489; *Jackson* v. *Hardin*, 83 Mo. 175.

And the omission by a testator of the name of one of his eleven children in giving instructions for his will, and mistakes in the names of some of the others, are not sufficient evidence of testamentary incapacity. *Re Wintermute*, 27 N. J. Eq. 447.

And the fact that two of the trustees of a testator presented a large bill against his estate for services performed, when he had previously been prompt and particular in the payment of his debts, has no tendency to prove him insane. *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882.

[74]*Napple's Estate*, 134 Pa. 494, 19 Atl. 679; *McFadin* v. *Catron*, 138 Mo. 197, 38 S. W. 732, 39 S. W. 771; *Cash* v. *Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 742.

So, evidence of age and impaired eyesight, and attacks of vertigo, attended by brief unconsciousness and loss of memory and physical exhaustion, and the fact that the testator had surrendered most of his business into other hands, will not invalidate his will, where it appears that he still transacted business, and was able to understand what he was doing. *Re Soule*, 1 Connoly, 18, 3 N. Y. Supp. 259.

[75]*Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Gilman* v. *Ayer* (N. J. Eq.) 47 Atl. 1049, Affirmed in 63 N. J. Eq. 806, 52 Atl. 1131; *Merrill* v. *Rush*, 33 N. J. Eq. 537.

And evidence that a testatrix was illiterate, penurious, and eccentric, violent and slatternly in her household duties and dress, and that she at times, upon losing her temper, appeared to be irrational, and that she drove away callers and grocers' boys delivering her supplies, and was uncivil and profane, and muttered to herself, and kept chickens in her house, and occasionally got intoxicated, does not show inability to manage her property, or incompetency to make a will. *Re Murphy*, 41 App. Div. 153, 58 N. Y. Supp. 450.

[76]*Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491.

[77]*Re Vanauken*, 10 N. J. Eq. 186; *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *Lingle* v. *Lingle* (Iowa) 96 N. W. 708; *Re Murphy*, 41 App. Div.

was unequal.[78] As long as it can be done consistently with public justice, the policy of the law requires that the protection to old age, afforded by the right of testamentary disposal, should continue unimpaired; and it is permitted to cease only when actual wrong would be done to third parties by its continuance, or where, by exposing the possessor to undue solicitation or to imposition, it proves an annoyance rather than an advantage. And the fact that a testator was a man of advanced years, or feeble in body or mind at the time of the execution of his will, raises no presumption against its validity.[79]

126. Excessive failure of memory invalidates.—A will made by a testator of great age and impaired mind and memory, however, ought not to be sustained, unless it appears that the disposition emanated from free will, without the interposition of others, and accorded with intentions previously expressed or implied from family relations.[80] And failure of memory which includes the testator's estate and the objects of his bounty establishes incapacity.[81]

127. And senile dread of relatives.—It is also to be observed that a party in extreme old age may fall under the subjection of relatives or attendants to such an extent as to deprive him of freedom of volition. His mind may be quite intelligent, his understanding of business clear, his competency to converse upon and transact [business] undoubted, and his bodily strength good; but there may grow upon him such a fear and dread of relatives or servants who may have surrounded him, and on whom he may have become perfectly dependent, so that his nervous system is wholly overcome, and he has no power to exert his mind in opposition to their wishes, or to resist their importunities.

153, 58 N. Y. Supp. 450; *Re Birdsall*, 2 Connoly, 433, 13 N. Y. Supp. 421.

[78] *Kise* v. *Heath*, 33 N. J. Eq. 239.

[79] *Re Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Re Dixon*, 42 App. Div. 481, 59 N. Y. Supp. 421.

[80] *Re Ames*, 51 Iowa, 596, 2 N. W. 408. And see *Jones* v. *Goodrich*, 5 Moore P. C. C. 16; *Re Soden*, 38 Misc. 25, 76 N. Y. Supp. 877.

[81] See *Galt* v. *Provan*, 108 Iowa, 561, 79 N. W. 357; *Hoskins* v. *Hoskins*, 9 Ky. L. Rep. 915, 7 S. W. 546; *Dumond* v. *Kiff*, 7 Lans. 465; *Aylward* v. *Briggs*, 145 Mo. 604, 47 S. W. 510; *Langley's Estate* (Cal.) 73 Pac. 824.

And an instruction in a will contest that great physical weakness or disease, old age, eccentricity, blunted perception, weakened judgment, and failing memory or mind are not necessarily inconsistent with testamentary capacity is objectionable where no reference is made to the signficance of such facts as evidence, as constituting, in effect, a withdrawal of such evidence from the consideration of the jury. *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82.

But while the fact that after receiving an injury a testator became forgetful of neighbors and friends, and wept upon being informed who they were, indicates a feeble intellect, and is strong evidence of mental disability when standing alone, it is also evidence of nervous excitement, and will not invalidate a will sustained by proof that the testator not only understood the matters of business he transacted, but also remembered them. *Reynolds* v. *Root*, 62 Barb. 256.

His mind is enslaved by his fears and a feeling of helplessness, so that, to that extent, and in matters in which he may be moved by them, he really is facile and imbecile. This state of things seems to be easily brought on in old age, when the faculties are otherwise entire, and the bodily strength considerable.[82]

g. Physical condition.

128. Mere weakness and its effects.—Mere physical weakness on the part of a testator is not evidence of testamentary incapacity,[83] though death is near;[84] and a diseased bodily condition on his part is not entitled to weight unless the bequests are extravagant, or widely different from those which the situation of the testator and of his family would warrant,[85] or unless there were some actual manifestations of irrationality.[86] And this is the rule though the physical weakness is accom-

[82] See 2 Taylor, Principles of Med. Jur. 2d ed. (1873) 558.

Forgetfulness upon the part of a testator, together with the fact that he was under the influence of a colored woman whom he had emancipated, yielding implicitly to all her wishes, and had lost all regard for the dictates of natural affection, furnish evidence tending to show testamentary incapacity. *Denton* v. *Franklin*, 9 B. Mon. 28.

[83] *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Stoutenburgh* v. *Hopkins*, 43 N. J. Eq. 577, 12 Atl. 689; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Re Patterson*, 26 Abb. N. C. 425, 13 N. Y. Supp. 463; *Re Pike*, 83 Hun, 327, 31 N. Y. Supp. 689; *Doyle's Estate*, 7 Pa. Co. Ct. 657; *Thompson* v. *Kyner*, 65 Pa. 368; *Berry Will Case*, 93 Md. 560, 49 Atl. 401.

Where the lack of ability upon the part of a testator, at the time of the execution of his will, to speak plainly and to discharge the duties in connection with the execution of the instrument that testators usually perform, is due to illness, the question which should be passed upon in the contest of the will is whether he was so far gone with his illness, or suffering such pain and disquietude therefrom, that he did not properly comprehend what he was doing, and act intelligently upon the subject. *Re McGraw*, 9 App. Div. 372, 41 N. Y. Supp. 481.

And the facts that a testator was at times of an irascible disposition, which was increased in the latter part of his life by excessive drinking, and that at the time his will was executed he was in a feeble condition, do not show testamentary incapacity, as against proof that he closed a real estate deal that had been running for months, on the day before he died. *Re Woolsey*, 17 Misc. 547, 41 N. Y. Supp. 263.

[84] *Jackson* v. *Jackson*, 39 N. Y. 153; *Re Connor*, 27 N. Y. S. R. 905, 7 N. Y. Supp. 855; *Re Patterson*, 26 Abb. N. C. 395, 13 N. Y. Supp. 463; *Ayres* v. *Ayres*, 43 N. J. Eq. 565, 12 Atl. 621.

And though the testator was without moral nature or natural affection. *Re Gorkow*, 20 Wash. 563, 56 Pac. 385.

[85] *Clarke* v. *Sawyer*, 3 Sandf. Ch. 352, Reversed on other grounds, 2 N. Y. 498; *Re Rohe*, 22 Misc. 415, 50 N. Y. Supp. 392; *Re Lacy*, 35 Misc. 581, 71 N. Y. Supp. 1129; *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Spellier's Estate*, 2 Pa. Dist. R. 513.

Evidence that a testator had a sore leg has no tendency to disqualify him from making a will. *Thomas* v. *Stump*, 62 Mo. 275.

And declarations by a dyspeptic that he had no stomach do not furnish evidence of testamentary incapacity. *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637, Affirmed in 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

And proof of drowsiness and that the testator appeared delirious a day or two before making a change in his will are not sufficient to establish incompetency to make such change. *Jackson* v. *Hardin*, 83 Mo. 75.

[86] *La Bau* v. *Vanderbilt*, 3 Bedf. 382; *Re Hamilton*, 29 Misc. 724, 62 N. Y.

panied by nervousness and its effects, interfering with the transaction of complicated business;[87] or by disease which might or might not cause insanity;[88] or by great pain,[89] or temporary lapses of under-

Supp. 820; *Wood* v. *Carpenter*, 166 Mo. 465, 66 S. W. 172; *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149. And see *Lennig's Estate*, 4 Pa. Dist. R. 94.

And a natural will for which the testator was able to give instruction and the execution of which he was able to complete will not be invalidated on the testimony of medical experts, based upon anterior observation, that he was very sick and could not have been competent. *Re Connor*, 27 N. Y. S. R. 905, 7 N. Y. Supp. 855.

[87]*Hoban* v. *Campau*, 52 Mich. 346, 17 N. W. 797; *Kearney's Estate*, 148 Pa. 218, 23 Atl. 1058; *Linton's Appeal*, 104 Pa. 228; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449.

And evidence of frequent sleeplessness and flightiness or violent outbursts of passion from the use of intoxicating liquors and narcotics does not show testamentary incapacity. *McCullough's Will*, 35 Pittsb. L. J. 169, Affirmed in *Keating's Appeal*, 36 Pittsb. L. J. 283.

[88] Paralysis, however universal, does not necessarily show absence of testamentary capacity, since it does not always affect the mind equally with the body. *M'Daniel's Will*, 2 J. J. Marsh. 331; *Rothrock* v. *Rothrock*, 22 Or. 551, 30 Pac. 453. And see *Gatley's Estate*, 4 Pa. Dist. R. 52; *Re King*, 29 Misc. 268, 61 N. Y. Supp. 238; *Rundell* v. *Downing*, 5 N. Y. S. R. 253.

And proof of general paresis and that the testator had become confined in an asylum does not invalidate his will as against evidence of entire business capacity. *Re Kiedaisch*, 2 Connoly, 438, 13 N. Y. Supp. 255.

As to paresis, see also *Re Cruger*, 36 Misc. 477, 73 N. Y. Supp. 812.

And testimony that a testator was affected by a disease of the brain, producing occasional convulsions and partial paralysis, and that he had two such convulsions while he was dictating his will, is not sufficient to invalidate it, where they are not shown to have had any effect upon his mind. *Parramore* v. *Taylor*, 11 Gratt. 220.

And the evidence of physicians that the invariable effects of a disease with which a testator was afflicted was to produce frenzy previous to death will not invalidate his will, where it does not appear that the state of frenzy had commenced at the time the will was executed, and there was evidence that he was in his right mind at the time. *Berry* v. *Hamilton*, 10 B. Mon. 129.

So, the fact that a will was made after the testator had an epileptic convulsion does not invalidate it, where he had recovered from the convulsion, and his mind had become clear and strong and his will was reasonable. *Re Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801; *Wood* v. *Carpenter*, 166 Mo. 465, 66 S. W. 172.

And the fact that a testator had an epileptic fit about five minutes after signing his will, after which he sank rapidly and died, and the opinion of the subscribing witnesses to his will, that he did not know what he was doing, are not sufficient to invalidate it, as against the testimony of the person who drew it and who had no interest in it, that the testator fully comprehended its provisions. *Re Lewis*, 51 Wis. 101, 7 N. W. 829.

A will made by an epileptic will be admitted to probate where there is nothing to show incapacity except during the continuance of the influence of the fits, though there is an entire absence of proof of instructions or knowledge of contents, and though the attesting witnesses could recollect nothing of the circumstances attending its execution. *Foot* v. *Stanton*, Deane & S. 19.

So, in *Re McKean*, 31 Misc. 703, 66 N. Y. Supp. 44, the will of the testator was sustained, though when he died his left side was almost wholly paralyzed, and he was afflicted with Bright's disease, and was morose, cynical, ungrateful, and selfish, and found no relief in travel, physicians, or medicines, and characterized the doctors as humbugs, and drugs as poisons; and his temper increased in sourness and he grew more peevish and irascible daily, and was suspicious of the kindness of his relatives, thinking it proceeded from mercenary motives, and the physicians regarded him as crazy.

[89]*Stevens* v. *Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27.

standing.[90] Nor will the taking of large quantities of medicine or stimulants be deemed to have caused testamentary incapacity.[91]

129. Absolute prostration.—In determining questions of testamentary capacity, the court adopts a more rigorous rule, however, where the testator was weak and suffering than where he was in comparative health.[92] And evidence that a testator was in a state of chronic stupor at the time his will was made, from which he could be awakened, but into which he would speedily relapse, the interval of his lucidity being too brief for any considerable mental exertion, together with evidence that he had but partly signed his name, is sufficient to justify cancelation of his will.[93] And probate will be refused where the testator's physical powers had so failed as to render it impossible for him to perform the act of making a will intelligently,[94]—especially where it does not conform to previous intentions.[95]

130. Deaf and dumb testators.—The rule has been asserted that the party offering the will of a deaf and dumb person for probate has the burden of proving that the testator knew the contents and was not imposed upon.[96] The necessity for this rule, however, vanishes "in the case of educated mutes, who are capable of communicating by writ-

[90] *Holmberg* v. *Phillips* (Iowa) 78 N. W. 66.

[91] *Martin* v. *Bowdern*, 158 Mo. 379, 59 S. W. 227; *Ortt* v. *Leonhardy* (Mo.) 74 S. W. 423.

[92] *Re McGraw*, 9 App. Div. 372, 41 N. Y. Supp. 481.

[93] *Knapp* v. *Reilly*, 3 Dem. 427. And see *Gray* v. *Rumrill*, 9 Va. Law Reg. 310, 44 S. E. 697.

[94] See *Byard* v. *Conover*, 39 N. J. Eq. 244; *Re Locwenstine*, 2 Misc. 323, 21 N. Y. Supp. 931; *Kingsley* v. *Blanchard*, 66 Barb. 317; *Re Raynor*, 44 N. Y. S. R. 468, 18 N. Y. Supp. 426; *Re McCarthy*, 48 N. Y. S. R. 315, 20 N. Y. Supp. 581; *Re Barbineau*, 27 Misc. 417, 59 N. Y. Supp. 375; *Renihan* v. *Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Re Coop*, 24 N. Y. S. R. 417, 6 N. Y. Supp. 664; *Re Rounds*, 25 Misc. 101, 54 N. Y. Supp. 710; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Re Burrows*, 8 Ohio N. P. 358; *Harwood* v. *Baker*, 3 Moore P. C. C. 282.

Evidence of the attending physician of a testatrix that she was not of sound mind, and that she had gastritis, which tends to weaken the mind, and that she was easily persuaded and would contradict herself, and testimony by her friends that she was melancholy and nervous and a mental and physical wreck, are sufficient in a will contest to entitle contestants to have the question of capacity submitted to a jury. *Crockett* v. *Davis*, 81 Md. 134, 31 Atl. 710.

And where it appears that a testator was afflicted with senile cystitis, a disease which causes the severest pain, rendering mechanical assistance necessary to obtain relief, and, unless obtained at frequent intervals, rendering the sufferer unable to concentrate his thoughts on anything but his sufferings, and that the drafting of his will was not commenced until three and one half hours after such assistance had been given, and that the draftsman was engaged one and one half hours and the nurse testified that when the draftsman and witnesses left the room she found him in intense agony, and that he later told her that he had been having some writing done, but his head would not let him finish it,—the question of testamentary incapacity and undue influence should be given to a jury. *Re Jacott*, 2 Silv. Sup. Ct. 544, 6 N. Y. Supp. 122.

[95] *Re Ehminne*, 30 Misc. 21, 62 N. Y. Supp. 1006.

[96] 1 Jarman, Wills, 5th Am. ed. chap. 3. And see *Davis* v. *Rogers*, 1 Houst. (Del.) 44.

ing." And "the fact that the testator wrote the will might fairly be regarded as sufficient evidence, prima facie at least, that he made it understandingly."[97] And the deaf and dumb testator may communicate his intention to execute by signs,[98] or by writing.[99] Whatever may once have been thought, it is now clear that even a concurrence of blindness with deafness and dumbness necessarily works no incapacity.[100] The question depends upon the education of the party afflicted with this calamity. Under recent improved culture deaf-mutes are enabled to receive instruction freely, and freely to communicate their views; and, when this is the case, their testamentary capacity cannot be questioned on the ground that they are deaf-mutes.[101]

h. Inquisition of lunacy or drunkenness as evidence.

See *infra,* chapter VI., COMMISSIONS OF LUNACY AND DRUNKENNESS.

VIII. LUCID INTERVALS.

131. Application of doctrine to wills.—The doctrine that an act performed by a lunatic during a lucid interval is binding applies to wills,[1] though the testator was subject to complete insanity.[2] And the will of a testator who was suffering from an attack of delirium tremens will be sustained if executed during a lucid interval.[3]

132. Restoration of disposing mind must be shown.— When a lucid interval is set up as the period in which a will was executed, it being established that the testator was previously habitually insane, it is necessary to show not merely a cessation of the more violent symptoms of the disease, but a restoration of the faculties, at the very period of such

[97] 1 Redf. Wills, chap. 3, § 5.

[98] *Owston's Goods,* 2 Swabey & T. 461, 31 L. J. Prob. N. S. 177, 6 L. T. N. S. 368, 10 Week. Rep. 410; *Geale's Goods,* 3 Swabey & T. 431, 33 L. J. Prob. N. S. 125, 12 Week. Rep. 1027.

[99] *Moore* v. *Moore,* 2 Bradf. 265. See *Christmas* v. *Mitchell,* 38 N. C. (3 Ired. Eq.) 535.

[100] *Weir* v. *Fitzgerald,* 2 Bradf. 42. And see *Wampler* v. *Wampler,* 9 Md. 540.

[101] The earlier cases will be found in a learned essay by Dr. H. P. Peet, in the 13th vol. of the Am. Journal of Insanity.

[1] *Duffield* v. *Robeson,* 2 Harr. (Del.) 375; *James White Memorial Home* v. *Haeg,* 204 Ill. 422, 68 N. E. 568; *Aubert* v. *Aubert,* 6 La. Ann. 104; *Kingsbury* v. *Whitaker,* 32 La. Ann. 1055, 36 Am. Rep. 278; *Re Cornelius,* 23 Misc. 434, 51 N. Y. Supp. 877; *Wright* v. *Lewis,* 5 Rich. L. 212, 55 Am. Dec. 714; *Clarke* v. *Cartwright,* 1 Phillim. Eccl. Rep. 90.

A rational will, made by one who understood his position, during a lucid interval, will be sustained though he was suffering from tubercular inflammation of the brain,—a progressive disease,—which began before the will was made, and rendered him frequently delirious. *Re Cornelius,* 23 Misc. 434, 51 N. Y. Supp. 877.

[2] *Kingsbury* v. *Whitaker,* 32 La. Ann. 1055, 36 Am. Rep. 278.

[3] *Crouzeilles's Succession,* 106 La. 442, 31 So. 64. And see *Re Hewitt,* 31 Misc. 81, 64 N. Y. Supp. 571.

execution.[4] But it is not necessary that the restoration be to a state of mind equal to that originally possessed by the patient. It is enough if he have a disposing mind.[5]

133. How proven.— Evidence to establish a lucid interval after derangement is required to be as strong and demonstrative as evidence to establish derangement;[6] and it should go to the state and habits of the person generally, and not to an accidental interview or to the degree of capacity demonstrated in a particular act.[7] Stronger proof of lucidity is necessary to uphold a will in cases of general insanity than in cases of insanity of a temporary or fluctuating character.[8] The fact that a will by an insane person was a rational one, however, and made in a rational manner, is strong though not conclusive evidence that it was made during a lucid interval,[9] imposing upon those who attack it

[4] *Halley* v. *Webster*, 21 Me. 461; *Gombault* v. *Public Administrator*, 4 Bradf. 226; *Boyd* v. *Eby*, 8 Watts, 66; *Harden* v. *Hays*, 9 Pa. 151; *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Rush* v. *Megee*, 36 Ind. 69; *Hall* v. *Warren*, 9 Ves. Jr. 605; *Ex parte Holyland*, 11 Ves. Jr. 10, 8 Revised Rep. 67; *Steed* v. *Calley*, 1 Keen, 620; *Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441; *Ayrey* v. *Hill*, 2 Addams Eccl. Rep. 206; *White* v. *Driver*, 1 Phillim. Eccl. Rep. 84; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375. And see Jarman, Wills, 5th Am. ed. Randolph & T. 77.

[5] See cases, *supra*; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Lilly* v. *Waggoner*, 27 Ill. 395.

He must be in such a condition as to know the nature of the business he is doing. *James White Memorial Home* v. *Haeg*, 204 Ill. 422, 68 N. E. 568.

[6] *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441; *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689; *Ricketts* v. *Jolliff*, 62 Miss. 441; *Hall* v. *Warren*, 9 Ves. Jr. 606.

The knowledge and admission of the testator himself, that his mind had been disordered, are strong proofs of re-established faculties. *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

[7] *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441; *Ricketts* v. *Jolliff*, 62 Miss. 441.

The fact that a will corresponded with a former will made while the testator was unquestionably sane, and with the state of his affections, sufficiently proves that it was made during a lucid interval. *Dimes* v. *Dimes*, 10 Moore P. C. C. 422.

And so do declarations by a testator as to his intention to make such a will, made while sane. *Coghlan's Case*, cited in 19 Ves. Jr. 508.

And proof that a will written by a testator was proper and natural and conformable to his affections, and that he consequently recognized it during a lucid interval, is sufficient to sustain it, though he was at times so violent as to render it necessary to tie him. *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90.

[8] *Duffield* v. *Robeson*, 2 Harr. (Del.) 375.

Lucid intervals are much more easily proved in cases of delirium than in cases of fixed mental derangement or permanent insanity. *Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441.

And evidence that a testator had softening of the brain, finally culminating in his death shortly after the execution of his will, and of severe prostration at times, during which his intellect was feeble and his memory nearly gone, does not show testamentary incapacity, where it appears that there were intervals between attacks in which his mind was reasonably clear, during one of which the will was executed, and it was simple and reasonable in its provisions. *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287.

[9] *Weir's Will*, 9 Dana, 434; *Gombault* v. *Public Administrator*, 4 Bradf. 226; *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90; *Nichols* v. *Binns* 1 Swabey & T. 239.

the burden of proving insanity at the moment it was made.[10] But infirmity of mind after derangement is evidence tending to show, not that there had been a lucid interval, but that the disorder had not been entirely rooted out.[11] And evidence of sanity before and after a day on which a will was made by a testator generally insane is not sufficient to establish a lucid interval at that time,[12] though it would be if there were no signs of irrationality at the time, and the disposition harmonized with previous declarations.[13]

IX. Unexecuted or nuncupative wills.

134. Nature; strict proof of intent necessary.— In some jurisdictions wills of personal estate corresponding to long-entertained intentions upon the part of a testator are held valid as unexecuted papers, where the execution was delayed for the want of witnesses or other causes until insanity intervened.[14] And such insanity will not reflect back on previous eccentricities so as to invalidate the will.[15] But to render such a will effectual the cause which prevented its being signed, where the testator knew how to write, must have been a physical, and

[10] *Kingsbury* v. *Whitaker*, 2 La. Ann. 1055, 36 Am. Rep. 278; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577, 15 So. 297; *Mifflin* v. *Smedley*, 3 Del. Co. Rep. 143.

A will of a simple nature, which is rational and natural under the circumstances of the case, may be admitted to probate as having been made during a lucid interval, though the testator had been confined and remained so until his death, and he was afterwards found upon inquisition to have been insane, without lucid intervals, for a period covering the date of the will. *Bannatyne* v. *Bannatyne*, 16 Jur. 864, 14 Eng. L. & Eq. Rep. 581, 2 Rob. Eccl. Rep. 472. And see *Mifflin* v. *Smedley*, 3 Del. Co. Rep. 145.

And fluctuating capacity, and that a will may have been made during a lucid interval, will be inferred from contradictory opinions as to the testator's capacity, particularly where it appears that he was occasionally capable. *Williams* v. *Goude*, 1 Hagg. Eccl. Rep. 577.

[11] *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441.

A will of one who had been insane, but who acted sanely for an interval of a month, after which he became depressed as to his religious condition, executed during the time of such depression, will not be sustained, where the attesting witnesses deemed him incompetent, though it was in his own handwriting, and rational in its provisions. *Symes* v. *Green*, 5 Jur. N. S. 742, 1 Swabey & T. 401, 28 L. J. Prob. N. S. 83.

[12] *Harden* v. *Hays*, 9 Pa. 151.

So, the presumption against a will arising from the fact that the testator had been insane, and from evidence of delusion and other indications of derangement existing shortly before the will was made, is not rebutted by proof of calmness on his part and of his transacting matters of business under the sanction of his family. *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433.

[13] *Gombault* v. *Public Administrator*, 4 Bradf. 226.

[14] *Fulleck* v. *Allinson*, 3 Hagg. Eccl. Rep. 527; *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

A will of a person whose physical condition was such that she could not write is good, as an unexecuted paper, where it was drawn from her instructions, and read over to and approved by her. *Martin* v. *Wotton*, 1 Lee Eccl. Rep. 130.

[15] *Hoby* v. *Hoby*, 1 Hagg. Eccl. Rep. 146.

not a mental, one.[16] And such instruments changing the whole testamentary plan of the testator will not be upheld unless the change of intention was so distinctly ascertained that there could be no doubt of the testator's meaning.[17] So, testamentary capacity and intent of the testator at the time of making a nuncupative will must appear by the clearest and most indisputable testimony.[18]

X. Revocation.

135. Effect of destruction or defacement.— The destruction of a will by a lunatic testator does not revoke it, the insane intent to destroy not being sufficient.[19] And a will partially defaced by a testator, while insane, will be probated as it existed in its integral state, if that can be ascertained.[20] One who is mentally incompetent to make a will is equally so to revoke a will previously made.[21] And the destruction of a will does not constitute revocation unless the testator at the time had capacity to understand the nature and effect of the act, and to perform it or to direct its performance freely and voluntarily, with in-

[16] *Jackson* v. *Moore*, 14 La. Ann. 209.

[17] *Wood* v. *Wood*, 1 Phillim. Eccl. Rep. 357.

[18] *Dorsey* v. *Sheppard*, 12 Gill & J. 192, 37 Am. Dec. 77; *Re Yarnall*, 4 Rawle, 46, 26 Am. Dec. 115; *Blewitt* v. *Blewitt*, 4 Hagg. Eccl. Rep. 410.

To sustain a nuncupative will the evidence must show that it contains at least the true substance and import of the declarations made by the testator. *Re Yarnall*, 4 Rawle, 46, 26 Am. Dec. 115.

[19] *Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Forbing* v. *Weber*, 99 Ind. 588; *Smith* v. *Wait*, 4 Barb. 28; *Re Forman*, Tucker, 205; *Dominick* v. *Dominick*, 20 Abb. N. C. 286; *Ford* v. *Ford*, 7 Humph. 92; *Brunt* v. *Brunt*, L. R. 3 Prob. & Div. 37, 28 L. T. N. S. 368, 21 Week. Rep. 392.

A subsequent revocation of a will made by a testator while he was unquestionably sane, without any evidence of a change of purpose or any ground for a change, after he had shown signs of mental collapse, may be attributed to mental delusion. *Miller* v. *White*, 5 Redf. 321.

[20] *Scruby* v. *Fordham*, 2 Addams Eccl. Rep. 74; *Borlase* v. *Borlase*, 4 Notes of Cases, 106.

So, probate of a will in its original state will be granted when an alteration had been made while the testator was of unsound mind. *Bicknell's Goods*, 3 Addams Eccl. Rep. 231.

And the contents of a will destroyed by an insane testator may be proved in the same manner as other facts are established. *Ford* v. *Ford*, 7 Humph. 92.

And an unexecuted draft of a will may be admitted to probate where the will itself was destroyed by the testator while insane, after which he recovered and gave directions for the preparation of another will to the same effect, but killed himself before its completion. *Downer's Goods*, 1 Spinks Eccl. & Adm. Rep. 106, 26 Eng. L. & Eq. Rep. 600.

[21] *Smith* v. *Wait*, 4 Barb. 28; *Allison* v. *Allison*, 7 Dana, 94; *McIntire* v. *Worthington*, 68 Md. 203, 12 Atl. 251.

A codicil cannot be regarded as effective as a revocation of a former will, where it is invalid as an affirmative testamentary disposition because of the insufficient mental capacity of the testator. *Delafield* v. *Parish*, 25 N. Y. 9.

And where there is reason to suppose that a testator was wanting in testamentary capacity at the time of the execution of a will which revoked a preceding one, an issue as to testamentary capacity at the time of the execution of the preceding will should be awarded. *Thomas's Estate*, 20 W. N. C. 336.

tent to effect a revocation.[22] But where a will is produced for probate with the signature of the testator torn off, a presumption is raised that it was personally revoked, and that he had capacity to revoke it.[23] A commission of lunacy against a testator does not work a revocation of a will made when he was of sound mind.[24] But an act of destruction by one under inquisition is not followed by a presumption of revocation; the burden of showing it still rests with the party affirming it.[25]

XI. Morphinism and other addictions.

136. Rules as to drunkenness apply.—Mental incapacity of a testator at the time of making a will invalidates it, though it was caused by morphine or other drugs, and though they were taken for medicinal purposes.[26] And the use of such drugs for many years, together with great age, raise a presumption that the mental faculties of the testator may have become so enfeebled that he would be unable to understand the provisions of a complicated will without explanation.[27] But the existence of unsoundness of mind from such causes must be shown to

[22]*Rhodes* v. *Vinson,* 9 Gill, 169, 52 Am. Dec. 685; *Re Forman,* 54 Barb. 279; *Re Forman,* Tucker. 205; *Richardson* v. *Adams,* 110 Ga. 425, 35 S. E. 684.

The rationality or irrationality of a testator at the time of defacing his will is to be inferred from the rationality or irrationality of his act, where there is nothing to evidence it *aliunde. Scruby* v. *Fordham,* 1 Addams Eccl. Rep. 74.

And the fact that a testator was weak and approaching his death, and wandering in his mind, does not incapacitate him to revoke his will, where he was easily restored to his normal condition, and understood the disposition the law would make in the absence of a will, and intended to adopt it, and had no settled and unchangeable delusion and no antipathy toward any legatee or beneficiary. *Re Joncs,* 2 Ohio S. & C. P. Dec. 409. And see *Laing* v. *Bruce,* 1 Dunlop, B. & M. 59.

[23]*Re Jones,* 2 Ohio S. & C. P. Dec. 409.

But where a will was drawn by a testator and was in his custody both while he was of unsound mind and of sound mind, the burden of showing that it was not done after he became insane, and that therefore it amounted to a revocation of a former will, rests with the person asserting such revocation. *Harris* v. *Berrall,* 1 Swabey & T. 153, 7 Week. Rep. 19.

[24]*Hughes* v. *Hughes,* 2 Munf. 209.

[25]*Re Jones,* 2 Ohio S. & C. P. Dec. 409.

[26]*Stedham* v. *Stedham,* 32 Ala. 525. And see *Re Underhill,* 21 Ohio L. J. 279.

[27]*Rutland* v. *Gleaves,* 1 Swan, 198.

And where the mind of a testatrix had been seriously impaired by strong drink and opiates, and it appears that she had nothing to do with the preparation of her will, and that she had not read it or heard it read, and its contents had not been stated to her, proof that she knew what was in it when she signed it is imperatively demanded before it can be admitted to probate. *Burritt* v. *Silliman,* 16 Barb. 198.

But a finding sustaining a will will not be disturbed on appeal, where the testator disinherited a daughter because of her desire to marry a man whom he did not like, though he was an invalid, subsisting largely upon whisky and morphine, but not taking the latter in quantities sufficient to affect him mentally, and a majority of the witnesses were of the opinion that he was competent. *Carlin* v. *Baird,* 11 Ky. L. Rep. 932, 13 S. W. 434.

have been actually present at the time of the making of the will.[28] And such addictions will not invalidate it though the testator's mind was apparently weakened thereby, where he fully understood what he was doing at the time.[29] So, though the ordinary effect of morphine is to weaken the will power, such use is not material in an action to set aside a will for undue influence, where no weakening of the will is shown and no effort to control the testator appears.[30] But it is proper that full inquiry should be made as to the effect of such addictions upon the mind, and costs will not be imposed upon the contestant of a will where such addiction is established.[31] A moderate use of narcotics for medicinal purposes does not affect testamentary capacity, where no impairment of mental power appears.[32]

[28]*Miller* v. *Oestrich*, 157 Pa. 264, 27 Atl. 742; *McCullough's Will*, 35 Pittsb. L. J. 169.

Incapacity of a testator arising from the use of morphine is but temporary, and where he did not have the habit fixed there is no presumption in favor of a continuance thereof. *Camp* v. *Shaw*, 52 Ill. App. 241.

But when a will is made by a testator upon his death-bed and shortly before death, and it appears that he was delirious or in a stupor from the use of drugs, there is no presumption that it was made during a lucid interval, though such intervals are shown to have existed. *Elliott* v. *Welby*, 13 Mo. App. 19.

[29]*Frost* v. *Wheeler*, 43 N. J. Eq. 577, 12 Atl. 612; *Re Glockner*, 17 N. Y. S. R. 798, 2 N. Y. Supp. 97; *Epling* v. *Hutton*, 121 Ill. 555, 13 N. E. 242.

Evidence that a testator's mind was greatly impaired by the use of opium and liquor, in consequence of which he was frequently incapable of transacting business, will not repel the presumption of sanity arising from the fact that he wrote his will himself, in the absence of anything to show that he was incapable of transacting business at the very moment the will was executed. *Temple* v. *Temple*, 1 Hen. & M. 476.

[30]*Bush* v. *Lisle*, 89 Ky. 393, 12 S. W. 762.

[31]*Frost* v. *Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612.

[32]*Re Glockner*, 17 N. Y. S. R. 798, 2 N. Y. Supp. 97; *Brown* v. *Torrey*, 24 Barb. 583; *Miller* v. *Oestrich*, 157 Pa. 264, 27 Atl. 742; *Epling* v. *Hutton*, 121 Ill. 555, 13 N. E. 242.

CHAPTER V.

GIFTS.

137. Gifts *inter vivos*.
138. Testamentary gifts.
139. Habitual drunkenness affecting gifts.

137. Gifts inter vivos.— The degree of capacity to make a valid gift *inter vivos* is the same as that required to make a valid contract or deed;[1] which is a higher degree of capacity than that necessary for the making of a valid will.[2] One who is conscious of his acts and understands their nature and effect has sufficient mental capacity to make such a gift.[3] And the fact that a donor was declining in health, and that his understanding was greatly weakened, does not necessarily imply the absence of capacity to dispose of property by gift.[4] That a donor was laboring under a delusion, however, out of which he could not be reasoned, and which so took possession of his mind that he could not act reasonably upon the subject of the gift, and which led him to make it, is sufficient to invalidate it, and prior idiocy or imbecility

[1] *Crum* v. *Thornley*, 47 Ill. 192.

Where one embezzles the property of another knowing that the latter was of unsound mind and not capable of transacting the ordinary business of life, it is not material whether the latter parted with the property willingly or unwillingly. *Hobbs* v. *People*, 183 Ill. 336, 55 N. E. 692.

[2] *Lemon* v. *Jenkins*, 48 Ga. 313. And see *Clarke* v. *Sawyer*, 3 Sandf. Ch. 351.

[3] *Richardson* v. *Smart*, 65 Mo. App. 14; *Coffey* v. *Coffey*, 179 Ill. 283, 53 N. E. 590, Affirming 74 Ill. App. 241; *Jennings* v. *Hennessy*, 26 Misc. 265, 55 N. Y. Supp. 833; *Zeltner* v. *Bodman German Protestant Widows' Home*, 1 Ohio S. & C. P. Dec. 306.

A gift by a father to a son, who had performed occasional services for him without charge, is valid when made while the donor had sufficient mental capacity to understand the transaction, though he had not capacity to transact business generally. *Van Deusen* v. *Rowley*, 8 N. Y. 358.

[4] *Ralston* v. *Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420.

So, mere failure of memory does not establish incapacity to make a gift. *Galer* v. *Galer*, 108 Iowa, 496, 79 N. W. 257.

And the fact that a father was insane directly before making a gift to a son, and again directly afterwards, from the violence of disease, does not invalidate the gift. *Richardson* v. *Smart*, 65 Mo. App. 14.

And a finding that a grantor was of sound mind up to within three days of making a deed of gift, and from that time on his mind was unsound, will be set aside as against evidence, where characteristics indicating insanity appear, which were exhibited continuously for at least three months prior to the date of the commencement of insanity as specified in the finding. *Field* v. *Shorb*, 99 Cal. 661, 34 Pac. 504.

A finding that a donor was of unsound mind is a mere conclusion, and not a sufficient basis for a judgment invalidat-

need not be shown.[5] Where a gift from a principal to an agent is impeached on the ground of incapacity, fraud, or undue influence, it should be made to appear, in order to support it, that the confidence of the donor had not been abused, and that it was made freely and knowingly.[6]

138. Testamentary gifts.— A disposition of property in anticipation of death, by *ante mortem* transfers, is governed by the same tests of capacity as a disposition thereof by will;[7] the rule of testamentary capacity, that the testator must have a fair appreciation of the nature of his act, of his property, and of what he wishes to do with it, applying substantially in case of a gift during life of a not clearly undue portion of the donor's estate to a natural object of his bounty.[8] And such a gift is not invalidated by the fact that the donor was advanced in years, and did not have independent advice.[9] Nor will extreme old age and loss of memory affect a gift to a natural object of the donor's

ing a gift. *Teegarden* v. *Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

[5]*Riggs* v. *American Tract Soc.* 95 N. Y. 503; *Nottidge* v. *Prince*, 2 Giff. 246, 29 L. J. Ch. N. S. 857, 6 Jur. N. S. 1066, 8 Week. Rep. 742.

And a conveyance by a grantor of advanced age, to his son-in-law, of all his property, to the exclusion of his children, who were needy and worthy, in consideration of the agreement of the son-in-law to take care of him and his wife for life, will be set aside after his death, where the evidence as to his mental capacity was conflicting, and the rental of the property was sufficient to pay the expenses of their keeping, the unreasonableness of the transaction being decisive. *Bussey* v. *Gross*, 9 Ky. L. Rep. 843, 7 S. W. 150.

[6]*Parris* v. *Cobb*, 5 Rich. Eq. 450.

A deed of gift, subject to a power of appointment by the donor, from an elderly person to a confidential agent, though without intervention of a disinterested third person, and though the solicitor drawing the deed was the solicitor for the person taking the benefit under it, is valid and will be upheld where the circumstances do not indicate undue influence exerted over an insufficient understanding. *Hunter* v. *Atkins*, 8 Myl. & K. 113.

[7]*Young* v. *Otto*, 57 Minn. 307, 59 N. W. 199; *Greer* v. *Greer*, 9 Gratt. 330. And see *Dinges* v. *Branson*, 14 W. Va. 100.

The question as to the validity of a gift made a few days before the donor's death is not what he contemplated or intended, but whether his intentions were carried into effect; and an intelligent will directing or assenting to the act is essential. *Duncombe* v. *Richards*, 46 Mich. 166, 9 N. W. 149.

[8]*Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230. And see *Greer* v. *Greer*, 9 Gratt. 330.

A deed by a parent to a child, without consideration, will not be set aside because it constitutes an unequal distribution of the parent's property, unless incapacity appears, or it is shown that some imposition was practised, or confidence abused, or undue influence used. *Moore* v. *Moore*, 67 Mo. 191.

And evidence that a father, believing that his son had wronged him, and attempted to kill him, inflicted a mortal wound upon himself, and gave a package of bonds to a favorite daughter-in-law, thereby departing from a previously declared intention as to their disposition, does not establish insanity which will defeat the gift. *Crum* v. *Thornley*, 47 Ill. 192.

[9]*Soberanes* v. *Soberanes*, 97 Cal. 140, 31 Pac. 910.

The fact that an aged man, who made a gift to one of his heirs to the exclusion of the others, manifested prudence and judgment in determining the best mode of giving the conveyance effect after his death, raises a presumption of capacity to make the gift. *Clearwater* v. *Kimler*, 43 Ill. 272.

bounty, where it was apparently voluntary and the donor appeared to be competent to attend to his own affairs.[10] Gifts *causa mortis*, however, like wills, are usually made when the donor is in a situation rendering him particularly susceptible to undue influence, and should, therefore, be closely scrutinized, and set aside in every case of doubt as to capacity and volition.[11] And a jury is authorized to find a gift void from undue influence where the donor acted without independent and disinterested advice, at a time when his mind was enfeebled by age and disease, though not to the extent of producing mental unsoundness, where it comprised a large portion of his estate and operated to deprive those having a natural claim on his bounty of all benefit therefrom.[12] A person receiving a voluntary conveyance from an infirm person, whether the relation existing between them is confidential or not, or that of consanguinity or otherwise, is bound to make it satisfactorily appear that the donor fully understood the character, nature, and effect of his act.[13]

139. Habitual drunkenness affecting gifts.— Drunkenness of a donor, produced by the donee, or intoxication so extreme that he did not know what he was about, is a material circumstance to be considered in deciding as to the validity of a gift.[14] And the gift of one's whole estate, disinheriting the natural objects of his bounty, without reason-

[10] *Re Allison*, 35 N. Y. S. R. 323, 12 N. Y. Supp. 324.

Declarations of a donor while of sound mind, as to his intentions concerning the disposal of certain property, made before a sickness claimed to have resulted in unsoundness of mind, are not of themselves evidence that he was insane at a subsequent period, when he deeded the same property to others. *Howe* v. *Howe*, 99 Mass. 88.

[11] *Duncombe* v. *Richards*, 46 Mich. 166, 9 N. W. 149; *Ellis* v. *Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Thorp* v. *Amos*, 1 Sandf. Ch. 26; *Shirley* v. *Whitehead*, 36 N. C. (1 Ired. Eq.) 130.

And a deed made by a man eighty-two years of age a few days after an accident resulting in the death of his wife, to one for whom he had no peculiar or excessive affection, without consideration, should be set aside as the probable result of weakness of mind and undue influence. *Musick* v. *Fisher*, 96 Ky. 15, 27 S. W. 812.

[12] *Woodbury* v. *Woodbury*, 141 Mass. 330, 55 Am. Rep. 479, 5 N. E. 275; *Lyon* v. *Home*, L. R. 6 Eq. 655, 37 L. J. Ch. N. S. 674, 18 L. T. N. S. 451, 16 Week. Rep. 824.

Mere proof by a subscribing witness to a deed, that he saw it executed, is not sufficient to sustain it, where it was in the nature of a testamentary disposition, purporting to have been signed by the grantor by his mark when he was in his ninetieth year, partly deaf and nearly blind and helpless, and it was drawn in the handwriting of the husband of the grantee, and witnessed only by her son. *Lansing* v. *Russell*, 13 Barb. 521.

[13] *Jones* v. *Thompson*, 5 Del. Ch. 374.

[14] *Samuel* v. *Marshall*, 3 Leigh, 567. And see *Blagg* v. *Hunter*, 15 Ark. 246.

And a deed based on a consideration of love and affection, made by a person of weak intellect and habitual drunkenness, upon the day of his marriage, to his brother, without reservation for himself or family, and a bill of sale to such brother, made after marriage, raises a trust in equity for the benefit of the wife and other representatives of the donor, though there was no positive proof of fraud, and though sometimes he expressed satisfaction with the transaction, his intoxication having been contributed to in some measure by the grantee. *Rutherford* v. *Ruff*, 4 Desauss. Eq. 350.

able motive, warrants an inference of fraud which will invalidate it.[15] And a conveyance without consideration will be relieved against in equity, where the grantor was so intoxicated as not to know what he was doing, though the intoxication was not induced or produced by the grantee.[16] An habitual drunkard, however, is presumed to be competent to make a valid gift, unless it appears that his intemperance had produced a settled derangement of his faculties.[17] And a gift will not be set aside because the donor's memory was somewhat impaired from advanced age and the use of intoxicating liquors, where he still possessed a sound practical judgment in business matters, and exhibited judgment in making the disposition, which was not unreasonable or unjust.[18]

[15] *Samuel* v. *Marshall*, 3 Leigh, 567.

[16] *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357; *Warnock* v. *Campbell*, 25 N. J. Eq. 485; *Ryerson* v. *Adams*, 6 N. J. Eq. 618.

[17] *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340.

[18] *Wiley* v. *Ewalt*, 66 Ill. 26; *Belcher* v. *Belcher*, 10 Yerg. 121.

A deed of trust for the benefit of the grantor's wife and children, though made while intoxicated, will not be set aside in equity upon the ground that undue advantage had been taken of his condition. *Hutchinson* v. *Tindall*, 3 N. J. Eq. 357.

CHAPTER VI.

COMMISSIONS OF LUNACY AND DRUNKENNESS.

I. Lunacy.
140. Process to determine lunacy by a commission.
141. Jurisdiction.
142. General manner of issuing.
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145. Tests of incapacity.
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150. Inquisition as evidence; conclusiveness generally.
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155. Superseding on recovery.
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156. Drunkenness warranting inquisition.
157. Inquisition of habitual drunkenness as evidence.
158. Discharge and restoration.

I. Lunacy.

140. Process to determine lunacy by a commission.—In most of the United States, as in England, process exists by which, when a party is incapable of the management of his estate, whether from mental unsoundness or from habitual drunkenness, a committee may be appointed to whom the custody of his property is committed. It would be out of place to set forth here the statutes by which this process is defined and settled; it is enough now to notice the general scheme of practice which exists in England, and which has been, with the exception of only slight alterations of detail, adopted in this country.[1]

141. Jurisdiction.—In the absence of statutory provision on the subject, a court of chancery, under the rules of the common law, will have

[1] See Ordronaux, Insanity (1877) 2 *et seq.*

authority to protect the estates of persons who, by reason of mental infirmities, are unable to do so; and, to accomplish this end, can appoint a proper person for the purpose.[2]

And the jurisdiction of a court to appoint guardians for persons of unsound mind is as extensive as is its jurisdiction to probate wills, grant letters testamentary, and to sell property of an intestate, and allot dower and partition, where such powers are all conferred by the same statutory provision.[3] And a constitutional provision granting the general assembly power to establish courts of probate with general jurisdiction for the granting of letters testamentary does not deny it the power to invest probate courts with original jurisdiction in matters pertaining to persons of unsound mind.[4] To acquire jurisdiction, notice to the alleged lunatic is held to be necessary by a majority of the cases.[5] But the contrary rule has also been asserted.[6] And the

[2]*Shapter* v. *Pillar,* 28 Colo. 209, 63 Pac. 302.

An appointment of a guardian of an incompetent person, showing upon its face that the court was without jurisdiction, is subject to collateral attack in an action brought in the name of the incompetent person by the guardian. *McGee* v. *Hayes,* 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767.

[3]*Craft* v. *Simon,* 118 Ala. 625, 24 So. 380.

In Ohio, where a person has been indicted for a crime his sanity can only be investigated by a jury in the common pleas court, as provided by law; and the probate court cannot entertain jurisdiction of a lunacy inquisition before his trial. *State ex rel. Palmer* v. *South,* 7 Ohio N. P. 442, 5 Ohio S. & C. P. Dec. 588.

[4]*Craft* v. *Simon,* 118 Ala. 625, 24 So. 380.

[5] Among the numerous cases from the different states holding this rule are: *Moody* v. *Bibb,* 50 Ala. 245; *McCurry* v. *Hooper,* 12 Ala. 823, 46 Am. Dec. 280; *Chase* v. *Hathaway,* 14 Mass. 222; *McGee* v. *Hayes,* 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767; *State ex rel. Blaisdell* v. *Billings,* 55 Minn. 467, 43 Am. St. Rep. 524, 57 N. W. 206, 794; *State ex rel. Kelly* v. *Kilbourne,* 68 Minn. 320, 71 N. W. 396; *Winslow* v. *Troy,* 97 Me. 130, 53 Atl. 1008; *Re Vanauken,* 10 N. J. Eq. 186; *Re Rust,* 177 Pa. 340, 35 Atl. 623; *Haines* v. *Cearlock,* 95 Ill. App. 203; *Lance* v. *McCoy,* 34 W. Va. 416, 12 S. E. 728; *Arrington* v. *Arrington,* 32 Ark. 674; *Jones* v. *Larned* (Colo. App.) 66 Pac. 1071; *Kimball* v. *Fisk,* 39 N. H. 110, 75 Am. Dec. 213; *North* v. *Joslin,* 59 Mich. 624, 26 N. W. 810; *Stewart* v. *Taylor,* 23 Ky. L. Rep. 577, 63 S. W. 783; *Hunt* v. *Searcy,* 167 Mo. 158, 67 S. W. 206; *Ex parte Dozier,* 4 Baxt. 81; *Mosby* v. *Gisborn,* 17 Utah, 257, 54 Pac. 121; *Evans* v. *Johnson,* 39 W. Va. 299, 23 L. R. A. 737, 45 Am. St. Rep. 912, 19 S. E. 623; *Berry* v. *Berry,* 147 Ind. 176, 46 N. E. 470.

And it has been held that the presence of the alleged lunatic cannot supply the requirement of the statute that he should be served, since he is incapable by reason of his incompetency to consent to the jurisdiction of the court, or waive any of the steps necessary to confer jurisdiction. *McGee* v. *Hayes,* 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767.

Proper service of citation will be presumed, however, in the absence of evidence to the contrary. *Reason* v. *Jones,* 119 Mich. 672, 78 N. W. 899; *Soules* v. *Robinson,* 158 Ind. 97, 92 Am. St. Rep. 301, 62 N. E. 999, affirming (Ind. App.) 60 N. E. 726.

And a proceeding to declare a person to be of unsound mind, and for the appointment of a guardian, in which the sheriff's return was complete and regular in every respect and conformed to the statute, and the meaning of the writ was evident, is not subject to objection that the alleged incompetent had no opportunity to be heard at the inquisition, though the writ was not technically accurate. *Craft* v. *Simon,* 118 Ala. 625, 24 So. 380.

[6] See *Granger* v. *Sherriff,* 133 Cal.

doctrine that notice may be dispensed with upon a clear showing that it would be improper or unsafe is supported by reason as well as authority.[7]

142. General manner of issuing.—When there is reason to believe that a party, from unsoundness of mind or habitual drunkenness, is incapable of managing his affairs, a petition lies generally from any person interested in his person or estate, for the issuing of a commission.[8] Upon the reception of the petition, the court directs a commission to issue to one or more persons—generally required to be learned in the law—directing the inquiry by commissioner and jury, as to the facts of the petition. The commissioner, being thus authorized, directs a precept to the sheriff, commanding him to summon a jury, who, when they meet, hear testimony—on both sides if desired—on the matter submitted to them, and, after being charged by the commissioner as to the law of the case, return a finding as to whether, from the lunacy or habitual drunkenness complained of, the respondent is incapable of managing his estate.[9] Should the finding be in the affirmative, the court will appoint a committee, who will take charge of the respondent's estate, subject, however, to the absolute right of the respondent to traverse the finding, *i. e.*, to put in a formal denial of it, in which case the question is determined before a court and jury, in the same way as any other contested fact. Whether the alleged

416, 65 Pac. 873; *Chavannes* v. *Priestley*, 80 Iowa, 316, 9 L. R. A. 193, 45 N. W. 766; *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033; *State ex rel. Kelly* v. *Kilbourne*, 68 Minn. 320, 71 N. W. 396; *Re Bellenger*, 32 Misc. 414, 66 N. Y. Supp. 531; *Medlock* v. *Cogburn*, 1 Rich. Eq. 477; *Davison* v. *Tipton*, 10 Ohio L. J. 321.

So, in *Bumpus* v. *French*, 179 Mass. 131, 60 N. E. 414, it was held that the appointment of a temporary guardian without notice is constitutional.

But absence of notice should be considered on application by the lunatic to be permitted to traverse the proceedings. *Re Sweeney*, 81 App. Div. 231, 81 N. Y. Supp. 47.

[7] See *Re Blewitt*, 131 N. Y. 541, 30 N. E. 587; *O'Brien* v. *O'Brien*, 2 N. Y. Anno. Cas. 117, 38 N. Y. Supp. 157; *Oster* v. *Meyer*, 23 Ky. L. Rep. 245, 67 S. W. 857; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

[8] The petition must be sustained by affidavits. *Ex parte Persse*, 1 Molloy, 219; *Re Lincoln*, 1 Brewst. (Pa.) 392. And it is necessary to jurisdiction. *Re Payn*, 8 How. Pr. 220; *Re Mason*, 1 Barb. 436.

But the appointment of a conservator of an alleged lunatic, made on application of four selectmen who authorized one of their number to inquire into the case and make the application, signing their names, is not subject to collateral attack under a statute providing for such an application to be signed by the person preferring it. *State* v. *Hyde*, 29 Conn. 564.

[9] The New York practice is given in Ordronaux, Insanity (1877) 14. See, as to the practice in regard to the appointment and removal of committees, *Black's Case*, 18 Pa. 434; *Hulings* v. *Laird*, 21 Pa. 265.

A proper instruction to the jury on a commission of lunacy is that a finding against the inquisition should be that the person sought to be put under guardianship is of sound mind and capable of managing his estate; and a finding in its favor should be that he is of unsound mind and incapable of managing his estate. *Cochran* v. *Amsden*, 104 Ind. 282, 3 N. E. 934.

lunatic really is capable of volition as to a traverse, and desires that a traverse should be entered, will be determined, it seems, by the chancellor himself, by personal examination or otherwise.[10]

143. Nature and necessity of.— The proceeding to put a person under a conservator or guardian is in the nature of a commission on a writ *de lunatico inquirendo*.[11] And one cannot be regarded as insane so as to authorize the appointment of a guardian or conservator without the issue of such a writ and a finding of a jury thereon;[12] an appointment without an inquisition being absolutely void;[13] and impeachable in any court in a collateral proceeding in which a party seeks a benefit thereby,[14] though chancery may exercise a temporary jurisdiction over a lunatic before inquisition, when necessary for the protection of his estate or his maintenance.[15]

144. Issue before a commission is general incompetency.— It will be seen that the point at issue under a commission of lunacy or habitual drunkenness is the general, and not the partial or particular, incompetency of the party who is the subject of the inquiry.[16] A commis-

[10]*Re Cumming*, 11 Eng. L. & Eq. Rep. 202, 1 De G. M. & G. 537, 21 L. J. Ch. N. S. 753, 16 Jur. 483.

[11]*Griswold* v. *Butler*, 3 Conn. 227.

It is a quasi criminal proceeding. *Taylor* v. *Barker*, 20 Ky. L. Rep. 582, 47 S. W. 217; *Oster* v. *Meyer*, 23 Ky. L. Rep. 2455, 67 S. W. 851. And see *State* v. *Duestrow*, 70 Mo. App. 311.

[12]*Eslava* v. *Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Coon* v. *Cook*, 6 Ind. 268; *Martin* v. *Stewart* (Kan.) 73 Pac. 107.

The finding must conform to the statute providing for it. *Re Wendel*, 33 Misc. 532, 68 N. Y. Supp. 904.

A finding, in a proceeding for guardianship, that one is mentally incapable, is equivalent to a finding of mental incompetency. *Re Leonard*, 95 Mich. 295, 54 N. W. 1082.

And the finding of a jury that a person named was of unsound mind is sufficient under a statute requiring the court to appoint guardians for persons of unsound mind, to authorize such an appointment, at least, on collateral attack. *Craft* v. *Simon*, 118 Ala. 625, 24 So. 380.

But a finding on a commission of lunacy that a person whose sanity was in question was of unsound mind, not stating how or when it became unsound, and not finding him to be an idiot, is not sufficient to support an inquisition so as to render it admissible in evidence as prima facie proof of his idiocy. *Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 535.

And a return to a commission of lunacy that the request to have a guardian appointed is right and reasonable is not a finding that the party is insane and incapable of taking care of himself, —that being the subject-matter of the inquiry. *Smith* v. *Burnham*, 1 Aik. (Vt.) 84. And see *Re Beaumont*, 1 Whart. 52, 29 Am. Dec. 33.

[13]*Moody* v. *Bibb*, 50 Ala. 248; *Eslava* v. *Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Re Payn*, 8 How. Pr. 220.

A judgment declaring a person to be of unsound mind will be set aside when procured by falsely representing that he was confined in a hospital and could not be produced without injury to his health. *Asbury* v. *Frisz*, 148 Ind. 513, 47 N. E. 328.

[14]*Eslava* v. *Lepretre*, 21 Ala. 504, 56 Am. Dec. 266. And see *Asbury* v. *Frisz*, 148 Ind. 513, 47 N. E. 328.

[15]*Vane* v. *Vane*, L. R. 2 Ch. Div. 124; *Re Harris*, 7 Del. Ch. 42, 28 Atl. 329; *Nailor* v. *Nailor*, 4 Dana, 340; *Re Dey*, 9 N. J. Eq. 181; *Re Wendell*, 1 Johns. Ch. 600; *Re Kenton*, 5 Binn. 613.

[16]*Watson's Interdiction*, 31 La. Ann. 757.

In determining the question as to the issue of a commission of lunacy, no regard is had for the possible results of

sion of lunacy is executed with deliberation, after a calm and full review of the previous life of the party under consideration. And he is not likely, as in criminal defenses, to obtain a verdict of insanity through undue sympathy, for his interests and his pride are both enlisted in resisting his moral and intellectual disfranchisement. It becomes, therefore, a simple test: Is the respondent prevented, by mental unsoundness or habitual drunkenness, from managing his own estate?[17] If he is, no matter how responsible he may be for crime, or capable at particular times of making a bargain, the finding must be against him.

145. Tests of incapacity.— The rule has been declared that to authorize the appointment of a committee or guardian, the mind of the alleged lunatic must have been so far impaired as to reduce it to the standard of idiocy; and that it is not sufficient that he is incapable of managing his affairs or governing himself in consequence of mental imbecility and weakness.[18] But it now seems to be settled that the issuance of a commission of lunacy is governed solely by a considera tion of what is necessary for the protection of the person and property, and well-being and happiness of the alleged lunatic;[19] and that one need not be a technical idiot or lunatic, or absolutely or utterly mad, to justify the appointment of a committee or guardian;[20] and that want of discretion, from whatever cause, is sufficient reason for

the commission as to the validity of antecedent acts, when motives actuating the proceeding are taken into consideration. *Re J. B.* 1 Myl. & C. 538.

And title to land is not involved in a lunacy proceeding, and a commission in such a proceeding has no power to settle any such question. *Hughes* v. *Jones*, 116 N. Y. 667, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446.

[17] *Titcomb* v. *Vantyle*, 84 Ill. 371; *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Fentress* v. *Fentress*, 7 Heisk. 428; *Gray* v. *Obear*, 59 Ga. 675. And see *infra*, § 145, TESTS OF INCAPACITY.

In actions for the interdiction of a party for insanity, however, investigation of the motives of those who are provoking the interdiction is of the utmost consequence. *Francke* v. *His Wife*, 29 La. Ann. 302.

[18] *Re Morgan*, 7 Paige, 236; *Re Shaul*, 40 How. Pr. 205. And see *Ex parte Barnsley*, 3 Atk. 168; *Re Donegal*, 2 Ves. Sr. 407.

Within this rule a verdict of unsoundness on a commission of lunacy is equivalent to one of idiocy or lunacy. *Sherwood* v. *Sanderson*, 19 Ves. Jr. 280, 13 Revised Rep. 193.

[19] *Re J. B.* 1 Myl. & C. 138; *Re Hoblyn*, 29 L. T. 305; *Com. ex rel. Euchenberg* v. *Schneider*, 59 Pa. 328; *Calderon* v. *Martin*, 50 La. Ann. 1153, 23 So. 909; *Re Clifford*, 57 N. J. Eq. 14, 41 Atl. 356; *Re Clark*, 57 App. Div. 5, 67 N. Y. Supp. 631, 175 N. Y. 139, 67 N. E. 212, reversing the previous case on the question of the sufficiency of the return. And see *Plympton* v. *Hall*, 55 Minn. 22, 21 L. R. A. 675, 56 N. W. 351; *Re Streiff* (Wis.) 97 N. W. 189.

Upon an inquisition of lunacy the court does not merely consider the medical evidence to ascertain whether the irregularities and defects do or do not amount to insanity, but is governed by a regard for the well-being and happiness of the alleged lunatic, and the condition and security of his property. *Re Hoblyn*, 29 L. T. 305.

[20] *Shapter* v. *Pillar*, 28 Colo. 209, 63 Pac. 302; *Cleveland's Appeal*, 72 Conn. 340, 44 Atl. 476; *McCammon* v. *Cunningham*, 108 Ind. 545, 9 N. E. 455; *Shaw* v. *Dixon*, 6 Bush, 644; *Calderon*

the appointment of a guardian, where it is likely to bring the party to want and render him a public charge.[21] But a committee cannot be appointed in a proceeding *de lunatico inquirendo* unless it is clearly established that the party is either an idiot, a lunatic, or a person of unsound mind.[22] The question at issue in such a proceeding is whether the defendant was so far deprived of his reason and understanding as to be unable to govern himself and manage his affairs.[23]

v. *Martin*, 50 La. Ann. 1153, 23 So. 909; *Re Conover*, 28 N. J. Eq. 330; *Jackson* v. *Jackson*, 37 Hun, 306; *Riggs* v. *American Tract Soc.* 95 N. Y. 511; *Re Clark*, 57 App. Div. 5, 67 N. Y. Supp. 631; *Re Anderson*, 132 N. C. 243, 43 S. E. 649; *Re Emswiler*, 8 Ohio N. P. 132, 11 Ohio S. & C. P. Dec. 10; *Smith's Case*, 22 Pa. Co. Ct. 487; *Com. ex rel. Euchenberg* v. *Schneider*, 59 Pa. 328; *Re Streiff* (Wis.) 97 N. W. 189; *Ridgeway* v. *Darwin*, 8 Ves. Jr. 65, 6 Revised Rep. 227.

The term, "*non compos mentis*," used in the Maryland act giving power to courts to superintend and direct the affairs of such persons, embraces not only lunatics and idiots, but all others whose minds are unsound. *Greenwade* v. *Greenwade*, 43 Md. 313.

And an inquisition under the Tennessee statute contemplates three kinds of incapacity, idiocy, lunacy, and unsoundness of mind short of that involving an inability to govern one's self and property. *Fentress* v. *Fentress*, 7 Heisk. 428.

And an instruction in a proceeding for the appointment of a guardian, which distinguished between unsoundness of mind from idiocy on the one hand and lunacy on the other, is proper under a statute like that of Iowa, designating three classes for whom guardians may be appointed. *Smith* v. *Hickenbottom*, 57 Iowa, 733, 11 N. W. 664.

Under the Michigan statute as to commissions of lunacy the infirmity which justifies the appointment of a guardian must be equivalent to insanity, and such as to render the person incompetent to have charge of or do any business. And a petition alleging that the party is feeble in body and mind so as to be unable to manage her business affairs with a proper degree of judgment and skill, her mind being so weak that she could be influenced by others in any direction, even against her own interest and that of her family, and could be induced to part with her property without just compensation, is not sufficient to give the court jurisdiction of a proceeding for the appointment of a guardian. *Re Storick*, 64 Mich. 685, 31 N. W. 582.

[21] *Angell* v. *Probate Court*, 11 R.I. 187; *McCammon* v. *Cunningham*, 108 Ind. 545, 9 N. E. 455; *Nailor* v. *Nailor*, 4 Dana, 340; *Greenwade* v. *Greenwade*, 43 Md. 313; *Re Tracy*, 1 Paige, 580; *Re Streiff* (Wis.) 97 N. W. 189; *Ridgeway* v. *Darwin*, 8 Ves. Jr. 65, 6 Revised Rep. 227. And see *Frantz* v. *Frantz*, 6 Ohio S. & C. P. Dec. 555.

A guardian may be appointed for an alleged lunatic where there is reasonable ground to apprehend that the lunatic may do violence to himself or others, or squander his property, though no act of madness has been committed. *Com.* v. *Meredith*, 14 W. N. C. 188. And see *Re Cope*, 7 Pa. Co. Ct. 406.

So, the fact that a female defendant in an action was unmarried and above sixty years of age, and had been deaf and dumb from infancy, renders her incapable of defending the action, and authorizes the appointment of a guardian *ad litem* to defend it for her. *Markle* v. *Markle*, 4 Johns. Ch. 168.

[22] *Re Shaul*, 40 How. Pr. 204; *Re Mason*, 3 Edw. Ch. 380; *Re Morgan*, 7 Paige, 236; *Re Perrine*, 41 N. J. Eq. 409, 5 Atl. 579; *Re Beaumont*, 1 Whart. 52, 29 Am. Dec. 33; *Hopkins* v. *Howard*, 20 R. I. 395, 39 Atl. 519; *Re Holmes*, 4 Russ. Ch. 182, 28 Revised Rep. 42.

Mere incompetency to manage one's own affairs will not alone support a charge of lunacy against him. *Sherwood* v. *Sanderson*, 19 Ves. Jr. 280, Cooper Ch. 108, 13 Revised Rep. 193. But see *Re Burr*, 17 Barb. 13; *Re Monahan*, 9 Ir. Eq. Rep. 253, 3 Jones & L. 258.

[23] *Shapter* v. *Pillar*, 28 Colo. 209, 63 Pac. 302; *Gray* v. *Obear*, 59 Ga. 675; *Hamrick* v. *State*, 134 Ind. 324, 34 N. E. 3; *Fiscus* v. *Turner*, 125 Ind. 46, 24 N. E. 662; *McCammon* v. *Cunningham*, 108 Ind. 545, 9 N. E. 455; *Snyder* v. *Snyder*, 142 Ill. 60, 31 N. E. 303; *Guthrie* v.

And the question on an inquisition against one afflicted with a delusion shown to have a dangerous tendency is whether there is such imminent danger as to require his control for his own good or that of others.[24] Some of the cases have qualified this rule, however, by requiring incapacity for the carrying on of ordinary business with reasonable prudence.[25] And within this rule one who has sufficient sense and judgment to transact the business affairs pertaining to the situation in life in which he is placed is not an incompetent for whom a guardian should be appointed.[26] But the general rule holds that the mere fact

Guthrie, 84 Iowa, 372, 51 N. W. 13; *Shaw* v. *Dixon*, 6 Bush, 644; *Lackey* v. *Lackey*, 8 B. Mon. 107; *Re Lindsley*, 43 N. J. Eq. 9, 10 Atl. 549; *Re James*, 35 N. J. Eq. 58; *Re Hill*, 31 N. J. Eq. 203; *Re Collins*, 18 N. J. Eq. 253; *Re Conover*, 28 N. J. Eq. 330; *Jackson* v. *Jackson*, 37 Hun, 306; *Re Rogers*, 9 Abb. N. C. 141; *Re Burr*, 17 Barb. 13; *Re Mason*, 1 Barb. 436; *Re Barker*, 2 Johns. Ch. 232; *Re Emswiler*, 8 Ohio N. P. 132, 11 Ohio S. & C. P. Dec. 10; *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Re Copc*, 7 Pa. Co. Ct. 406; *Com.* v. *Meredith*, 14 W.N.C. 188; *M'Elroy's Case*, 6 Watts & S. 451; *Com.* v. *Reeves*, 140 Pa. 258, 21 Atl. 315; *Robertson* v. *Lyon*, 24 S. C. 266; *Henderson* v. *McGregor*, 30 Wis. 78; *Ex parte Cranmer*, 12 Ves. Jr. 445; *Gibson* v. *Joyes*, 6 Ves. Jr. 266, 5 Revised Rep. 295; *Sherwood* v. *Sanderson*, 19 Ves. Jr. 286, Cooper Ch. 108, 13 Revised Rep. 193. And see *Jones* v. *Learned* (Colo. App) 66 Pac. 1071.

And a finding on a commission of lunacy that the alleged lunatic is mentally incapable of governing himself or managing his affairs is sufficient to give the court jurisdiction to authorize the appointment of a committee of his estate. *Re Mason*, 1 Barb. 436; *Re Barker*, 2 Johns. Ch. 232.

An allegation in a petition that the plaintiff employed counsel to set aside a judgment rendered against him does not overthrow a finding by the court that he was at the time of unsound mind, and incapable of managing his own affairs. *Lantis* v. *Davidson*, 60 Kan. 389, 56 Pac. 745.

[24]*Com.* v. *Meredith*, 14 W. N. C. 188, 17 Phila. 90; *Owing's Case*, 1 Bland Ch. 290; *Re Colvin*, 3 Md. Ch. 278; *Re Chattin*, 16 N. J. Eq. 496.

While the abstract belief in spiritualism raises no presumption of incompetency, the fact that a person has surrendered his will to the control of such influences, rather than to the exercise of sound judgment, and that the supposed communications from deceased persons are allowed to influence him in the distribution of the property, or the contracting of marriage, so that his property would go to others than the natural objects of his bounty,—a case is presented which requires an investigation as to his competency. *Re Beach*, 23 App. Div. 411, 48 N. Y. Supp. 437.

[25]*Hamrick* v. *State*, 134 Ind. 324, 34 N. E. 3; *Fiscus* v. *Turner*, 125 Ind. 46, 24 N. E. 662; *Re Williams*, 24 App. Div. 247, 48 N. Y. Supp. 475; *Re Streiff* (Wis.) 97 N. W. 189.

A commission may issue against a person incapable of managing his affairs, though he is not totally incapable of taking care of himself. *Com. ex rel. Euchenberg* v. *Schneider*, 59 Pa. 328.

[26]*Re Storick*, 64 Mich. 685, 31 S. W. 582.

When unsoundness of mind is proved on a commission of lunacy the question is as to its degree; and the court should look at the value and importance of the property to be controlled, and consider the question whether or not the alleged lunatic had ever previously had property to control, since his capacity would be greater if he were used to managing property. *Re Collins*, 18 N. J. Eq. 253.

And a commission of lunacy will not issue against a man under the care of his wife, where it does not appear to be required for his comfort and protection, and might be attended with injurious results, though his mind was unbalanced. *Re Clement*, Shelford on Lunatics, 92.

And a woman able to take care of herself in the home provided for her, and who knows how to care for her house and table and clothing, and transact the ordinary affairs of the household which

that a person cannot manage his estate judiciously, or that his management is not such as a person of intellect, vigor, and skill might approve, does not warrant the appointment of a guardian or committee;[27] mental health and fitness to manage the common and ordinary affairs of life being required to exempt one from inquisition, and not competency proportioned to the extent of one's estate.[28]

146. Age, disease, weakness.— A commission of lunacy is not confined to direct insanity, but applies to cases of imbecility of mind from any cause,—as age, disease, weakness, or habitual drunkenness.[29] But the imbecility of age must amount to unsoundness of mind.[30] A person is not a person of unsound mind because he is aged, if he is capable of transacting all ordinary business involving the taking care of his property, and understands the nature and effect of what he does, and can exercise his will with discretion, notwithstanding the influence of others,[31] though he requires something more than his own mind furnishes for the protection of himself and of his property.[32] Nor is mere weakness of intellect of itself sufficient to establish insanity justifying the issue of a commission of lunacy.[33] But a guardian may

she is accustomed to deal with, is not an incompetent for whom a guardian will be appointed. *Re Storick*, 64 Mich. 685, 31 N. W. 582.

But an inquisition of lunacy will lie against a deaf-mute sixty-five years of age, who had been so since infancy, and could neither read nor write, nor express her understanding, nor transact business, and had always been cared for by her relatives, though she could sweep, cook, and sew, and do common, every-day work, and it was possible to communicate to her a desire that she should do such work. *Re Perrine*, 41 N. J. Eq. 409, 5 Atl. 579.

[27]*Com.* v. *Reeves*, 140 Pa. 258, 21 Atl. 315; *Com. ex rel. Euchenbery* v. *Schneider*, 59 Pa. 328; *Com.* v. *Meredith*, 14 W. N. C. 188, 17 Phila. 90; *Darling* v. *Bennet*, 8 Mass. 129; *Schick* v. *Stuhr* (Iowa) 94 N. W. 915; *Re Shelleig*, 11 Ohio S. & C. P. Dec. 81.

And the fact that a man is not able to provide a comfortable and suitable maintenance for his family does not authorize the appointment of a guardian, though he made foolish bargains and squandered his earnings. *Partello* v. *Holton*, 79 Mich. 372, 44 N. W. 619.

[28]*Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

[29]*Ridgeway* v. *Darwin*, 8 Ves. Jr. 65, 6 Revised Rep. 227; *Re Cranmer*, 12 Ves. Jr. 446; *Re Perrine*, 41 N. J. Eq. 411, 5 Atl. 579; *Re Collins*, 18 N. J. Eq. 253; *Re Barker*, 2 Johns. Ch. 232; *Re Clark*, 57 App. Div. 5, 67 N. Y. Supp. 631; *Re Streiff* (Wis.) 97 N. W. 189.

[30]*Re Collins*, 18 N. J. Eq. 253; *Re Rush*, 53 N. Y. Supp. 581; *Taylor* v. *Moore*, 23 Ky. L. Rep. 1572, 65 S. W. 612; *Re Streiff* (Wis.) 97 N. W. 189; *Ex parte Cranmer*, 12 Ves. Jr. 445.

[31]*Emerick* v. *Emerick*, 83 Iowa, 411, 13 L. R. A. 757, 49 N. W. 1017; *Darling* v. *Bennet*, 8 Mass. 129; *Re Shaul*, 40 How. Pr. 204; *Re Brown*, 45 Mich. 326, 7 N. W. 899; *Re Shelleig*, 11 Ohio S. & C. P. Dec. 81; *Re Holmes*, 4 Russ. Ch. 182, 28 Revised Rep. 42; *Ex parte Cranmer*, 12 Ves. Jr. 445.

To warrant a commission of lunacy the mind of an aged person must have been so impaired that he was not only incapable of managing his property, but also incapable of governing himself. *Re Lindsley*, 44 N. J. Eq. 564, 6 Am. St. Rep. 913, 15 Atl. 1.

But a person afflicted with senile dementia or imbecility may be declared a lunatic. *Re Kelly*, 6 Ont. Pr. Rep. 220.

[32]*Re Langley*, cited in Shelford on Lunatics, 90.

[33]*Franeke* v. *His Wife*, 29 La. Ann. 302; *Watson's Interdiction*, 31 La. Ann. 757; *Greenwade* v. *Greenwade*, 43 Md. 313; *Re Mason*, 60 Hun, 46, 14 N. Y.

be appointed for one who is of such mental weakness that his judgment cannot be trusted in the management of business, whether it arises from unsoundness of mind, idiocy, or lunacy.[34]

147. Eccentricity or partial unsoundness.— An inquisition should not issue unless the evidence shows something more than eccentricity or partial unsoundness,[35] or than superstition, folly, or unfounded jealousy.[36] And the mere fact that a party is a lunatic will not warrant a commission, where he enjoys lucid intervals, and during such intervals he is competent to govern himself and his affairs.[37] But an inquisition will lie against one incapable of governing himself or his estate, notwithstanding the fact that he has lucid intervals.[38]

148. Question for jury.— The existence of such a state of unsoundness of mind as will give the courts jurisdiction to superintend the affairs of a person is a question of fact depending upon proof.[39] And the question whether a delusion upon a particular subject will authorize a finding of lunacy upon an inquisition is for the determination of the jury.[40] But it would appear to be proper to provide for the

Supp. 434; *Com. ex. rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Re Heft*, 8 Pa. Dist. R. 99; *Smith's Appeal*, 12 Pa. Super. Ct. 649, 22 Pa. Co. Ct. 487; *Re Donegal*, 2 Ves. Sr. 407, Ves. Sr. Supp. 369.

And mere weakness of mind does not justify the issue of a commission of lunacy, though it is combined with lack of business capacity or experience. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

And partial failure of memory and decay and feebleness of the intellectual faculties are not evidence of unsoundness of mind which will justify a finding of lunacy. To warrant such a finding there must have been a total deprivation or suspension of the ordinary powers of the mind. *Re Vanauken*, 10 N. J. Eq. 192.

[34]*Smith* v. *Hiekenbottom*, 57 Iowa, 733, 11 N. W. 664; *Re Flint*, Shelford on Lunatics, 91; *Re J. B.* 1 Myl. & C. 538.

But an instruction in an action for the discharge of a trustee and to have the trust property turned over to the *cestui que trust*, in which insanity is alleged as a defense, that mere weakness of mind, where there is no fraud or imposition, will not relieve, is inapplicable to the case, and fragmentary in its character and therefore erroneous. *Obear* v. *Gray*, 73 Ga. 455.

[35]*Re Cope*, 7 Pa. Co. Ct. 406.

[36]*Com. ex rel. Rubright* v. *Western Pennsylvania Hospital*, 3 Pittsb. 299.

And where, by statute, a guardian may be appointed for a spendthrift, to warrant such appointment there must be evidence of excessive drinking, gaming, debauchery, and the like. Proof of weak-minded habits in the management of money is not enough. *Morey's Appeal*, 57 N. H. 54.

[37]*Ex parte Atkinson*, Jac. 333.

[38]*Re Hill*, 31 N. J. Eq. 203; *Guthrie* v. *Guthrie*, 84 Iowa, 372, 51 N. W. 13.

[39]*Greenwade* v. *Greenwade*, 43 Md. 313.

A proceeding to declare a person to be of unsound mind, and for the appointment of a guardian, in which a jury is drawn in accordance with the methods prescribed for drawing juries in probate court, is not subject to objection that no jury was summoned as provided by law, jurisdiction of such proceedings having been conferred upon probate courts. *Craft* v. *Simon*, 118 Ala. 625, 24 So. 380.

And there can be no review on the merits except on the question of jurisdiction, in the absence of a provision for making the evidence a part of the record. *Com. ex rel. Cope* v. *Harrold*, 204 Pa. 154, 53 Atl. 760.

[40]*M'Elroy's Case*, 6 Watts & S. 451. And see *Re Weaver*, 116 Pa. 225, 9 Atl. 323.

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submission of the question either to the court or to the jury, since the constitutional and statutory provisions that in all cases involving life and liberty the accused should have a speedy trial before an impartial jury apply only to accusations of offenses against the criminal law, and not to the appointment of a guardian for an insane person by virtue of an adjudication of lunacy.[41] And it has been held that the issuance of a commission of lunacy is a matter of judicial discretion.[42]

149. Proof to establish incompetency.— Mere eccentricity or peculiarity is not evidence of insanity in a proceeding for the issue of a commission, where that is a normal characteristic of the party.[43] Nor does the fact that the physical and mental powers of a person were weakened and impaired show him to be incompetent to manage his affairs, so as to warrant a guardianship.[44] And old age and impaired sight and hearing raise no presumption against soundness of mind.[45] Nor does an improvident or unusual bargain.[46] And a delusion which is slight and harmless will not authorize a finding of lunacy on an inquisition, where there was no prospect or probability of its effect-

tion as against the weight of evidence is properly denied where there was evidence of lunacy, and the jury had the advantage of a personal examination. *Re Davenport*, 63 N. J. Eq. 342, 50 Atl. 411.

[41]*Black Hawk County* v. *Springer*, 58 Iowa, 417, 10 N. W. 791. And see *Re Welch*, 108 Wis. 387, 84 N. W. 550.

It has been held, however, that the procedure on an application for a commission of lunacy must be conducted with the same sanctions as other judicial investigations. *Re Lincoln*, 1 Brewst. (Pa.) 392; *Re Petit*, 2 Paige, 174; *Re Russell*, 1 Barb. Ch. 38.

And it is the duty of the sheriff to select and summon jurors on an inquisition of lunacy, and it is both improper and irregular for the commissioners to dictate what persons should be summoned. *Re Wager*, 6 Paige, 11.

[42]*Re Clifford*, 57 N. J. Eq. 14, 41 Atl. 356.

Although an issue has been directed to ascertain the sanity or insanity of a person, and a verdict of insanity is returned, and the judge certifies that he cannot say that it was improper, yet an appellate court will disregard the proceedings if the evidence at the hearing was such that the chancellor should have made a different decision in the first instance. *Atwood* v. *Smith*, 11 Ala. 894.

[43]*Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Re Cope*, 7 Pa. Co. Ct. 406. And see *Smith's Case*, 22 Pa. Co. Ct. 487.

[44]*Re Collins*, 18 N. J. Eq. 253.

[45]*Re Collins*, 18 N. J. Eq. 253; *Re Vanauken*, 10 N. J. Eq. 186. And see *English* v. *Porter*, 109 Ill. 285.

And proof that a man is old and under the influence of his children, and was induced to dissipate his property for their indulgence when he had usually been careful of it, is not sufficient to warrant placing his property in the hands of a guardian. *Darling* v. *Bennet*, 8 Mass. 129.

[46]*Re Welch*, 108 Wis. 387, 84 N. W. 550.

And the fact that one makes an improvident bargain, or many such bargains, or that one is unthrifty or unsuccessful in business, though tending to show insanity in connection with other evidence, is not sufficient to establish it in a proceeding for the issue of a commission. *Re Carmichael*, 36 Ala. 514.

But evidence of forgetfulness on the part of a person against whom an inquisition is issued of the fact that he had a considerable sum of money which he had himself deposited in a savings bank, and of the recent execution by him of important papers, and the inability on his part to comprehend the nature of the proceedings in lunacy against him, warrants setting aside a

ing any harm.[47] But evidence of insane delusions, together with opinions of competent and expert medical witnesses, having good opportunities for observation, that a person was so insane as to be unfit to manage his affairs, is sufficient to justify a commission.[48] And evidence of impaired health by excessive drinking, and of sudden change of character and feeling with reference to both domestic and business matters, and unusual behavior and delusion, is sufficient to sustain a finding of insanity and inability to care for one's self.[49] An order ought not to be made assigning a guardian *ad litem* for a party alleged to be of insane mind, however, where there was a bona fide dispute as to such unsoundness.[50] And where the questions of the well-being of the alleged lunatic and condition and security of his property are left at all in doubt upon an inquisition, a further inquiry should be directed.[51] And but little weight can be given in such cases to the opinions of nonexpert witnesses as to mental condition.[52] But while the courts will not be controlled by the opinion of medical experts, they will give them respectful consideration.[53] So, insanity in the family of the person against whom the inquisition is issued is entitled to

return that he was capable of governing himself and his property as against evidence. *Re Lawrence,* 28 N. J. Eq. 331.

[47]*M'Elroy's Case,* 6 Watts & S. 451.

Where the relator in an inquisition of lunacy charges delusion, the alleged lunatic has the right to show that the alleged delusion was founded on fact. *Com. ex rel. Haskell* v. *Haskell,* 2 Brewst. (Pa.) 491.

[48]*Re Fitzgerald,* 30 N. J. Eq. 59.

And evidence that the alleged incompetent was much cast down, and thought that his sons had misused him and were wasting his property, and that he desired somebody to take care of it, may be considered as tending to show his mental condition, and that he was subject to delusions. *Smith* v. *Hickenbottom,* 57 Iowa, 733, 11 N. W. 664.

[49]*Barbo* v. *Rider,* 67 Wis. 598, 31 N. W. 155.

[50]*Fry* v. *Fry,* L. R. 15 Prob. Div. 25, Affirmed in L. R. 15 Prob. Div. 50, 59 L. J. P. N. S. 43, 62 L. T. N. S. 501, 38 Week. Rep. 615.

The oath of a party applying for the appointment of a guardian *ad litem* for a person alleged to be of unsound mind, but not so found by inquisition, is not sufficient evidence of lunacy. Facts should be shown from which the court may judge for itself. *McIntyre* v. *Kingsley,* 1 Ch. Chambers Rep. (Ont.) 281.

[51]*Re Hoblyn,* 29 L. T. 305. And see *Re Persse,* 1 Molloy, 219; *Re Shaul,* 40 How. Pr. 204; *Re Russell,* 1 Barb. Ch. 38; *Re Cope,* 7 Pa. Co. Ct. 406.

[52]*Eloi* v. *Eloi,* 36 La. Ann. 563.

The jury on a proceeding for the appointment of a guardian for an alleged lunatic should be left at liberty to apply the same general rules to nonexpert testimony as are applicable to the testimony of other witnesses when estimating its value. *Cunco* v. *Bessoni,* 63 Ind. 524.

[53]*Francke* v. *His Wife,* 29 La. Ann. 302.

A person will not be interdicted on the ground of idiocy and imbecility on the evidence of two medical witnesses, neither of whom had ever conversed with him until the day before the filing of their report, and who had not had opportunity to test his mental condition. *Watson's Interdiction,* 31 La. Ann. 457.

consideration.[54] And the alleged lunatic may be brought into court after a return of the inquisition, and inquiry made by inspection.[55]

150. Inquisition as evidence; conclusiveness generally.—The prevailing rule in the absence of statutory provisions, both in England and the United States, is that the finding of an inquest in a lunacy proceeding is only presumptive proof of insanity, making a prima facie case only.[56] It is not conclusive evidence of incapacity,[57] ex-

[54]*Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491.

So, evidence of previous insanity may be considered on a commission of lunacy as tending to prove permanent unsoundness of mind which might have continued up to the time of the trial. *Obear* v. *Gray*, 73 Ga. 455.

[55]*Re Wendell*, 1 Johns. Ch. 600; *Re Payn*, 8 How. Pr. 224; *Re Rush*, 53 N. Y. Supp. 581.

The commissioners may compel the production of the lunatic, in a proceeding for an inquisition before them, for their inspection and that of the jury, if deemed desirable; and this should be done in all possible cases. *Re Russell*, 1 Barb. Ch. 38.

And the custodian of a lunatic or other person who interposes to prevent the inspection of a lunatic by the commissioners or the jury is punishable as for contempt of court. *Wenman's Case*, 1 P. Wms. 701.

But other evidence should be given in determining whether a guardian should be appointed for a person alleged to be *non compos mentis* than that arising from an examination of the person himself. *Brigham* v. *Brigham*, 12 Mass. 504.

And the alleged lunatic cannot be examined without oath as to matter upon which the jury are to act. *Re Rush*, 53 N. Y. Supp. 581.

And a person under examination for unsoundness of mind cannot be compelled to disclose the contents of a will made by him. *Alvord* v. *Alvord*, 109 Iowa, 113, 80 N. W. 306.

[56]*Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Hopson* v. *Boyd*, 6 B. Mon. 296; *Den ex dem. Aber* v. *Clark*, 10 N. J. L. 218, 18 Am. Dec. 417; *Hill* v. *Day*, 34 N. J. Eq. 150; *Kern* v. *Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *Van Deusen* v. *Sweet*, 51 N. Y. 386; *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 N. Y. S. R. 386, 22 N. E. 446; *Hoyt* v. *Adee*, 3 Lans. 173; *Demelt* v. *Leonard*, 19 How. Pr. 141; *Hirsch* v. *Trainer*, 3 Abb. N. C. 274; *Armstrong* v. *Short*, 8 N. C. (1 Hawks) 11; *Rippy* v. *Gant*, 39 N. C. (4 Ired. Eq.) 443; *Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 535; *Messenger* v. *Bliss*, 35 Ohio St. 587; *Moore* v. *Hershey*, 90 Pa. 196; *Draper's Estate*, 26 W. N. C. 218; *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24; *McGinnis* v. *Com.* 74 Pa. 245; *Miskey's Appeal*, 107 Pa. 611; *Leckey* v. *Cunningham*, 56 Pa. 373; *Koons* v. *Benscoter*, 2 Kulp, 451; *Gresh* v. *Tamany*, 2 Kulp, 453; *Wolf's Case*, 195 Pa. 438, 46 Atl. 72; *Com.* v. *Spink*, 137 Pa. 255, 20 Atl. 680; *Sergeson* v. *Sealey*, 2 Atk. 412, 9 Mod. 370; *Price* v. *Berrington*, 2 Beav. 286; *Faulder* v. *Silk*, 3 Campb. 126; *Rodd* v. *Lewis*, 2 Lee Eccl. Rep. 176; *Hall* v. *Warren*, 9 Ves. Jr. 608, 7 Revised Rep. 306; *Baxter* v. *Portsmouth*, 5 Barn. & C. 170, 2 Car. & P. 178, 7 Dowl. & R. 614; *Yates* v. *Boen*, 2 Strange, 1104. And see also *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 355; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470.

Nor is an inquisition finding a party not to be of unsound mind conclusive evidence of his soundness of mind. *Hume* v. *Burton*, 1 Ridgeway P. C. 204.

And a verdict determining the sanity of a party on a particular day is not even prima facie evidence that he was sane at a prior or subsequent date, on a question of the validity of a contract then made. *Emery* v. *Hoyt*, 46 Ill. 258.

[57]*Pittard* v. *Foster*, 12 Ill. App. 132; *Blandy* v. *Blandy*, 20 App. D. C. 535; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Hunt* v. *Hunt*, 13 N. J. Eq. 161; *Den ex dem. Aber* v. *Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Hart* v. *Deamer*, 6 Wend. 497; *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Rider* v. *Miller*, 86 N. Y. 507; *Cook* v. *Cook*, 53 Barb. 180; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Parker* v. *Davis*, 53 N. C. (8 Jones L.) 460; *McCleary* v. *Barcalow*, 6 Ohio C. C. 481; *Willis* v. *Willis*, 12 Pa. 159; *Com.*

cept as against parties and privies or perhaps persons dealing with the lunatic under the inquisition.[58] And it is not necessarily a bar to habeas corpus.[59] It is admissible as evidence of incompetency, however, even as against strangers.[60] And a judgment of a court of competent jurisdiction on an inquisition of lunacy, finding the party to be insane, is prima facie evidence of the fact adjudged.[61] And a commission finding a testator to have been of unsound mind remaining

v. *Spink*, 137 Pa. 255, 20 Atl. 680; *Dyre's Estate*, 12 Phila. 156; *Keys* v. *Norris*, 6 Rich. Eq. 388; *Stannard* v. *Burns*, 63 Vt. 244, 22 Atl. 460; *Williams* v. *Robinson*, 39 Vt. 267; *Price* v. *Berrington*, 2 Beav. 286; *Sergeson* v. *Sealey*, 2 Ark. 412, 9 Mod. 370. And see *Kellogg* v. *Cochran*, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677.

And a determination of a surrogate or of a higher court having power to review his decision with relation to the competency of a testator to make a will of personal property is not conclusive upon the parties in a subsequent suit as to the validity of the devise of real estate in the same will. *Bogardus* v. *Clark*, 4 Paige, 623.

In *Sims* v. *Sims*, 121 N. C. 297, 40 L. R. A. 737, 61 Am. St. Rep. 665, 28 S. E. 407, however, it was held that in North Carolina a marriage with a person who had, in appropriate proceedings, been found to be mentally imbecile, is absolutely void *ab initio*, and can be at any time so declared by the court.

[58] *Draper's Estate*, 26 W. N. C. 218; *Hoyt* v. *Adee*, 3 Lans. 173; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Demelt* v. *Leonard*, 19 How. Pr. 140; *Hart* v. *Deamer*, 6 Wend. 497; *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Frazer* v. *Frazer*, 25 Ky. L. Rep. 882, 76 S. W. 546.

Under a statutory provision that proceedings for the appointment of a guardian of an insane inhabitant of the county shall be the same as in any other ordinary action, however, the proceedings are *in personam*, and a finding therein that the defendant was a resident of a certain county does not estop even the guardian from denying it in a proceeding for the collection of taxes from him. *Brown* v. *Lambe* (Iowa) 93 N. W. 486.

But a commission of idiocy finding a party to be of sound mind and a fine and recovery suffered by him and a warrant of attorney made by him are conclusive evidence of sufficient sanity to make the warrant of attorney and suffer the recovery, where the issue as to his sanity is joined after his death, and the warrant of attorney and caption of the fine are acknowledged before the same officer at the same time. *Hume* v. *Burton*, 1 Ridgeway P. C. 204.

A petitioner in lunacy proceedings is not a party to the record so as to be personally estopped by the finding of the jury therein, except to the extent that all the rest of the world is estopped *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446.

And the fact that one is a party who promoted lunacy proceedings and signed a petition and was subsequently appointed the committee of the lunatic does not estop him from traversing the truth of the inquisition, and saying that at the time of the act in question the alleged lunatic had sufficient capacity to perform it. *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691.

[59] *Com. ex rel. Draper* v. *Kirkbride*, 3 Brewst. (Pa.) 393; *Noel* v. *Karper*, 53 Pa. 97.

[60] *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Pittard* v. *Foster*, 12 Ill. App. 132; *Rogers* v. *Walker*, 6 Pa. 371, 47 Am. Dec. 470; *M'Creight* v. *Aiken*, Rice L. 56; *Herndon* v. *Vick*, 18 Tex. Civ. App. 583, 45 S. W. 852; *Sergeson* v. *Sealey*, 2 Atk. 412, 9 Mod. 370; *Frank* v. *Mainwaring*, 2 Beav. 115; *Hall* v. *Warren*, 9 Ves. Jr. 609, 7 Revised Rep. 306. And see *Covenhoven's Case*, 1 N. J. Eq. 27.

[61] *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Clark* v. *Trail*, 1 Met. (Ky.) 35; *White* v. *Palmer*, 4 Mass. 147; *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Willis* v. *Willis*, 12 Pa. 159; *Noel* v. *Karper*, 53 Pa. 97; *Rogers* v. *Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Com. ex rel. Cope* v. *Harrold*, 204 Pa. 154, 53 Atl. 760; *Hamilton* v. *Hamilton*, 10 R. I. 538; *Keys* v. *Norris*, 6 Rich. Eq. 388; *Thomasson* v. *Kercheval*, 10 Humph. 322; *Herndon* v. *Vick*, 18 Tex. Civ. App.

unsuperseded raises a presumption, in a subsequent proceeding, that he remained a lunatic until his death, though it might be rebutted by positive proof of recovery or a lucid interval.[62] And the effect of such adjudication is to shift the burden of proof to the party asserting capacity.[63] But the other party to the action may traverse the truth of the inquisition, and attempt to show that at the time of the act he had sufficient capacity to perform it.[64] Under statutes invalidating contracts, gifts, etc., of persons of unsound mind, and placing the management of the affairs of such persons in the hands of the court, however, an inquisition has been regarded as a proceeding *in rem*, and as conclusive evidence of insanity as to all acts done after the inquisition.[65] And evidence of a lucid interval, or of recovery, is inadmis-

583, 45 S. W. 852; *Stevens* v. *Stevens*, 127 Ind. 560, 26 N. E. 1078; *Hughes* v. *Hughes*, 2 Munf. 209.

The force of an adjudication of insanity is not affected by the marriage and consequent change of name of an insane woman against whom it was rendered. *Redden* v. *Baker*, 86 Ind. 191.

So, the appointment by the court in a pending action of a guardian *ad litem* for a party on the ground of insanity is prima facie evidence of the party's insanity in any subsequent stage of the case. *Little* v. *Little*, 13 Gray, 264.

[62] *Prinsep* v. *Dyce Sombre*, 10 Moore P. C. C. 232; *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90.

But an inquisition of lunacy against a testator is of little weight in a will contest unless it finds idiocy from birth. *Hopson* v. *Boyd*, 5 B. Mon. 296.

[63] *Leckey* v. *Cunningham*, 56 Pa. 373; *Willis* v. *Willis*, 12 Pa. 159; *Glass* v. *Hilberg*, 1 Pa. Dist. R. 621; *Pittsburgh & W. R. Co.* v. *Thompson*, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; *Snook* v. *Watts*, 11 Beav. 105, 12 Jur. 444; *Bannatyne* v. *Bannatyne*, 14 Eng. L. & Eq. Rep. 581, 16 Jur. 864, 2 Rob. Eccl. Rep. 472.

The court will issue a commission on a prima facie case. *Ex parte Tomlinson*, 1 Ves. & B. 57, 12 Revised Rep. 191.

And a determination in a trial at law that a party was *non compos mentis* is decisive and conclusive as against a determination that he was *compos mentis* in an ecclesiastical court in a proceeding with relation to the same matter, and no appeal lies from it. *Maxwell* v. *Mountague*, cited in 3 Atk. 546.

[64] *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Covenhoven's Case*, 1 N. J. Eq. 27; *Den ex dem. Aber* v. *Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Re Christie*, 5 Paige, 242; *Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 535; *Parker* v. *Davis*, 53 N. C. (8 Jones L.) 460; *Armstrong* v. *Short*, 8 N. C. (1 Hawks) 11; *Johnson* v. *Kincade*, 37 N. C. (2 Ired. Eq.) 470; *Moore* v. *Hershey*, 90 Pa. 196; *Willis* v. *Willis*, 12 Pa. 159; *Sergeson* v. *Sealey*, 2 Atk. 412, 9 Mod. 370.

But to require the jury in an action by an heir for lands conveyed by his ancestor who had been found insane, to find for the plaintiff, unless they believed from the evidence that the ancestor was capable of transacting his own business with judgment and discretion, is error. *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578.

[65] *Redden* v. *Baker*, 86 Ind. 191; *Musselman* v. *Cravens*, 47 Ind. 1; *Soules* v. *Robinson*, 158 Ind. 97, 92 Am. St. Rep. 301, 62 N. E. 999; *Leonard* v. *Leonard*, 14 Pick. 280; *Willwerth* v. *Leonard*, 156 Mass. 277, 31 N. E. 299; *Wait* v. *Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Thorpe* v. *Hanscom*, 64 Minn. 201, 66 N. W. 1; *Rhoades* v. *Fuller*, 139 Mo. 179, 40 S. W. 760; *Kiehne* v. *Wessell*, 53 Mo. App. 667; *Payne* v. *Burdette*, 84 Mo. App. 332; *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901; *Re Patterson*, 4 How. Pr. 35; *Fitzhugh* v. *Wilcox*, 12 Barb. 235; *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Brown* v. *Miles*, 61 Hun, 453, 16 N. Y. Supp. 251; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388, 59 Am. Rep. 499; *Wallace* v. *Frey*, 27 Misc. 29, 56 N. Y. Supp. 1051; *Wadsworth* v. *Sherman*, 14 Barb. 171; *L'Amoureux* v. *Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Mitchell* v. *Spaulding*,

sible to controvert the insanity of a person under guardianship.[66] And it has been held that the presumption remains conclusive so long as the adjudication of incapacity remains in force, though there be no acting guardian.[67] But the rule has also been laid down that the act of an alleged incompetent will be valid where he is actually of sound mind, though he was under guardianship at the time;[68] and that it is not conclusive where the guardianship has been either terminated, suspended, or abandoned;[69] and that the party claiming against an inquisition may show, by lapse of time or otherwise, that the patient has recovered and become again able to contract.[70] And the doctrine

20 Pa. Super. Ct. 296; *Elston* v. *Jasper*, 45 Tex. 409. And see *Klohs* v. *Klohs*, 61 Pa. 245; *Tozer* v. *Saturlee*, 3 Grant Cas. 162; *American Trust & Bkg. Co.* v. *Boone*, 102 Ga. 202, 40 L. R. A. 250, 66 Am. St. Rep. 167, 29 S. E. 182; *White* v. *Palmer*, 4 Mass. 147; *Heff* v. *Cox*, 5 Ohio N. P. 413.

An order finding a person legally incompetent to contract, and unfit to manage his property, and appointing a guardian for him, is not subject to collateral attack when made by a court of competent jurisdiction, and will be presumed to have been correctly made in the absence of direct attack. *Isaacs* v. *Jones*, 121 Cal. 257, 53 Pac. 793, 1101.

And the appointment of a guardian by a court of competent jurisdiction cannot be attacked on the ground of irregularity, in a criminal prosecution in which the authority of the appointee to make a demand for the return of property is called in question. *State* v. *Thompson*, 28 Or. 296, 42 Pac. 1002.

[66]*Rannells* v. *Gerner*, 80 Mo. 475; *Kiehne* v. *Wessell*, 53 Mo. App. 667; *Wallace* v. *Frey*, 27 Misc. 29, 56 N. Y. Supp. 1051.

[67]*Redden* v. *Baker*, 86 Ind. 191; *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388, 59 Am. Rep. 499; *Wallace* v. *Frey*, 27 Misc. 29, 56 N. Y. Supp. 1051; *L'Amoureux* v. *Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Re Patterson*, 4 How. Pr. 34.

So, a guardian will not be heard to assert that his ward is sane and competent to testify as a witness in his favor. *Hart* v. *Miller*, 29 Ind. App. 222, 64 N. E. 239.

[68]*Breed* v. *Pratt*, 18 Pick. 115; *Stone* v. *Damon*, 12 Mass. 487.

And an adjudication that a person is insane and the appointment of a guardian for him do not necessarily show that his insanity is of such a character as to disqualify him from making a valid contract, so as to terminate an agency which he had previously conferred upon his wife, in the absence of proof that the insanity was of such character. *Motley* v. *Head*, 43 Vt. 633.

[69]*Willworth* v. *Leonard*, 156 Mass. 277, 31 N. E. 299; *Thorpe* v. *Hanscom*, 64 Minn. 201, 66 N. W. 1; *Grimes* v. *Shaw*, 2 Tex. Civ. App. 20, 21 S. W. 718; *Elston* v. *Jasper*, 45 Tex. 409. And see *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596.

This is so though the guardianship is subsequently reinstated. *Mitchell* v. *Spaulding*, 206 Pa. 220, 55 Atl. 968.

And a sale of real estate by one who had been adjudged insane seven years before, but for whom no guardian had been appointed, and who had in the interval recovered her reason, is voidable only, and not void, although there had been no adjudication of recovery. *Topeka Water Supply Co.* v. *Root*, 56 Kan. 187, 42 Pac. 715.

And when no guardian was appointed an inquisition is not conclusive against the right of the lunatic to choose a domicil. *Re Fidelity Trust Co.* 27 Misc. 118, 57 N. Y. Supp. 361.

[70]*Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901; *Topeka Water Supply Co.* v. *Root*, 56 Kan. 187, 42 Pac. 715; *Lower* v. *Schumacher*, 61 Kan. 625, 60 Pac. 538; *Clark* v. *Trail*, 1 Met. (Ky.) 35; *Elston* v. *Jasper*, 45 Tex. 409. And see *Lucas* v. *Parsons*, 23 Ga. 267; *Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996.

A party claiming against an inquisition, and seeking to show that, by lapse of time or otherwise, the patient has recovered and become again able to con-

that an inquisition is conclusive has been held to be applicable to contracts and gifts only; and that the rule adopted with reference to wills is that the inquisition is only prima facie evidence of incompetency.[71] So, an order for admission to an asylum, having no bearing on the legal mental status of the patient, is not entitled to the faith and credit of a judgment.[72] Nor will an *ex parte* order appointing a guardian *ad litem* shift the burden of proof of insanity.[73]

151. Effect of inquisition on overreached acts.—The rule is universal that an inquisition of lunacy is prima facie evidence only of mental incapacity at the time of acts done by a lunatic before the issuing of the commission, but which are overreached by the finding.[74]

tract, should do so by motion to discharge the guardian, but may be allowed to set up such claim in a collateral action. *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901; *Clark* v. *Trail*, 1 Met. (Ky.) 35.

[71]*Lewis* v. *Jones*, 50 Barb. 645; *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901; *Re Widmayer*, 74 App. Div. 336, 77 N. Y. Supp. 663, Affirming 34 Misc. 439, 69 N. Y. Supp. 1014; *Re Coe*, 47 App. Div. 177, 62 N. Y. Supp. 376; *Stone* v. *Damon*, 12 Mass. 487; *Breed* v. *Pratt*, 18 Pick. 115; *Harrison* v. *Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Pittard* v. *Foster*, 12 Ill. App. 132; *Ames* v. *Will*, 40 Or. 495, 67 Pac. 737; *Jenckes* v. *Probate Court*, 2 R. I. 255; *Slinger's Will*, 72 Wis. 22, 37 N. W. 236.

A court of equity may commit the property of a person not capable of managing his estate to the charge of a committee and still give effect to a will subsequently made by him while laboring under such incapacity. *Stewart* v. *Lispenard*, 26 Wend. 255; *Brady* v. *McBride*, 39 N. J. Eq. 495.

But while an inquisition finding a person insane does not of itself establish incompetency to make a will, when taken in connection with proof that the testator died insane, it is sufficient to cast the burden of proof of testamentary capacity upon the proponent of the will. *Re Taylor*, 1 Edm. Sel. Cas. 375. And see *infra*, chapter xx.

[72]*Re Maas*, 10 Okla. 302, 61 Pac. 1057. And see *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596.

And statements, declarations, and admissions of a person accused of crime, made while an inmate of an insane hospital are not to be deemed those of a person of unsound mind and allowed no weight, unless he is proved by other evidence to have been of unsound mind when he made them; since being confined in the hospital is not prima facie evidence of insanity. *Goodwin* v. *State*, 96 Ind. 550.

But the certificate of a judge, given pursuant to a positive law authorizing the confinement of an insane person in a lunatic asylum, is an adjudication *in rem* upon the subject of lunacy, and is prima facie evidence of the existence of facts asserted therein as against all persons notified to attend the hearing and investigation. *Monroe County* v. *Budlong*, 51 Barb. 493.

[73]*Isle* v. *Cranby*, 199 Ill. 39, 64 N. E. 1065, Reversing 101 Ill. App. 221.

And a finding of a board of commissioners of insanity as to the residence of an insane person under a statutory provision with reference to confinement in a hospital of persons having legal settlements in another county is *ex parte*, and does not estop the guardian of an insane person from denying such residence in a proceeding for the collection of personalty taxes. *Brown* v. *Lambe* (Iowa) 93 N. W. 486.

[74]*Hopson* v. *Boyd*, 6 B. Mon. 296; *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Harvey* v. *Sullens*, 56 Mo. 372; *Gridley* v. *Boggs*, 62 Cal. 201; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Brady* v. *McBride*, 39 N. J. Eq. 495; *L'Amoureux* v. *Crosby*, 2 Paige, 422, 22 Am. Dec. 655; *Hughes* v. *Jones*, 116 N. Y. 67, 5 L. R. A. 632, 15 Am. St. Rep. 386, 22 N. E. 446; *Banker* v. *Banker*, 63 N. Y. 409; *Van Deusen* v. *Sweet*, 51 N. Y. 378; *Demelt* v. *Leonard*, 19 How. Pr. 140; *Lewis* v. *Jones*, 50 Barb. 648; *Hicks* v. *Marshall*, 8 Hun, 327; *Searles* v. *Harvey*, 6 Hun, 658; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Re Patter-*

And it may be rebutted by proof of soundness of mind or lucid intervals, and that the act in question was done during such an interval.[75] The mere fact that an act is overreached by inquisition against the party performing it does not render it prima facie invalid.[76] An inquisition finding a party to be insane, however, may be given in evidence even against strangers, and is strongly confirmatory of other evidence of incompetency,[77] shifting the burden of proof to the person

son, 4 How. Pr. 35; *Klohs* v. *Klohs*, 61 Pa. 245; *Imhof* v. *Witmer*, 31 Pa. 243; *Titlow* v. *Titlow*, 54 Pa. 224, 93 Am. Dec. 691; *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Willis* v. *Willis*, 12 Pa. 159; *Clark* v. *Caldwell*, 6 Watts, 139; *Tozer* v. *Saturlee*, 3 Grant Cas. 162; *Wood* v. *Wood*, 4 Brewst. (Pa.) 75; *Hutchinson* v. *Sandt*, 4 Rawle, 234, 26 Am. Dec. 127; *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185; *Frank* v. *Mainwaring*, 2 Beav. 115.

An inquisition against a husband, found two days after his marriage, declaring him to have been of unsound mind for six months, is only presumptive evidence of incapacity in an action for the annulment of the marriage, and the fact that the wife had notice of the inquisition does not make it conclusive. *Banker* v. *Banker*, 63 N. Y. 409.

So, a decree dismissing a petition for the appointment of a guardian for an alleged incompetent person and a verdict and judgment on appeal in favor of sanity are not conclusive thereof in an action subsequently brought for the recovery of land conveyed by him between the time of the decree and the time of the verdict, but may be given in evidence as tending to prove sanity. *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414.

[75] *Hutchinson* v. *Sandt*, 4 Rawle, 234, 26 Am. Dec. 127; *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185; *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Palmer* v. *Parkhurst*, 1 Ch. Cas. 112.

The fact that a commission of lunacy overreached the act in question does not prevent an issue to inquire whether or not the party performing it was of unsound mind at the time of performance. *Frank* v. *Mainwaring*, 2 Beav. 115.

[76] *Jackson ex dem. Cadwell* v. *King*, 4 Cow. 207, 15 Am. Dec. 354; *Jacobs* v. *Richards*, 18 Beav. 300, 5 DeG. M. & G. 55, 23 L. J. Ch. N. S. 557, 18 Jur. 521, 2 Eq. Rep. 299; *Ex parte Bradbury*, 3 Jur. 1108, 4 Deacon Bankr. 202. And see *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Jones* v. *Hughes*, 15 Abb. N. C. 141.

And the fact that an application for the appointment of a guardian for a grantor was made on the day on which his deed was made, which appointment was subsequently made, does not change the presumption of business capacity at the time of the deed. *Doty* v. *Hubbard*, 55 Vt. 278.

And where a guardian had been appointed for a testator, the submission of the question to the jury in a will contest as to whether the testator was insane the day the will was made and when the guardian was appointed is objectionable as tending to prejudice the minds of the jury against the will, and give undue prominence to the fact of the appointment of a guardian. *Rice* v. *Rice*, 53 Mich. 432, 19 N. W. 132.

[77] *Nichol* v. *Thomas*, 53 Ind. 43; *Hopson* v. *Boyd*, 6 B. Mon. 296; *Wall* v. *Hill*, 1 B. Mon. 291, 36 Am. Dec. 578; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *Griswold* v. *Miller*, 15 Barb. 523; *Dominick* v. *Dominick*, 20 Abb. N. C. 286; *Rider* v. *Miller*, 86 N. Y. 507; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69. But see *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 901.

An inquisition finding a grantor to have been a lunatic for twenty years is sufficient to invalidate a deed made during that period, where the consideration was inadequate and the grantee held a position of trust and confidence with respect to the grantor. *Arnold* v. *Townsend*, 14 Phila. 216.

And the finding that a grantor had been a lunatic without lucid intervals from a time anterior to the date of his deed casts a sufficient cloud upon the purchaser's title to warrant him in coming into equity for relief. *Yauger* v. *Skinner*, 14 N. J. Eq. 389.

But, as against strangers, but slight

asserting the validity of the act;[78] the strength of the inquisition as evidence depending upon the attendant circumstances.[79] Neither is an inquisition of lunacy conclusive evidence of the precise period at which the lunacy commenced;[80] nor has it any effect upon the validity of acts performed before the time named in it as that of the commencement of the period of lunacy.[81] And the fact that a contract is overreached by an inquisition does not justify setting it aside where it is fair, and was made without notice of incompetency to the other party, —especially where the parties cannot be placed in their original positions.[82]

152. Right to traverse.— A traverse to a commission of lunacy will

consideration will be given an inquisition of previous unsoundness of mind, especially when it does not expressly find the party to have been an idiot from birth. *Hopson* v. *Boyd*, 6 B. Mon. 296.

[78]*Glass* v. *Hilberg*, 1 Pa. Dist. R. 621; *Hope* v. *Everhart*, 70 Pa. 231; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Demelt* v. *Leonard*, 19 How. Pr. 142.

Where a testator had been adjudged insane and was confined in an asylum, and was generally incompetent, a presumption of continued lunacy must be overcome by evidence of lucidity at the time the will was made. *Re Ely*, 16 Misc. 228, 39 N. Y. Supp. 177.

And an inquisition finding a grantor to have been a lunatic for five years is prima facie evidence of incompetency to make a deed, though the deed was made four years before the finding. *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185.

[79]*Bannatyne* v. *Bannatyne*, 14 Eng. L. & Eq. Rep. 581, 16 Jur. 864, 2 Rob. Eccl. Rep. 472.

It would be greatly diminished by the fact that the proceedings were *ex parte* and no person was present interested in procuring a verdict carrying the lunacy back to the particular period, or to point out to the jury the effect the verdict would have upon the interests of others. *Ibid.*

Greater effect should be given an adjudication of idiocy of a testator, made two years after the execution of his will, as evidence of incompetency, than would be given an adjudication of lunacy made at such time. *Townsend* v. *Bogart*, 5 Redf. 93.

[80]*Ex parte Bradbury*, 3 Jur. 1108, 4 Deacon Bankr. 202.

When the statute limits the inquiry as to sanity to the particular time when the inquiry is being made, the finding on an inquisition cannot be used to nullify previous acts. *Reals* v. *Weston*, 28 Misc. 67, 59 N. Y. Supp. 807; *Re Grote*, 31 Misc. 99, 64 N. Y. Supp. 1035.

[81]*Sullivan* v. *Flynn*, 9 Mackey, 396; *Elwood* v. *O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Shirley* v. *Taylor*, 5 B. Mon. 99; *Jennings* v. *Hennessy*, 26 Misc. 265, 55 N. Y. Supp. 833; *Mutual L. Ins. Co.* v. *Hunt*, 79 N. Y. 541; *Rippy* v. *Gant*, 39 N. C. (4 Ired. Eq.) 443; *Small* v. *Champeny*, 102 Wis. 61, 78 N. W. 407. And see *Hix* v. *Whittemore*, 4 Met. 545; *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514.

An act done prior to the interdiction cannot be annulled except by proving that the cause of the interdiction notoriously existed at the time the act was done, or that the person who dealt with the party of unsound mind could not have been deceived as to the state of his mind. *Wolf* v. *Edwards*, 106 La. 477, 31 So. 58.

Under N. Y. Code Civ. Proc. § 2335, the inquiry on an inquisition is restricted by statute to competency at the time it was made. See *Southern Tier Masonic Relief Asso.* v. *Laudenbach*, 5 N. Y. Supp. 961; *Dominick* v. *Dominick*, 20 Abb. N. C. 286; *Re Demelt*, 27 Hun, 480; *Re Cook*, 25 N. Y. S. R. 64, 6 N. Y. Supp. 720.

[82]*Nicll* v. *Morley*, 9 Ves. Jr. 478.

A lunatic of whose incompetency the other party had no notice will be held liable for goods purchased suited to his situation, notwithstanding the existence of a commission of lunacy. *Baxter* v. *Portsmouth*, 5 Barn. & C. 171, 2 Car. & P. 178, 7 Dowl. & R. 614.

be allowed when intelligently desired, where there is a reasonable doubt as to the propriety of the result of the inquisition.[83] And it is for the court to determine as to the intelligence of the desire.[84] There may be a traverse in part.[85] But an inquisition will not be set aside for a mere irregularity where the court is satisfied that substantial justice has been done.[86] Any person having an interest is usually permitted to traverse an inquisition,[87] though in some jurisdictions the right is confined to relatives either by blood or marriage.[88] An order appointing a guardian for an alleged incompetent person is also held to be appealable, and the alleged incompetent is an aggrieved party having the right to appeal.[89]

153. Evidence necessary to rebut inquisition.— One who seeks to establish the validity of acts of a person under guardianship as insane while the adjudication remains in force must show by clear and explicit and satisfactory evidence that he had at the time such mental capacity and freedom of will as are required to render such acts valid,[90] or that such a consideration had been received that justice and equity would require the enforcement of the obligation.[91] Defects of judgment, however, may coexist with legal capacity, and capacity to transact business with judgment and discretion need not be

[83] *Re Comfort*, 63 N. J. Eq. 377, 53 Atl. 133; *Re Davenport*, 63 N. J. Eq. 342, 50 Atl. 441.

[84] *Re Davenport*, 63 N. J. Eq. 342, 50 Atl. 441.

[85] *Wolf's Case*, 195 Pa. 438, 46 Atl. 72.

[86] *Ex parte Glen*, 4 Desauss. Eq. 546.

And a judgment finding a person insane on an inquisition is not invalidated by the mere fact that the action was pending for ten years before the judgment was rendered. *Hunt* v. *Searcy*, 167 Mo. 158, 67 S. W. 206.

[87] See *Re Cumming*, 11 Eng. L. & Eq. Rep. 202, 1 De G. M. & G. 537, 21 L. J. Ch. N. S. 753, 16 Jur. N. S. 483.

A proceeding by an adjudged lunatic for a discharge from guardianship estops him from subsequently going into equity and attacking the validity of the original inquisition. *Cornett* v. *Cornett*, 122 Mich. 685, 81 N. W. 920.

But refusal of counsel for an alleged lunatic to apply for the appointment of a master to ascertain as to his intelligence is not a waiver of the client's right to a traverse. *Re Davenport*, 63 N. J. Eq. 342, 50 Atl. 441.

[88] *Re Wolf*, 195 Pa. 438, 46 Atl. 72.

The wife of an alleged lunatic is a person aggrieved who may traverse an inquisition under the Pennsylvania statute. *Com. ex rel. Pitcairn* v. *Pitcairn*, 204 Pa. 514, 54 Atl. 328. *Contra*, *Re Varnum*, 70 Vt. 147, 40 Atl. 43. And so is a niece (*Re Heft*, 8 Pa. Dist. R. 99). And so is a sister (*Re Miller*, 7 Pa. Dist. R. 269).

But the plaintiff in an action against the lunatic for trespass is not. *Re Wolf*, 9 Kulp, 523.

[89] *Re Moss*, 120 Cal. 695, 53 Pac. 357; *Shapter* v. *Pillar*, 28 Colo. 209, 63 Pac. 302.

[90] *Stevens* v. *Stevens*, 127 Ind. 560, 26 N. E. 1078; *Breed* v. *Pratt*, 18 Pick. 115; *Grimani* v. *Draper*, 6 Notes of Cases, 418.

The court on appeal in an action for the appointment of a guardian, in which the party was twice adjudged incompetent, will not set aside the findings of the lower court, in the absence of a strong showing of sanity. *Sponable* v. *Hanson*, 87 Mich. 204, 49 N. W. 644.

[91] *Hicks* v. *Marshall*, 8 Hun, 327.

shown.[92] And the presumption of insanity arising from an inquisition of lunacy may be rebutted by proof of a will having nothing on its face sounding of folly,[93] or by one containing the same provisions as a previous will made when the sanity of the testator was unquestionable.[94]

154. Proceedings may be set aside if irregular or inequitable.—If a commission be found to have been irregular in its inception or execution, or if substantial justice has not been done, either the commission may be quashed, or, if it has matured into an inquisition, the inquisition may be set aside. Thus inquisitions have been set aside because of undue interference by the commissioners with the summoning of the jury;[95] because the sheriff improperly interfered with the deliberations of the jury;[96] because the alleged lunatic had no notice given him of its occurrence;[97] because a stranger was appointed committee without the assent of the relatives of the lunatic and without a reference;[98] because the commissioners refused to issue subpœnas in behalf of the alleged lunatic;[99] because, upon the personal examination of the lunatic by the court, and of the evidence adduced upon the trial, the court held that the jury erred in finding their verdict; though in such case the introduction of new evidence, where no valid reason can be shown why the same was not produced upon the trial, will not be permitted *ex parte* to contradict the verdict, unless there has been gross error or

[92] *Wall* v. *Hill*, 1 B. Mon 290, 36 Am. Dec. 578.

[93] *Re Watts*, 1 Curt. Eccl. Rep. 594.

The fact that a commission *de lunatico inquirendo* was issued against a testator covering the time at which his will was made will not invalidate it as against a showing of full capacity by the subscribing witnesses and others who gave minute accounts of what he said and did at the time. *Rodd* v. *Lewis*, 2 Lee Eccl. Rep. 176.

And testimony as to the sanity of the grantor at the time of the execution of his deed is not overcome by an inquisition finding him to be a lunatic with lucid intervals, and that that state had continued for twenty years. *Craig* v. *Feland*, 4 T. B. Mon. 232.

[94] *Re Pendleton*, 1 Connoly, 480, 5 N. Y. Supp. 849.

But a will made by a person who had been afflicted with delusions, against whom a commission had issued which was not superseded, and who had never quitted the asylum, will not be admitted to probate upon evidence that he appeared sane and his delusions were no longer apparent, unless the proof of sanity and capability is clear and convincing. *Grimani* v. *Draper*, 6 Notes of Cases, 418.

The members of an inquisition which found a grantor to be of unsound mind are competent witnesses to prove unsoundness or a lucid interval where the facts are within their knowledge, but they cannot give their opinions as to the nature of their finding and what they intended by it. *Hutchinson* v. *Sandt*, 4 Rawle, 234, 26 Am. Dec. 127; *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185.

And they cannot be examined as witnesses for the purpose of impeaching the regularity of their finding. *Bowman* v. *Van Baum*, 17 Phila. 633, 14 W. N. C. 185.

[95] *Re Wager*, 6 Paige, 11.

[96] *Re Arnhout*, 1 Paige. 497.

[97] *Re Tracy*, 1 Paige, 580.

[98] *Lamoree's Case*, 11 Abb. Pr. 274, 32 Barb. 122, 19 How. Pr. 375.

[99] *Re Plank*, 5 Clark (Pa.) 35.

undue prejudice exhibited on the part of the jury.[100] The inquisition, also, is defective if it does not conform to the statute in its finding;[1] though a mere misnomer of the lunatic in the inquisition and other proceedings will not, of itself, invalidate them; for this may be amended by an order entering such amendment into future documents in which such lunatic's name is mentioned, the only point to be considered being the establishment of his identity.[2] Where the inquisition and proceedings have been set aside for any cause, a second commission cannot be issued on the original petition, because the continuance of the reasons upon which the first was based cannot be presumed at law, but must be proved *de novo*.[3]

155. Superseding on recovery.—Where one has been adjudged a person of unsound mind and incapable of managing his person and property, he is entitled to have the commission superseded when he has recovered his mind.[4] The test of recovery warranting the superseding of a commission rests on the question whether or not the party is now of sane mind, and capable of managing his estate.[5] A commission of lunacy, however, will not be at once superseded on the ground of recovery of the lunatic on evidence that he no longer exhibits un-

[100] *Re Russell*, 1 Barb. Ch. 38; *Teboat Case*, 9 Abb. Pr. 211.

[1] *Re Morgan*, 7 Paige, 236.

[1] *Re Crawford*, 1 Myl. & C. 240; Ordronaux, Insanity, *ut supra*.

[3] *Hinchman* v. *Richie*, Brightly (Pa.) 144, 182; Ordronaux, Insanity, *ut supra*.

[4] *Greenwade* v. *Greenwade*, 43 Md. 313; *Re Rogers*, 5 N. J. Eq. 46; *Ex parte Drayton*, 1 Desauss. Eq. 144. And see *Lackey* v. *Lackey*, 8 B. Mon. 107; *Re Russell*, 1 Barb. Ch. 38; *Re Lasher*, 2 Barb. Ch. 97; *Re Mason*, 1 Barb. 436; *Re Beaumont*, 1 Whart. 52, 29 Am. Dec. 33; *Cockrill* v. *Cockrill*, 79 Fed. 143.

The provisions of Cal. Code of Civ. Proc. § 1766, authorizing the restoration of a person adjudged insane or incompetent, are only applicable to those for whom guardians have been appointed, and cannot be applied to the order of the judge committing a person to an insane hospital under the provisions of the political code. *Kellogg* v. *Cochran*, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677.

In *Sims* v. *Sims*, 121 N. C. 297, 40 L. R. A. 737, 61 Am. St. Rep. 665, 28 S. E. 407, however, it was held that a guardian of a lunatic cannot be removed in an *ex parte* proceeding in which no notice was served on him.

[5] *Cochran* v. *Amsden*, 104 Ind. 282, 3 N. E. 934; *Re Brugh*, 61 Hun, 193, 16 N. Y. Supp. 551; *Re Ferris*, 74 App. Div. 619, 77 N. Y. Supp. 309. And see *Re Bischoff*, 37 Misc. 734, 76 N. Y. Supp. 467.

To warrant superseding a commission of lunacy it is not necessary that the mind of the lunatic should be restored to its original state, it is sufficient if the party is competent for ordinary purposes, such as the making of a will of personal estate. *Ex parte Holyland*, 11 Ves. Jr. 10, 8 Revised Rep. 67.

It is fitness to manage property and the ordinary affairs of life which will warrant superseding a commission of lunacy, and not competency proportioned to the extent of the lunatic's estate. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

But a committee of a lunatic should not be discharged upon a claim that he had so far recovered as to be able to govern himself, where it does not appear that he was also able to manage his estate, and no application had been made for the discharge of the committee of the estate. *Re Burr*, 17 Barb. 9.

soundness of mind, but will be ordered to stand over until it can be seen how the removal of the restraint will affect him.[6] And the continuance of an insane delusion is sufficient to prevent the superseding of a commission, though its existence was but slightly manifested.[7] The burden of proof of recovery on an application to supersede a commission rests with the person whose mind has been adjudged insane.[8] And evidence which will warrant superseding it is usually required to be stronger in favor of sanity than would have been required to have prevented the commission originally.[9] An order of restoration to capacity is to all intents and purposes a judgment, which may be reviewed by certiorari where no appeal is provided for.[10]

II. Drunkenness.

156. Drunkenness warranting inquisition.—Courts of chancery are entitled to the custody and control of the person as well as of the estate of habitual drunkards, and may exercise that control by means of a committee, as in the case of a lunatic.[11] And where a person's mind has become unsound from the constant use of alcoholic liquors, rendering him incapable of conducting his own affairs, the appointment

[6] *Re Blackmore*, 1 De G. J. & S. 84, 1 New Reports, 187, 32 L. J. Ch. N. S. 436, 9 Jur. N. S. 90, 8 L. T. N. S. 264, 476. And see *Hovey* v. *Harmon*, 49 Me. 269; *Re Burr*, 2 Barb. Ch. 208; *Re Rogers*, 5 N. J. Eq. 46.

So, where a party who had been found a lunatic with lucid intervals had frequent relapses, the commission should not be superseded, but merely suspended for a time to see if recovery is perfect. *Ex parte Ferrars*, Mosely, 332.

[7] *Re Dyce Sombre*, 13 Jur. 857, 1 Macn. & G. 116, 1 Hall & T. 285.

A commission in lunacy will not be superseded where the alleged lunatic is liable at any moment to be excited beyond his power of control and requires constant supervision and care to prevent the squandering of his property, though at times he acts like a sane man. *Re Helmbold*, 12 Phila. 424.

[8] *Greenwade* v. *Greenwade*, 43 Md. 313; *Re Thompson*, 16 Montg. Co. L. Rep. 102.

A person under inquisition applying to supersede it cannot be required to submit to a personal examination by physicians. *Re Newcomb*, 58 App. Div. 338, 68 N. Y. Supp. 988.

[9] *Re Dyce Sombre*, 13 Jur. 857, 1 Macn. & G. 116, 1 Hall & T. 285.

To warrant superseding a commission of lunacy the person adjudged insane must satisfactorily establish the absence of any disorder, especially of a dangerous tendency, by the evidence of persons having competent knowledge of the whole subject, not only as to his present state, but with reference to his former incompetency. *Ex parte Holyland*, 11 Ves. Jr. 10, 8 Revised Rep. 67.

The most satisfactory proof of recovery upon which to base the superseding of a commission of lunacy is the conviction on the part of the patient of the nonreality of the delusions which previously arose from his disease. *Re Dyce Sombre*, 13 Jur. 857, 1 Macn. & G. 116, 1 Hall & T. 285.

A complaint in an action by a person under guardianship as of unsound mind, in an action brought by him to impeach sales of his property made by his guardian, alleging that they occurred before he was released from disability, does not show a termination of the guardianship. *Robeson* v. *Martin*, 93 Ind. 420.

[10] *State ex rel. Kelly* v. *Probate Court*, 83 Minn. 58, 85 N. W. 917.

[11] *Re Lynch*, 5 Paige, 120; *Re Tracy*, 1 Paige, 580; *Hill* v. *Horton*, 4 Dem. 90. But see *Re Brown*, 1 Abb. Pr. 112; *Tome* v. *Stump*, 89 Md. 264, 42 Atl. 902.

of a guardian is authorized under the statutes providing for such appointment, and for the care, custody, and management of idiots, insane persons, and persons incapable of conducting their own affairs,[12] though proceedings are generally taken against them under special statutes. And statutes authorizing proceedings to determine whether a person is an habitual drunkard and incapable of managing his own estate are not unconstitutional as depriving the person of the right to control and dispose of his property, and to make contracts.[13] Drunkenness is habitual and will authorize the issue of a commission when it is customary, usual, or common, as distinguished from seldom, unusual, or uncommon.[14] Mere occasional acts of drunkenness are not sufficient to constitute one an habitual drunkard;[15] though it is not necessary that one should be constantly intoxicated.[16] But where a person is intoxicated during any considerable portion of his time to such a degree as to deprive him of his ordinary reasoning faculties it is prima facie evidence that he is incapable of managing his affairs.[17] And one who is found by inquest to be an habitual drunkard need not also be found incapable of managing his estate, to justify the confirmation of the inquisition, as such incapacity is presumed and is a ques-

[12] *Re Wetmore,* 6 Wash. 271, 33 Pac. 615.

But it cannot be laid down as a rule of law that because a man is a drunkard he is of unsound mind, and unsoundness of mind is not presumed therefrom. *Lang's Estate,* 65 Cal. 19, 2 Pac. 491.

[13] *Devin* v. *Scott,* 34 Ind. 67.

A finding that a person is an habitual drunkard, without reference to whether or not he is of unsound mind, violates no constitutional right. *Com. ex rel. McGinnis* v. *McGinnis,* 3 Pittsb. 445.

But where there is a dispute, a committee for an alleged habitual drunkard should not be appointed without notice to the alleged incompetent. *Re Coffin,* 83 N. Y. Supp. 941.

[14] *Com. ex rel. McGinnis* v. *McGinnis,* 3 Pittsb. 445; *Ludwick* v. *Com.* 18 Pa. 174; *State* v. *Pratt,* 34 Vt. 323.

One who has a fixed habit of frequently getting drunk, though he may be oftener sober than drunk, and may be sober for weeks at a time, is an habitual drunkard, for whom a commission may be issued. *Brown* v. *Brown,* 38 Ark. 324.

[15] *Ludwick* v. *Com.* 18 Pa. 174; *Murphy* v. *People,* 90 Ill. 59; *Re Hoyt,* 20 Abb. N. C. 162.

Before one can be regarded as an habitual drunkard, for whom a commission may be appointed, it must appear that he drinks to excess so frequently that it has become a fixed practice or habit with him. *Walton* v *Walton,* 34 Kan. 195, 8 Pac. 110.

And evidence as to the conduct of a person at other times when intoxicated may be given for the purpose of showing the character of acts relied upon as evidence of intoxication, on an application for a commission, though it would not be evidence of present intemperance. *State* v. *Huxford,* 47 Iowa, 16.

[16] *Ludwick* v. *Com.* 18 Pa. 174; *Walton* v. *Walton,* 34 Kan. 195, 8 Pac. 110; *State* v. *Pratt,* 34 Vt. 323.

[17] *Re Tracy,* 1 Paige, 580.

In *Murphy* v. *People,* 90 Ill. 59, it was held that a judgment finding a person to be an habitual drunkard will not be reversed on appeal, where the evidence shows that he had been drunk three to five times within the preceding two years.

tion of law.[18] The sufficiency of evidence of habitual intoxication in a proceeding for a commission is one for the jury.[19]

157. Inquisition of habitual drunkenness as evidence.— An inquisition of habitual drunkenness is only presumptive, and not conclusive, evidence of incapacity as to acts done by the habitual drunkard before the issuing of the commission, but which are overreached by a retrospective finding.[20] And the rule is general in the absence of statute, that an inquistion finding a party to be an habitual drunkard is only prima facie evidence of incapacity as to any acts, its only effect being to shift the burden of proof to the party asserting capacity.[21] But under statutes contemplating a complete transfer of property of an habitual drunkard to the custody of the law, and prohibiting all gifts of goods and chattels of an habitual drunkard, and prohibiting him from contracting, such transfers and contracts are utterly void, and an inquisition finding a person to be an habitual drunkard is conclusive of his incapacity to dispose of his property, or to contract debts from the time it was made,[22] even as against a bona fide holder of a bill or

[18] *Ludwick* v. *Com.* 18 Pa. 172.

The fact that a person is able to care for himself and manage his estate is no defense to a proceeding to have him declared an habitual drunkard, where habitual drunkenness is shown. *Com. ex rel. McGinnis* v. *McGinnis*, 3 Pittsb. 445.

[19] *State* v. *Pratt*, 34 Vt. 324; *Re Tracy*, 1 Paige, 580.

Affirmative evidence of witnesses acquainted with the habits of a person, that they had seen him drunk, will sustain a determination that he is an habitual drunkard, as against negative testimony of others that they never saw him intoxicated, though they had knowledge of his habits. *Murphy* v. *People*, 90 Ill. 59.

[20] *L'Amoureux* v. *Crosby*, 2 Paige, 427, 22 Am. Dec. 655; *Wadsworth* v. *Sherman*, 14 Barb. 169; *Tozer* v. *Saturlee*, 3 Grant Cas. 162; *Re Haviland*, 1 W. N. C. 345; *Klohs* v. *Klohs*, 61 Pa. 245.

[21] *Leckey* v. *Cunningham*, 56 Pa. 370; *Noel* v. *Karper*, 53 Pa. 97; *McGinnis* v. *Com.* 74 Pa. 245; *Miskey's Appeal*, 107 Pa. 611; *Leonard* v. *Leonard*, 14 Pick. 280. And see *Re Johnson*, 57 Cal. 529; *Lewis* v. *Jones*, 50 Barb. 645.

A finding at an inquisition of habitual drunkenness is prima facie only, and not conclusive evidence, whether it was negative or affirmative. *Miskey's Appeal*, 107 Pa. 611.

And the continuance of a person, found by an inquisition to be an habitual drunkard, in his business as a mechanic in the regular way, after the finding as before, is sufficient proof of mental soundness to rebut the presumption arising from the inquisition, and to sustain his receipt for money from his employer, in discharge of an indebtedness for labor performed. *Black's Estate*, 132 Pa. 134, 19 Atl. 31.

[22] *Devin* v. *Scott*, 34 Ind. 67; *Wadsworth* v. *Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Wadsworth* v. *Sherman*, 14 Barb. 171; *L'Amoureux* v. *Crosby*, 2 Paige, 427; *Re Patterson*, 4 How. Pr. 34. *Niblo* v. *Harrison*, 9 Bosw. 668; *Cockrill* v. *Cockrill*, 79 Fed. 143, Affirmed in 34 C. C. A. 254, 92 Fed. 811.

An inquisition finding a person incapable of conducting his own affairs in consequence of habitual drunkenness is conclusive evidence of his incapacity subsequently to waive notice of nonpayment and protest of a promissory note, though the note was made previous to the finding, and evidence that at the time of signing the waiver he was perfectly sober and competent is inadmissible. *Wadsworth* v. *Sherman*, 14 Barb. 169.

And where a judgment is rendered against a person under guardianship as an habitual drunkard, the guardian not having been made a party, and not hav-

note, and even though he might have enjoyed lucid intervals.[23] This doctrine, however, does not apply to wills, and a will is not rendered absolutely void by the fact that the testator was subject to a commission as an habitual drunkard at the time it was made. It is, nevertheless, valid if at that time he had sufficient mental capacity to make it, the commission being only prima facie evidence of incapacity in such case, which may be rebutted by proof,[24] the effect thereof being merely to shift the burden of proof to the party asserting capacity.[25] And to invalidate a will made by a person under a commission, the testimony must go to the extent of showing that, at the time of its execution, the testator was mentally unfit to dispose of his property.[26] It has been held, however, that while a commission remains unrevoked, an habitual drunkard cannot make a valid will without permission of the court, the existence of the commission being conclusive against the validity of the will;[27] but this doctrine was subsequently overruled, in a case distinguishing and explaining the former case.[28]

158. Discharge and restoration.— The court will not discharge a committee and restore the property of an habitual drunkard to him, where he had been found incapable of managing his affairs by reason of his habitual drunkenness, upon mere proof of the fact that he is competent to manage his affairs, unless it also appears that a permanent reformation has been made, and, as proof of permanent reformation, it is usually required to be shown that he has voluntarily refrained from the use of intoxicating liquors for at least one year preceding the application.[29] And a party asserting capacity after an inquisition of habitual drunkenness has the burden of proving that the

ing had knowledge thereof until after its rendition, on a contract made after the inquisition, collection thereof will be enjoined at the suit of the guardian, where it does not affirmatively appear that the contract on which it was rendered was for necessaries furnished, and that the guardian had failed to make needful provisions. *Rogers* v. *State*, 33 Ind. 543.

[23]*Wadsworth* v. *Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Tozer* v. *Saturlee*, 3 Grant Cas. 162.

[24]*Re Patterson*, 4 How. Pr. 34; *Leckey* v. *Cunningham*, 56 Pa. 370; *Dugan's Estate*, 6 Pa. Dist. R. 222; *Lewis* v. *Jones*, 50 Barb. 645; *Re Johnson*, 57 Cal. 529.

The court, in a will contest, may properly hear evidence as to whether or not a testator who had been adjudged an habitual drunkard was actually restored to capacity at the time of the execution of his will. *Re Johnson*, 57 Cal. 529.

[25]*Leckey* v. *Cunningham*, 56 Pa. 370; *Dugan's Estate*, 6 Pa. Dist. R. 222; *Hannum* v. *Worrall*, 2 Del. Co. Rep. 49.

[26]*Dugan's Estate*, 6 Pa. Dist. R. 222.

[27]*Re Patterson*, 4 How. Pr. 34.

An application to the court, under this rule, to suspend an inquisition of habitual drunkenness so far as to permit a person to make a will, was addressed to the discretion of the court, and might be made *ex parte* or on notice to the committee and next of kin, as the court might direct. *Re Patterson*, 4 How. Pr. 34.

[28]*Lewis* v. *Jones*, 50 Barb. 645.

[29]*Re Hoag*, 7 Paige, 312.

alleged habitual drunkard was able to understand the character of his acts at the time of the act in question.[30] After discharge and restoration the proceedings may generally be reinstated upon proof of relapse into habitual intoxication.[31]

[30]*Noel* v. *Karper*, 52 Pa. 97. And see *Cockrill* v. *Cockrill*, 79 Fed. 143, Affirmed in 34 C. C. A. 254, 92 Fed. 811.

Proceedings for the appointment of a committee of an alleged habitual drunkard are in part for the protection of his family; and where such family and the committee fail to procure the allowance of the committee's bond, and the committee fails to take charge of his property for over twenty years, leaving the drunkard the management thereof until his death, it is presumed that the proceedings were abandoned, and that they had been discharged. *Leckey* v. *Cunningham*, 56 Pa. 370.

And property sold by a person declared an habitual drunkard by inquisition cannot be recovered, where the commissioner neither acted nor gave bond, and the drunkard's friends permitted him to buy and sell. *Bixler* v. *Gilleland*, 4 Pa. 156.

[31]*Roberts's Estate*, 197 Pa. 621, 47 Atl. 987.

CHAPTER VII.

RESTRAINT.

159. Right to restrain generally.
160. Discharge from confinement.
161. In the case of habitual drunkards.

159. Right to restrain generally.— A person should not be restrained of his liberty or confined in an asylum unless he is actually insane,[1] and his welfare or the safety of society requires it.[2] The law in such a case undoubtedly is, that confinement is justifiable if the safety either of the patient or of others requires it, or it is necessary for his restoration to health.[3] But the general practice is not to direct, even under a finding of lunacy, the confinement of the lunatic, unless such confinement be required by the public peace and morals,

[1] *Van Deusen* v. *Newcomer*, 40 Mich. 90.

[2] *Com. ex rel. Rubright* v. *Western Pennsylvania Hospital*, 3 Pittsb. 299; *Com. ex rel. Draper* v. *Kirkbride*, 3 Brewst. (Pa.) 393; *Com. ex rel. Nyce* v. *Kirkbride*, 2 Brewst. (Pa.) 400; *Gresh's Case*, 12 Pa. Co. Ct. 295; *Hinchman* v. *Richie*, Brightly (Pa.) 143; *Look* v. *Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Anderdon* v. *Burrows*, 4 Car. & P. 210; *Nottridge* v. *Ripley*, 2 Journal of Psychological Med. & Med. Jur. 630.

A statute providing for an inquiry as to sanity and the removal to a lunatic asylum of persons in confinement under indictment does not confer authority to order the confinement of such a person out on bail, on the ground that the property of others is endangered by his being at liberty. *Ex parte Trice*, 53 Ala. 546.

All persons who unite in the procurement of an illegal commitment to a lunatic asylum are liable for false imprisonment, and a statute providing for the admission into an asylum of persons not adjudged insane does not remove the liability of persons giving false or fraudulent certificates for the purpose of procuring such commitment. *Bacon* v. *Bacon*, 76 Miss. 458, 24 So. 968.

[3] *Hinchman* v. *Richie*, Brightly (Pa.) 143. And see *Biddle* v. *Jenkins*, 61 Neb. 400, 85 N. W. 392.

Under the Louisiana code there are three things necessary to justify the interdiction of a party as insane: 1, the absolute incapacity to administer one's estate; 2, the absolute incapacity to take care of one's person; and 3, an actual and unavoidable necessity to interdict. *Francke* v. *His Wife*, 29 La. Ann. 302.

And a person who, though originally bright, lost her mind from epilepsy, and became unable to take the slightest care of herself, though not an idiot, is an insane person within the meaning of the provisions of the Iowa Code for the care and custody of the insane. *Speedling* v. *Worth County*, 68 Iowa, 152, 26 N. W. 50.

And insanity which leads the person afflicted with it to make improper exposure of his person in public renders him a person dangerous to the community, within the meaning of a statute providing for the restraint of such persons at public expense. *Montgomery County* v. *Ristine*, 124 Ind. 242, 8 L. R. A. 461, 24 N. E. 990.

or by the interest of the patient.[4] Confinement of a dangerous lunatic, however, is always justifiable.[5] And it is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who causes a breach of the peace, as to order the arrest of a sane man under like circumstances.[6] And a person who is so insane that it would be dangerous to suffer him to be at liberty may be confined from necessity by any person without a warrant until the proper proceedings can be had for his security.[7] But no man can be deprived of his liberty without due process of law, whether the alleged cause of the detention is insanity or crime.[8] And an adjudication

[4]*Com. ex rel. Nyce* v. *Kirkbride*, 2 Brewst. (Pa.) 400. See *Re Kings County Insane Asylum*, 7 Abb. N. C. 425.

A mere unchangeable belief in things which have no existence on the part of an ignorant man is not such insanity as will authorize his confinement, though a belief in an unnatural or disgraceful state of affairs existing beyond, and in a direction entirely contrary to, the ordinary elements of rational belief, without cause, might be sufficient. *Com. ex rel. Rubright* v. *Western Pennsylvania Hospital*, 3 Pittsb. 299.

[5]*Van Deusen* v. *Newcomer*, 40 Mich. 90; *Emmerich* v. *Thorley*, 35 App. Div. 452, 54 N. Y. Supp. 791; *Scott* v. *Wakem*, 3 Fost. & F. 328; *Brookshaw* v. *Hopkins*, Lofft, 243.

[6]*Lott* v. *Sweet*, 33 Mich. 308.

A law authorizing justices of the peace to confine lunatics is not unconstitutional as conferring ministerial power upon a judicial officer. *Madison County* v. *Moore* (Ind.) 68 N. E. 905.

And a magistrate is not deprived of the authority to commit an insane person, believed by him to be dangerous, to an insane asylum, by the fact that, upon suggestion of insanity before trial under an indictment, a commission was appointed to inquire into his mental condition, which reported him insane and he was remanded to prison. *State ex rel. Kennedy* v. *Uniacke*, 48 La. Ann. 1230, 20 So. 749.

[7]*Colby* v. *Jackson*, 12 N. H. 526; *Davis* v. *Merrill*, 47 N. H. 208; *Van Deusen* v. *Newcomer*, 40 Mich. 90. And see *Re Sherman*, 17 R. I. 356, 22 Atl. 276; *Emmerich* v. *Thorley*, 35 App. Div. 452, 54 N. Y. Supp. 791; *Fletcher* v. *Fletcher*, 28 L. J. Q. B. N. S. 136, 1 El. & El. 420, 5 Jur. N. S. 678, 7 Week. Rep. 187.

An order by a judge for the temporary confinement of a person alleged to be insane, pending proceedings for the determination of that question, is not a denial of due process of law when made on a written complaint and affidavit to the fact of insanity, but is clearly within the police power of the state to restrain dangerous persons in case of an emergency. And such an order is an adjudication, and is not void on its face because it fails to recite the affidavit of a physician on which it was based, or the fact that the proceedings for a hearing as to sanity were then pending. *Porter* v. *Ritch*, 70 Conn. 235, 39 L. R. A. 353, 39 Atl. 169.

But the right ceases when confinement is no longer reasonably necessary. *Keleher* v. *Putnam*, 60 N. H. 30, 49 Am. Rep. 304.

And where proceedings for the restraint of an alleged lunatic are commenced and abandoned and the imprisonment still continues, the authority is abused, and the party causing it becomes a trespasser from the beginning. *Colby* v. *Jackson*, 12 N. H. 526.

[8]*Com. ex rel. Stewart* v. *Kirkbride*, 2 Brewst. (Pa.) 419; *Smith* v. *People*, 65 Ill. 375; *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633; *People ex rel. Sullivan* v. *Wendel*, 33 Misc. 496, 68 N. Y. Supp. 948.

A statute authorizing the commitment to or retention in an asylum of a person alleged to be insane, without giving him particular notice and opportunity to be heard, is unconstitutional, since it lacks the essential element of due process of law. *Re Lambert*, 134 Cal. 626, 55 L. R. A. 856, 86 Am. St. Rep. 296, 66 Pac. 851.

But a statute providing for the removal of insane convicts to an asylum, and their return to prison on recovery, is not unconstitutional as authorizing

without notice, under which a party is confined, is void, where the statute gives him the right to be present at the trial.[9] A finding of a duly appointed commission *de lunatico inquirendo* is not conclusive on the question of the propriety of the confinement of a person in an asylum.[10] And, as a general rule, the committee of a lunatic should confine him only when authorized to do so by the court.[11]

160. Discharge from confinement.— A lunatic who recovers his sanity should be released from custody, and for that purpose may petition to be inspected, though the question of recovery is not to be tried by inspection only, but by examining witnesses upon the question of the probable continuance of insanity.[12] And the general rule seems to be that the question as to whether or not continued restraint would be beneficial is one for a jury, to be determined upon proper evidence

the commitment and detention of an insane person without a hearing. *Re Le Donne*, 173 Mass. 550, 54 N. E. 244.

[9]*Re Wellman*, 3 Kan. App. 100, 45 Pac. 726; *State ex rel. Blaisdell* v. *Billings*, 55 Minn. 467, 43 Am. St. Rep. 524, 57 N. W. 206, 794; *Re Rust*, 177 Pa. 340, 35 Atl. 623. And see *Re Doyle*, 16 R. I. 537, 5 L. R. A. 359, 27 Am. St. Rep. 759, 18 Atl. 159.

It would appear that notice can be dispensed with only when to give it would be improper and unsafe. *Re Blewitt*, 131 N. Y. 542, 30 N. E. 587; *Re Vanauken*, 10 N. J. Eq. 186.

And then only by express order of the court. *Re Vanauken*, 10 N. J. Eq. 186; *People ex rel. Sullivan* v. *Wendel*, 33 Misc. 496, 68 N. Y. Supp. 948. And see *Re Egan*, 36 App. Div. 47, 55 N. Y. Supp. 105.

The contrary rule, however, that notice may be dispensed with, was laid down in *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033. And the same seems to have been held in *Re Walker*, 57 App. Div. 1, 67 N. Y. Supp. 647.

And proceedings for the confinement of the insane, though without a jury, are not in conflict with a constitutional guaranty against deprivation of personal liberty without trial by jury, such provisions applying to criminal prosecutions only. *Black Hawk County* v. *Springer*, 58 Iowa, 417, 10 N. W. 791.

[10]*Com.* v. *Spink*, 137 Pa. 255, 20 Atl. 680.

Commitment to the hospital for the insane is a very different thing from an inquisition of lunacy, since in the latter proceeding the status of the party is fixed as to all the world, while the statutory inquiry with reference to confinement in an asylum is restricted to that one specific purpose. *Goodwin* v. *State*, 96 Ind. 550.

But one whose mind is so affected by disease as to render it necessary to restrain him in a lunatic asylum for his own good is a lunatic within the meaning of 8 & 9 Vict. chap. 100, § 44, prohibiting the receiving of lunatics into houses not duly licensed or registered. *Reg.* v. *Bishop*, 14 Cox C. C. 404, 49 L. J. Mag. Cas. N. S. 45, L. R. 5 Q. B. Div. 259, 42 L. T. N. S. 240, 28 Week. Rep. 475, 44 J. P. 330.

[11]*Com. ex rel. Draper* v. *Kirkbride*, 3 Brewst. (Pa.) 393.

The question of unlawful restraint of the liberty of a citizen in an insane asylum is a judicial one, to be determined by the courts, and not by an individual or physician. *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120.

[12]*Ash's Case*, Freem. Ch. 259; *People ex rel. Fullerton* v. *Gilbert*, 115 Ill. 59, 3 N. E. 744. And see *Re Lee* (N. J. Eq.) 55 Atl. 107.

A statute authorizing the restoration of a person adjudged insane or incompetent applies only to persons adjudged insane or incompetent and for whom guardians had been appointed. It does not apply to a person who had been committed to an insane asylum because his liberty would endanger health, person, or property, but for whom no guardian had been appointed. *Aldrich* v. *Alameda County*, 120 Cal. 140, 52 Pac. 148.

submitted to their consideration.[13] And a person confined upon an allegation of lunacy may be discharged on habeas corpus, when it appears that there are no indications of danger to himself or to others or to his estate.[14] But a person restrained is not entitled to discharge, where he is imbecile and unable to care for himself,[15] or because he had lucid intervals.[16] And a dangerous lunatic should not be liberated upon the mere ground of the informality of the certificates upon which he was confined.[17] Sanity is presumed, however, on an application for a discharge from an asylum, and the evidence should preponderate to overcome the presumption.[18] And discharge is prima facie evidence of restoration to sanity.[19]

161. In the case of habitual drunkards.—Medical men employed by an habitual drunkard or his friends, in his behalf, are justified in

[13]*Re Dey*, 9 N. J. Eq. 181.

In Com. ex rel. Draper v. *Kirkbride*, 3 Brewst. (Pa.) 393, however, it was held that the question whether or not restraint would be beneficial to a person alleged to be insane is one for the court.

[14]*Com.* v. *Kirkbride*, 7 Phila. 8; *People ex rel. Fullerton* v. *Gilbert*, 115 Ill. 59, 3 N. E. 744.

To warrant the discharge of a person from restraint who had been acquitted of homicide on the ground of insanity, and confined in an asylum, the evidence must show not only the restoration of sanity, but also that it was safe for him to be at large. *Com. ex rel. Bickel* v. *Bennet*, 15 W. N. C. 515.

In California the power to discharge a person alleged to be insane and received in the state insane asylum, except upon habeas corpus, is vested exclusively in the officers of the asylum, and includes the power to determine whether or not he had recovered, and to discharge persons improperly committed; and the effect of such a discharge, where no guardian had been appointed, is to restore the discharged person to legal capacity. *Kellogg* v. *Cochran*, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677.

[15]*Com. ex rel. Haskell* v. *Kirkbride*, 3 Brewst. (Pa.) 586.

The fact that a married woman consulted counsel with reference to a divorce previous to her commitment to an insane asylum by her husband, and afterwards brought an action therefor, does not entitle her to a discharge on habeas corpus, where it appears that the asylum was well managed, and that she was subject to no unnecessary or unusual restraint or improper treatment, and her remaining there would tend to promote her recovery. *Denny* v. *Tyler*, 3 Allen, 225.

[16]*Caffey* v. *State*, 78 Miss. 645, 29 So. 396.

[17]*Re Shuttleworth*, 11 Jur. 41, 2 New Sess. Cas. 470, 9 Q. B. 651, 16 L. J. Mag. Cas. N. S. 18. And see *Re Latta*, 43 Kan. 533, 23 Pac. 655.

[18]*Com. ex rel. Helmbold* v. *Kirkbride*, 11 Phila. 427.

The rule that a doubt on a criminal accusation should be resolved in favor of the accused applies in favor of sanity in a proceeding by habeas corpus for discharge of an alleged lunatic from an asylum. *Ibid.*

But the fact that a lawyer who had been confined in an asylum conducted his own case on habeas corpus for release with composure and skill is not sufficient to warrant such release as against evidence that he was afflicted with paresis, attended with mental delusions, and which is characterized by a tendency to commit acts of violence and aggression, leaving the patient to appear nearly well at times, but liable soon to lapse into his former condition. *Com. ex rel. Norton* v. *Chapin*, 19 Phila. 551.

And the court, on an inquisition of insanity, will not reject as erroneous the uncontradicted opinions of unprejudiced experts of high standing that insanity existed, simply because of its inability to detect the existence of mental disorder. *Re Sherman*, 17 R. I. 356, 22 Atl. 276.

[19]*Haynes* v. *Swann*, 6 Heisk. 560; *Clay* v. *Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

taking such measures as are reasonably necessary, either to cure or restrain him, when suffering from delirium tremens, so long as the fit lasts or is likely to return; and when no more restraint was used than was necessary as a part of the medical treatment, they are not liable therefor.[20] And a person may be restrained from doing business while suffering from delirium tremens.[21]

[20] *Symm* v. *Fraser*, 3 Fost. & F. 859; [21] *Scott* v. *Wakem*, 3 Fost. & F. 328.
Scott v. *Wakem*, 3 Fost. & F. 328.

CHAPTER VIII.

INSANITY AS A DEFENSE TO A CHARGE OF CRIME.

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I. General rules.

162. Criminal responsibility generally.—The rule is stated generally that a person who commits a crime, acting under the impulse of mental disease, is not criminally responsible therefor;[1] and that a person of insane mind is not subject to punishment for his criminal acts;[2] insanity being deemed an excuse whenever it is the efficient cause of a criminal act,[3] though brought on by the vices of the party

[1]*Hite* v. *Sims*, 94 Ind. 333; *Sage* v. *State*, 91 Ind. 141; *Cluck* v. *State*, 40 Ind. 263; *Goodwin* v. *State*, 96 Ind. 550; *Warner* v. *State*, 114 Ind. 137, 16 N. E. 189; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Giebel* v. *State*, 28 Tex. App. 151, 12 S. W. 591; *Smith* v. *State*, 19 Tex. App. 95; *State* v. *Felter*, 25 Iowa, 67; *State* v. *Mewherter*, 46 Iowa, 88; *Walker* v. *People*, 88 N. Y. 86; *Clark* v. *State*, 8 Tex. App. 350; *Smith* v. *State*, 22 Tex. App. 317, 3 S. W. 684.

The law of self-defense is applicable alike to the sane and the insane. *State* v. *Wade*, 161 Mo. 441, 61 S. W. 800.

[2]*State* v. *Gardiner*, Wright (Ohio) 392. *State* v. *Miller*, 7 Ohio N. P. 458.

[3]*Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95; *State* v. *Jones*, 50 N. H. 369, 9 Am.

himself.[4] Mental disorders, however, cannot be regarded as evidence of insanity which will confer legal irresponsibility for crime, unless they are caused by, or result from, disease or lesion of the brain.[5] And the criminal act must have resulted from unsoundness of the mind;[6] and it must have been so excessive as to overwhelm reason, conscience, and judgment.[7]

163. What constitutes insanity generally.— The unsoundness of mind which will excuse from criminal responsibility must be the result of mental disease as distinguished from weakness or passion.[8] And mere weakness of mind is not insanity which will excuse crime.[9] Nor will bad education or bad habits excuse it;[10] or the fact that the person is of a low order of intellect.[11] Neither is crime excused

Rep. 342; *State* v. *Miller*, 7 Ohio N. P. 458.

[4]*Cluck* v. *State*, 40 Ind. 263; *State* v. *Erb*, 74 Mo. 199. And see also chapter IX., INTOXICATION AS A DEFENSE TO CHARGE OF CRIME.

[5]*Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

[6]*United States* v. *Faulkner*, 35 Fed. 730; *State* v. *Geddis*, 42 Iowa, 268; *State* v. *Stickley*, 41 Iowa, 232; *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285.

Criminal acts from malice, and not from insanity, are punishable though the mind of the person committing them was so affected as to avoid his acts in a civil case, as those of a lunatic. *King* v. *Tuth*, 1 Wheeler C. C. 52, note.

[7]*State* v. *Murray* 11 Or. 413, 5 Pac. 55; *Spann* v. *State*, 47 Ga. 553; *Graham* v. *State*, 102 Ga. 650, 29 S. E. 584; *Com.* v. *Werling*, 164 Pa. 559, 30 Atl. 406; *Com.* v. *Wireback*, 190 Pa. 138, 42 Atl. 542.

And an instruction in a criminal prosecution that the law recognizes but two classes of persons,—sane and insane,—and that if the accused was insane in any degree, from any cause, at the time of the commission of the offense, he is entitled to acquittal, is erroneous, as calculated to mislead. *Copenhaver* v. *State*, 160 Ind. 540, 67 N. E. 453.

[8]*People* v. *Durfee*, 62 Mich. 487, 29 N. W. 109; *Welch* v. *Ware*, 32 Mich. 77.

The depression following physical illness, such as takes place ordinarily with men possessing fair average mental powers, cannot be regarded as insanity which will excuse crime. *Goodwin* v. *State*, 96 Ind. 550.

And the fact that a person was affected with mental disease which impaired his will and rendered him likely at any time to commit a crime is not alone sufficient to constitute legal insanity. *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112.

[9]*People* v. *Hurley*, 8 Cal. 390; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285; *Wartena* v. *State*, 105 Ind. 445, 5 S. W. 20; *Studstill* v. *State*, 7 Ga. 2; *Fitzpatrick* v. *Com.* 81 Ky. 357; *Newcomb* v. *State*, 37 Miss. 385; *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Anderson* v. *State*, 25 Neb. 550, 41 N. W. 357; *Nevling* v. *Com.* 98 Pa. 323; *Nelson* v. *State*, 43 Tex. Crim. Rep. 553, 67 S. W. 320.

Unless it was so great as to render the party unconscious that his act was wrong, or unable to choose between the right and wrong. *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651.

And proof that a person accused of crime is of weak mind is inadmissible in a prosecution therefor, where it is admitted that he was neither insane, nor an idiot, nor a lunatic. *Studstill* v. *State*, 7 Ga. 2; *State* v. *Shoultz*, 25 Mo. 128; *Patterson* v. *People*, 46 Barb. 625; *Jacobs* v. *Com.* 121 Pa. 586, 6 Am. St. Rep. 802, 15 Atl. 465.

[10]*United States* v. *Cornell*, 2 Mason, 91, Fed. Cas. No. 14,868. And see *People* v. *Goldsworthy*, 130 Cal. 600, 62 Pac. 1074.

[11]*Powell* v. *State*, 37 Tex. 348; *Fitzpatrick* v. *Com.* 81 Ky. 357.

So, the fact that a man is deaf and dumb does not render him irresponsible for the commission of criminal acts. *Reg.* v. *Whitfield*, 3 Car. & K. 121.

because committed under the influence of fear and excitement,[12] or jealousy.[13] And mere frenzy, or ungovernable passion, however furious, is not insanity within the meaning of the criminal law.[14] And the rule is the same though it temporarily dethrones reason, or for the time being controls the will, where the inability to control it arises from passion, and not from insanity.[15] Where the conduct of a person is influenced by anger, malice, love of gain, or a heart bent on mischief, as distinguished from insanity produced by the visitation of God, he is responsible for his acts.[16] Neither is mere mental depravity insanity in a legal sense;[17] nor is eccentricity, oddity, or hypochondria.[18] Insanity which will excuse crime must be, not the mere impulse of passion, or idle, frantic humor, but an absolute dispossession of the free natural agencies of the mind;[19] though it need not be furious, or manifested alike on all subjects.[20]

164. Theory that insanity is a question exclusively of fact.—A preliminary question meets us as we enter on the discussion of criminal responsibility. It is, whether the definition of "insanity" is for the court or for the jury. And the rule has been laid down that whether a person accused of crime had a mental disease, and whether the crime was the product of such disease, are questions of fact for the jury;

[12]*People* v. *Hurley*, 8 Cal. 390; *Willis* v. *People*, 32 N. Y. 715; *People* v. *Divine*, 1 Edm. Sel. Cas. 596.

[13]*Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99. And see *People* v. *Foy*, 138 N. Y. 664, 34 N. E. 396.

[14]*Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *Goodwin* v. *State*, 96 Ind. 550; *Sanders* v. *State*, 94 Ind. 147; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Fitzpatrick* v. *Com.* 81 Ky. 357; *People* v. *Finley*, 38 Mich. 482; *State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038; *People* v. *Foy*, 138 N. Y. 664, 34 N. E. 396; *Willis* v. *People*, 32 N. Y. 715; *Cole's Trial*, 7 Abb. Pr. N. S. 321; *Lynch* v. *Com.* 77 Pa. 205; *United States* v. *Cornell*, 2 Mason, 91, Fed. Cas. No. 14,868; *People* v. *Divine*, 1 Edm. Sel. Cas. 596.

[15]*Williams* v. *State*, 50 Ark. 517, 9 S. W. 5; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Smith* v. *State*, 55 Ark. 259, 18 S. W. 237; *State* v. *Stickley*, 41 Iowa, 232; *State* v. *Felter*, 25 Iowa, 67; *Welch* v. *Ware*, 32 Mich. 77; *People* v. *Mortimer*, 48 Mich. 37, 11 N. W. 776; *People* v. *Finley*, 38 Mich. 482.

But insanity produced by wrath or jealousy would operate as an excuse for crime to the same extent as any other kind of insanity. *People* v. *Foy*, 138 N. Y. 664, 34 N. E. 396.

[16]*Com.* v. *Farkin*, 2 Clark (Pa.) 208; *Nerling* v. *Com.* 98 Pa. 323.

[17]*Goodwin* v. *State*, 96 Ind. 550; *Com.* v. *Van Horn*, 188 Pa. 143, 41 Atl. 469.

[18]*Hawe* v. *State*, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452; *State* v. *Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178; *Sindram* v. *People*, 1 N. Y. Crim. Rep. 448; *Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110; *Com.* v. *Farkin*, 2 Clark (Pa.) 208; *Com.* v. *Meredith*, 17 Phila 90; *Johnson* v. *State*, 100 Tenn. 254, 45 S. W. 436; *United States* v. *Young*, 25 Fed. 710; *Queen* v. *Vauhan*, 1 Cox. C C. 80.

[19]*People* v. *Carnel*, 2 Edm. Sel. Cas 200; *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v *Smith*, 15 Phila. Leg. Int. 33, 6 Am. L. Reg. 257; *Com.* v. *Shurlock*, 14 Phila Leg. Int. 33; *Hoover* v. *State* (Ind.) 68 N. E. 591.

[20]*United States* v. *Faulkner*, 35 Fed 730.

that insanity is mental disease,—a disease of the mind; that an act produced by mental disease is not crime; that if he had a mental disease which irresistibly impelled him to commit the crime,—if the crime was the product of mental disease in him,—he is not guilty; and that whether he had an insane impulse to commit it, and whether he could resist it, are questions of fact;[21] and that the court cannot undertake to say what are the invariable or infallible tests as to insanity which will relieve from criminal responsibility;[22] and that whether or not a person accused of crime had a mental disease is as much a question of fact as whether or not he had a bodily disease; and it is also a question of fact for the jury whether or not the criminal act was the product of the mental disease;[23] the only element of law entering into the question of the existence of insanity as a defense being that no man shall be held accountable criminally for an act which is the offspring of mental disease.[24]

165. Objections to this view.—If the rule be that "mental disease" is exclusively a question of fact for a jury, and if it be also exclusively a question of fact for the jury to determine whether the act complained of was the product of mental disease, then any further examination of the question as a matter of law is unnecessary. All that is required is to use the words in question in a charge to the jury, and the matter, so far as concerns the court, is closed. It is now submitted, however, that, able and learned as are the judges who have maintained this view, it cannot be sustained on reasons either psychological or judicial. That it cannot be sustained on authority, these learned judges themselves concede.

166. Term "mental disease" includes every phase of disorder.—The proposition before us, then, is, that the entire question of responsibility is to be left to the jury, with the instruction that if the act was the product of "mental disease," they are to acquit. But what is "mental disease?" And here we encounter the first obstacle to this method of solving this vexed and yet most important question. "Mental disease," in fact is a term so indeterminate and vague, that to leave the question to the jury with the instructions here criticised is to leave it to them without any instructions at all. Mental, like physical disease, ranges from slight indisposition or disorder, on the one

[21] *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242. And see *Stevens* v. *State*, 31 Ind. 485, 33 Am. Rep. 175.

[22] *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

[23] *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242.

side, to the comatose state immediately preceding dissolution, on the other.

167. Definition of insanity must come from court, not experts.—It is argued that this is a question to be determined by experts, who alone can define scientifically what insanity is. But it is sufficient at this point to state (1) that the question in criminal issues is not insanity, but irresponsibility, which it is eminently important should be limited by positive definition by the highest judicial authority the state can constitute;[25] and (2) that experts do not form such an authority, (*a*) because their sense, as a body, cannot be obtained by any process known to our courts; (*b*) because there is no independent court of experts, which, on notice to both sides, and after argument, if necessary, can, when the experts called in a particular case conflict, give a judicial opinion upon the issue; and (*c*) because, in many cases of criminal defense, only those eccentric and exceptional experts are selected who believe in some wild theory which may help out the defendant's case.[26]

168. Must be legal, not medical, insanity.—The weight of authority bears out these assertions. It is not medical, but legal, insanity which is required to relieve from criminal responsibility;[27] though the law of insanity can only be properly dealt with from an harmonious treatment of the two sciences of law and of medicine.[28] The mere fact that a person is insane does not, *per se,* relieve him from criminal responsibility.[29] A slight departure from a well-balanced mind cannot be recognized as insanity in the administration of criminal law, though it might be pronounced insanity in medical science.[30] One may be criminally responsible where he is sufficiently under the guidance of reason to be legally answerable for his acts, though he is suffering from mental derangement,[31] and though he may be incapable of weighing the reasons for and against the act.[32] But in order to

[25] *Infra*, § 168.

[26] See *infra*, chapter XX., sub. III.

[27] *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *State* v. *Tyler*, 7 Ohio N. P. 443; *People* v. *Hettick*, 126 Cal. 425, 58 Pac. 918; *State* v. *Kalb*, 7 Ohio N. P. 547. And see *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742.

[28] *Guiteau's Case*, 10 Fed. 161.

[29] *People* v. *O'Connell*, 62 How. Pr. 436; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701.

[30] *Taylor* v. *Com.* 109 Pa. 262; *State* v. *Smith*, 49 Conn. 376; *State* v. *Tyler*, 7 Ohio N. P. 443; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

[31] *State* v. *Murray*, 11 Or. 413, 5 Pac. 55; *Clark's Case*, 1 N. Y. City Hall Rec. 176; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *Goodwin* v. *State*, 96 Ind. 550; *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991; *Hadfield's Case*, 27 How. St. Tr. 1282.

[32] *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664.

be criminally responsible one must have intelligence and capacity to have a criminal intent and purpose;[33] the question to be determined being whether, at the time of the act, he had mental capacity to entertain a criminal intent, and whether, in point of fact, he did entertain it.[34]

169. Jury not qualified to decide question of law.—Rejecting, therefore, as impracticable and unphilosophical, the suggestion to devolve on experts the determination of what "mental disease" is, and what are its results, we fall back upon the question in its original, and what, indeed, must in this view be its final, state, and ask whether a jury is a body fit to lay down settled rules on this momentous subject. And in answering this, we must remember what the issue really is. It is simply "responsible" or "irresponsible,"—an issue of all others the most vital. Is a jury competent, when the matter is so left to it, to establish definite rules which will place the doctrine of responsibility on grounds which are just and safe? We submit that it is not for the following reasons: (1) It does not form a continuous body, prepared for its office, as are our courts of justice, by prior study. (2) The reasons of its decisions are not given, so that these decisions can form the basis of future decisions. Each decision stands by itself, not controlled by those which preceded it, and not controlling those which succeed. (3) There is no "supreme" jury, by whom the decisions of "inferior" juries can be corrected and symmetrized. Hence, instead of obtaining in this way a definite and consistent body of law, which, whatever may be its merits, will, at least, be a rule of action, we will have a series of disjointed and conflicting edicts, from which no rule of action can be deduced. It is system, uniformity, and consistency that penal law, in this respect, eminently needs. What is necessary is not so much that the question should be decided in any particular way, but that there should be some decision, and that this decision should be expressly and positively announced, and be made a precedent for future cases. But this is what a jury cannot do.

170. Question, therefore, rests with the judges.— The definition of penal responsibility, therefore, is a high prerogative which judges, educated for the office as they are, and appointed by the state as the guardians at once of the sovereignty of the law and the liberty of the

[33] *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *King* v. *State*, 9 Tex. App. 515. And see *Anderson* v. *State*, 43 Conn. 514, 21 Am. Rep. 669.

[34] *Nerling* v. *Com.* 98 Pa. 323; *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664; *Thomas* v. *State*, 40 Tex. 60; *Burkhard* v. *State*, 18 Tex. App. 599.

citizen, cannot surrender or divide.[35] The state has the right to call on them to establish a consistent system which the community may take for its guidance. Every man may be exposed to danger from others, and therefore every man has a right to know whether he must protect himself beforehand by appealing for a commission of lunacy against his assailant, or must rely for redress on the ordinary common-law process of indictment. Even persons charged with crime have a right to be supplied with accurate information of the law by which their defense can be shaped. And, above all, society at large has a right to expect that the law which regulates the relations of reason to crime should be mapped out with precision by learned jurists, dedicated by solemn sanctions to continuous judicial service, whose decisions on trial can be reviewed on appeal, and who, if incapable or corrupt, can be removed.

171. Relative functions of court and jury.— In accordance with these rights the preponderance of modern authority would seem to establish the rule that the question as to how much intellect, understanding, judgment, and comprehension a man must have to make him amenable to the law with respect to a criminal act is one of law, for the court.[36] And the sanity of a person who pleads guilty is an issue for the court, and is required to be shown before he can be convicted, and evidence of such sanity should be introduced at the time of the plea.[37] But the question of the existence of such insanity as will excuse crime where the commission of the criminal act is established is one of fact for the jury,[38] under proper instructions,[39] to

[35] *Reg.* v. *Richards*, 1 Fost. & F. 87.

[36] *People* v. *Waltz*, 50 How. Pr. 204; *People* v. *Holmes*, 111 Mich. 364, 69 N. W. 501.

[37] *Burton* v. *State*, 33 Tex. Crim. Rep. 138, 25 S. W. 782.

[38] *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *Plake* v. *State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 S. W. 273; *State* v. *Geier*, 111 Iowa, 706, 83 N. W. 718; *State* v. *Klinger*, 43 Mo. 127; *State* v. *Holme*, 54 Mo. 153; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *People* v. *Pine*, 2 Barb. 566; *State* v. *Stark*, 1 Strobh. L. 479; *Clark* v. *State*, 8 Tex. App. 350; *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *Bowler's Case*, 1 Collinson on Lunacy, 673.

The submission of the issue of sanity or insanity to the jury in a criminal prosecution is not error, where there is evidence on the question. *Crews* v. *State*, 34 Tex. Crim. Rep. 533, 31 S. W. 373.

And an instruction in a prosecution for homicide, that if the accused was insane, the verdict should be not guilty, but if sane, it should be guilty, and that it is for the jury to determine the degree of guilt, is erroneous as a usurpation of the province of the jury; which is, to decide whether the act was criminal even though he was insane at the time. *People* v. *Webster*, 59 Hun, 398, 13 N. Y. Supp. 414.

[39] *People* v. *Pine*, 2 Barb. 566; *State* v. *Geier*, 111 Iowa, 706, 83 N. W. 718.

An instruction as to what constitutes insanity should not be argumentative, or such as would lead the jury to believe that the defense of insanity was not worthy of consideration. *People* v. *Holmes*, 111 Mich. 364, 69 N. W. 501; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123.

be submitted to and determined by it like any other fact in the case.[40] And it is always left to the jury to determine whether the mental condition of the accused was such that he was incapable of a specific intent to take life.[41] Likewise, the weight and sufficiency of evidence to establish the defense of insanity are questions exclusively for the jury;[42] and the verdict or finding will not be disturbed where the evidence as to insanity was conflicting.[43] And it is not improper for the court to tell the jury that the defense of insanity should be examined with caution.[44]

II. Special exceptions.

172. Enumeration of exceptions.— There is, however, a second preliminary difficulty that remains to be noticed before proceeding to an examination of the great question of criminal responsibility. The first has just been disposed of. The second, which is coeval with the existence of this branch of the law, arises from the opposite extreme, —namely, from the desire to force into an inflexible and positive judicial code, special opinions delivered by judges when particular facts requiring such opinions were under examination.

Thus, for instance, when a defendant, in whom there is no pretense of mania or homicidal insanity, claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to

[40] *State* v. *Holme*, 54 Mo. 153.

The question of insanity, when raised in a criminal prosecution, is to be passed upon by the jury, whether the accused has introduced evidence on the subject or not; and they must consider not only the specific evidence as to insanity, but also all circumstances developed by any of the evidence in the case bearing upon it. *McDougal* v. *State*, 88 Ind. 24.

[41] *United States* v. *King*, 34 Fed. 302; *Dejarnette* v. *Com.* 75 Va. 867.

[42] *Brown* v. *Com.* 14 Bush. 398; *Sharp* v. *State* (Ind.) 68 N. E. 286.

It is the duty of jurors in a criminal prosecution to carefully consider and weigh the evidence upon the subject of insanity, and give it the weight and credit which, in their judgment and conscience, they deem it entitled to receive. *Goodwin* v. *State*, 96 Ind. 550; *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271.

[43] *Williams* v. *State*, 50 Ark. 511, 9 S. W. 5; *Jamison* v. *People*, 145 Ill. 357, 31 N. E. 486; *Sharp* v. *State* (Ind.) 68 N. E. 286; *Boren* v. *State*, 32 Tex. Crim. Rep. 637, 25 S. W. 775; *People ex rel. Clough* v. *Levy*, 71 Cal. 618, 12 Pac. 791; *Elder* v. *State*, 100 Ga. 83, 26 S. E. 80; *State* v. *Dreher*, 137 Mo. 11, 38 S. W. 567.

A verdict, in a criminal prosecution, of the sanity or insanity of the accused, will not be set aside unless the court is clearly satisfied that it was erroneous and unjust. *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677.

[44] *People* v. *Kloss*, 115 Cal. 567, 47 Pac. 459; *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People* v. *Bumberger*, 45 Cal. 650; *People* v. *Pico*, 62 Cal. 50; *Sanders* v. *State*, 94 Ind. 147; *People* v. *DeGraff*, 1 Wheeler C. C. 203. But see *People* v. *Hettick*, 126 Cal. 425, 58 Pac. 918.

The defense of insanity is a legal one, and should not be disparaged to the jury or placed under the ban of disapproval by the court. *State* v. *Barry*, 11 N. D. 428, 92 N. W. 809.

determine is, whether or no he labors under such particular incapacity. The error has been to seize such an expression as this as an arbitrary elementary dogma, and to insist on its application to all other cases. Or, take the converse, and suppose the defense is merely homicidal insanity. In such a case it would be very proper to tell the jury that, unless they believe the homicidal impulse to have been uncontrollable, they must convict. And yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases as idiocy. It is proposed to avoid this difficulty by treating this question practically, in the only way in which it can arise in courts, and to consider briefly, not what is the general limit of moral responsibility in the abstract, but in what cases such responsibility ceases to exist.[45] These will now be discussed.

III. Idiocy and general mania.

173. What deprivation sufficient.— The question as to what mental disease will effect immunity from liability for criminal acts being one of law, for the courts, it remains to inquire what rules of law have been established on the subject. The earlier cases leaned to the position that the deprivation must have been total, or at least general, but more liberal views have gradually obtained, and the doctrine has become prevalent that, as to idiocy and general mania, the question depends upon the ability of the perpetrator to discern the character and criminality of the act itself.

174. Tests of earlier times.— The rule was laid down in early times that to be exempt from criminal responsibility one must be at the time so deprived of his understanding and memory as not to know what he was doing more than an infant or wild beast.[46] But this rule has become obsolete even with reference to idiocy or imbecility; the rule of the capacity of a fourteen-year-old child having been expressly repudiated.[47] And it has been stated that the true test of the pres-

[45] The difficulty in this respect has been increased by the looseness with which legal adjudications are cited by even some of the more eminent text-writers. In fact, while the exigencies of counsel and the duty of judges require a constant recourse to the text-books on this particular science, in making up such text-books the authorized law reports have not been sufficiently relied upon.

[46] *Arnold's Case*, 16 How. St. Tr. 764, Harg. St. Tr. 322.

[47] *Rodgers* v. *State* (Tex. Crim. App.) 28 S. W. 685.

In the above case it was held that the fact that a person charged with homicide was of dull intellect, and possessed about the intelligence of the average boy of thirteen or fourteen years of age, though he was a mature man, does not show imbecility which will affect his criminal responsibility.

In *State* v. *Richards*, 39 Conn. 591, however, the court favored the rule that imbeciles ought not to be held crim-

ence or absence of insanity is the presence or absence of a delusion,[48] —the absence of delusion being a characteristic of a sound mind.[49] But the contrary doctrine, that the presence or absence of delusion cannot be said to be the only legal test as a rule of law, has been adopted in civil cases,[50] and would seem to be in better accord with the more modern tests. Delusion, however, though not a test, is evidence of insanity.[51] So, some of the cases, modern as well as ancient, have adopted the rule that the test of criminal responsibility is the mental ability to discriminate between abstract right and wrong.[52] Within this rule criminal responsibility exists where there is sufficient mental capacity to know right from wrong.[53] But one

inally accountable unless they have capacity equal to that of ordinary children of fourteen years of age, with the qualification that the comparison should be restricted to the matter of appreciating right and wrong and the consequences of the act, and that the child taken as a standard should be one in humble life, with only ordinary training; but the court finally submitted the whole matter to a jury, requiring it to say whether the defendant had such knowledge of right and wrong, and such appreciation of the consequences and effects of his acts, as to be a proper subject for punishment.

[48]*Dew* v. *Clark*, 3 Addams Eccl. Rep. 79; *Hadfield's Case*, 27 How. St. Tr. 1282; *Macklin's Case*, 3 Couper, 257.

[49]*Com.* v. *Meredith*, 17 Phila. 90.

So, in *Boren* v. *State*, 32 Tex. Crim. Rep. 637, 25 S. W. 775, it was held that the rejection of a special instruction with reference to an insane delusion in a prosecution for homicide was not error, where the court instructed fully on the subject of insanity, since delusion is insanity.

And in *Wilcox* v. *State*, 94 Tenn. 107, 28 S. W. 312, it was held that refusal to define an insane delusion is not error, where the charge was full upon the subject of insanity, and especially that phase of it claimed to be a delusion.

[50]*Denson* v. *Beazley*, 34 Tex. 191; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99.

[51]*Com.* v. *Meredith*, 14 W. N. C. 188.

[52]*Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *Brinkley* v. *State*, 58 Ga. 296; *Spann* v. *State*, 47 Ga. 553; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701; *Hawe* v. *State*, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452; *Walker* v. *People*, 88 N. Y. 86, Affirming 1 N. Y. Crim. Rep. 7; *Moett* v. *People*, 85 N. Y. 373; *Wagner* v. *People*, 2 Keyes, 684; *Com.* v. *Farkin*, 2 Clark (Pa.) 208; *Gicbel* v. *State*, 28 Tex. App. 151, 12 S. W. 591; *Kinloch's Case*, 25 How. St. Tr. 891, 997; *Martin's Case*, Shelford on Lunatics, 467; *Reg.* v. *Davies*, 1 Fost. & F. 69; *Reg.* v. *Higginson*, 1 Car. & K. 129; *Parker's Case*, 1 Collinson on Lunacy, 477.

Within this rule an instruction, in a prosecution for homicide, to convict if the accused had capacity to know that he was violating the law, whatever may have been his moral conception of the act, is erroneous as authorizing the conviction of one who might not have capacity to distinguish between right and wrong. *Kearney* v. *State*, 68 Miss. 233, 8 So. 292.

And an instruction, in such a prosecution that if the killing was done with malice it was murder, though the accused may have labored under partial insanity, is erroneous, since there can be no such thing as malice without mental accountability; and this cannot coexist with incapacity to distinguish right from wrong. *Grissom* v. *State*, 62 Miss. 167.

[53]*Conway* v. *State*, 118 Ind. 482, 21 N. E. 285; *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *People* v. *Waltz*, 50 How. Pr. 204; *Clark's Case*, 1 N. Y. City Hall Rec. 176, 1 Wheeler C. C. 218, note; *Nevling* v. *Com.* 98 Pa. 323; *Stuart* v. *State*, 1 Baxt. 178.

who has not such capacity is not a proper subject of punishment for criminal acts.[54] This test, too, however, though at one time well supported, has been generally, if not universally, superseded by other tests.[55]

175. Test of right or wrong as to the particular act.—A large majority of modern cases, however, regard the test of capacity to distinguish between right and wrong as concrete, instead of abstract, and as having reference to the particular act in question; the test question being whether the accused was capable of distinguishing between right and wrong with respect to the act which he committed.[56] Within this rule one who is not capable of distinguishing right from wrong in regard to the act charged is not criminally accountable therefor.[57] And he is accountable if he has such capacity.[58] But insanity which will excuse must amount to a derangement so great as to obliterate the sense of right and wrong as to the particular act done

[54]*United States* v. *Shults*, 6 McLean, 122, Fed. Cas. No. 16,286; *Anderson* v. *State*, 42 Ga. 9; *Hays* v. *Com.* 17 Ky. L. Rep. 1147, 33 S. W. 1104; *Willis* v. *People*, 32 N. Y. 715; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356.

[55]See *infra*, § 175.

[56]Among the many cases announcing or applying this rule are: *Lide* v. *State*, 133 Ala. 43, 31 So. 953; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *State* v. *Richards*, 39 Conn. 591; *State* v. *Danby*, Houst. Crim. Rep. (Del.) 166; *Choice* v. *State*, 31 Ga. 424; *Taylor* v. *State*, 105 Ga. 746, 31 S. E. 764; *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *State* v. *Knight*, 95 Me. 467, 55 L. R. A. 373, 50 Atl. 276; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038; *Knights* v. *State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State* v. *Martin* (N. J.) 3 Crim. L. Mag. 44; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *People* v. *Krist*, 168 N. Y. 19, 60 N. E. 1057; *State* v. *Spivey*, 132 N. C. 989, 43 S. E. 475; *Blackburn* v. *State*, 23 Ohio St. 146; *Maas* v. *Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960; *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v. *Lutz*, 10 Kulp, 234; *State* v. *McIntosh*, 39 S. C. 97, 17 S. E. 446; *Johnson* v. *State*, 100 Tenn. 254, 45 S. W. 436; *Evers* v. *State*, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351; *People* v. *Calton*, 5 Utah, 451, 16 Pac. 902; *Vance* v. *Com.* 2 Va. Cas. 132; *Eckert* v. *State*, 114 Wis. 160, 89 N. W. 826; *Youtsey* v. *United States*, 38 C. C. A. 562, 97 Fed. 937; *United States* v. *Shults*, 6 McLean, 121, Fed. Cas. No. 16,286; *Reg.* v. *Layton*, 4 Cox C. C. 149.

[57]*Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *State* v. *Kavanaugh* (Del.) 53 Atl. 335; *State* v. *Thomas*, Houst. Crim. Rep. (Del.) 511; *Furst* v. *State*, 31 Neb. 403, 47 N. W. 1116; *State* v. *Spencer*, 21 N. J. L. 196; *Com.* v. *Sayres*, 12 Phila. 553; *Com.* v. *Moore*, 2 Pittsb. 502; *Com.* v. *Gearhardt*, 205 Pa. 387, 54 Atl. 1029; *Newcomb* v. *State*, 37 Miss. 385.

It is sufficient if, by reason of mental disease, the perpetrator of a criminal act could not perceive that it was wrong; he need not have been totally unconscious of its character and consequences. *State* v. *Kelley*, 74 Vt. 278, 52 Atl. 434.

[58]*State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *Humphreys* v. *State*, 45 Ga. 190; *Roberts* v. *State*, 3 Ga. 310; *Choice* v. *State*, 31 Ga. 424; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Anderson* v. *State*, 25 Neb. 550, 41 N. W. 357; *Hart* v. *State*, 14 Neb. 572, 16 N. W. 905; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Willis* v. *People*, 32 N. Y. 715, Affirming 5 Park. Crim. Rep. 621; *People* v. *Burgess*, 153 N. Y. 561, 47 N. E. 889; *State* v. *Haywood*, 61 N. C. (Phill. L.) 376; *State* v. *Murray*, 11

at the time of its performance,[59] or as to render the party unconscious that in doing the particular act, he was committing a crime,[60] or unable to apply such knowledge and be controlled by it.[61] It has been held that the ability to distinguish between moral good and evil, as distinguished from legal good and evil, is the test.[62] But the rule adopted by a great majority of the modern cases in which the question has been adverted to would seem to be that there must have been an absence of knowledge that an act is wrong either in a moral or legal sense, in order to relieve from criminal responsibilty.[63]

176. Test of knowledge of nature of act.— Some of the cases have made capacity to understand the nature, character, and consequences of the alleged criminal act a test of criminal responsibility therefor, holding that, to be effectual as a defense, insanity must be such as to render the accused unconscious of such nature, character, and consequences;[64] and that one would be criminally responsible thereunder if he had sufficient mind to be conscious of what he was doing.[65] But

Or. 413, 5 Pac. 55; *State* v. *Zorn*, 22 Or. 591, 30 Pac. 317; *State* v. *Kalb*, 2 Ohio Legal News, 364; *Stuart* v. *State*, 1 Baxt. 178; *Warren* v. *State*, 9 Tex. App. 619, 35 Am. Rep. 745; *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

[59]*McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *State* v. *Erb*, 74 Mo. 199; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Clark* v. *State*, 8 Tex. App. 350; *Smith* v. *State*, 22 Tex. App. 316, 3 S. W. 684; *Giebel* v. *State*, 28 Tex. App. 151, 12 S. W. 591; *Rex* v. *Offord*, 5 Car. & P. 168; *Bellingham's Case*, 1 Collinson on Lunacy, 636; *Queen* v. *Vaughan*, 1 Cox C. C. 80.

[60]*McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180.

It would, perhaps, be going too far to say that a person accused of crime would be responsible in every case where he had a glimmering of knowledge of what was right and wrong. *Reg.* v. *Layton*, 4 Cox C. C. 149.

[61]*Macfarland's Trial*, 8 Abb. Pr. N. S. 69.

[62]*Kinloch's Case*, 25 How. St. Tr. 891, 997.

[63]See *McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *People* v. *Pico*, 62 Cal. 50; *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *Choice* v. *State*, 31 Ga. 424; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Willis* v. *People*, 32 N. Y. 715, Affirming 5 Park. Crim. Rep. 621; *Moett* v. *People*, 85 N. Y. 373; *Macfarland's Trial*, 8 Abb. Pr. N. S. 69; *Blackburn* v. *State*, 23 Ohio St. 146; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *Com.* v. *Sayres*, 12 Phila. 553; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *State* v. *McIntosh*, 39 S. C. 79, 17 S. E. 446; *Bellingham's Case*, 1 Collinson on Lunacy, 636; *Reg.* v. *Townley*, 3 Fost. & F. 839.

[64]*State* v. *Gut*, 13 Minn. 343, Gil. 315; *Humphreys* v. *State*, 45 Ga. 190; *Fisher* v. *People*, 23 Ill. 283; *Hoover* v. *State* (Ind.) 68 N. E. 591; *Russell* v. *State*, 53 Miss. 367; *O'Brien* v. *People*, 36 N. Y. 276; *People* v. *Pine*, 2 Barb. 566; *Cole's Trial*, 7 Abb. Pr. N. S. 321; *State* v. *Brandon*, 53 N. C. (8 Jones L.) 463; *Recoir* v. *State*, 82 Wis. 295, 52 N. W. 84; *Bellingham's Case*, 1 Collinson on Lunacy, 636.

[65]*Brown* v. *Com.* 78 Pa. 122; *Com.* v. *Werling*, 164 Pa. 559, 30 Atl. 406; *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664; *Reg.* v. *Townley*, 3 Fost. & F. 839; *Com.* v. *Jones*, 1 Leigh, 612.

Within this rule, in order to be responsible, a person accused of crime must have sufficient power of memory to

it has more frequently been regarded as necessary that the accused should not only be incapable of knowing the nature and character of the act, but also that he should be without capacity to distinguish between right and wrong with reference to it; the question being whether he had sufficient use of his reason to understand the nature and character of the act and to know that it was wrong for him to commit it.[66] As thus modified the rule is practically the same as the prevailing one above set forth;[67] and under it one who is laboring under mental disease to such an extent that he does not know what he is doing, or that what he is doing is wrong, is not criminally responsible.[68] But he is criminally responsible for his acts if he has reason and capacity sufficient to enable him to distinguish between right and wrong, and understand the nature of his acts and his relation to the party injured,[69] and sufficient mental power to apply that knowl-

recollect the relation in which he stands to others, and in which others stand to him, and to know that the act he is doing is contrary to the dictates of justice and right, and injurious to others. *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *United States* v. *Faulkner*, 35 Fed. 730.

And one who sets fire to the house of another while in such a state of mind that he is not conscious that the effect of it would be to injure any one is not criminally responsible therefor. *Reg.* v. *Davies*, 1 Fost. & F. 69.

Nor can one be convicted of larceny where the case depends upon his sanity, unless the jury are satisfied that he had sufficient mind to comprehend all the essential ingredients of the offense; and the mere recognition that the property stolen belonged to another would not be sufficient. *People* v. *Cummins*, 47 Mich. 334, 11 N. W. 184, 186.

One who acts upon the persuasion of another, and is without capacity to resist such persuasion, cannot be guilty of burglary and larceny. *Hays* v. *Com.* 17 Ky. L. Rep. 1147, 33 S. W. 1104.

[66] *Guiteau's Case*, 10 Fed. 161; *People* v. *Pico*, 62 Cal. 50; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *Mackin* v. *State*, 59 N. J. L. 495, 36 Atl. 1040; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *Walker* v. *People*, 26 Hun, 67; *People* v. *Barberi*, 47 N. Y. Supp. 168; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Reg.* v. *Layton*, 4 Cox C. C. 149; *Reg.* v. *Doody*, 6 Cox C. C. 463; *Com.* v. *Platt*, 11 Phila. 421; *Davis* v. *United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360.

In *Knights* v. *State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508, however, it was held to be judicially erroneous to charge the jury that want of capacity on the part of a person accused of crime, to understand the nature of the act in question at the time of its commission, is necessary to render him irresponsible.

[67] *Supra*, § 175.

[68] *Guiteau's Case*, 10 Fed. 161; *State* v. *Zorn*, 22 Or. 591, 30 Pac. 317; *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 109; *Rex* v. *Arnold*, 16 How. St. Tr. 695.

[69] *State* v. *West*, Houst. Crim. Rep. (Del.) 371; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *Fitzpatrick* v. *Com.* 81 Ky. 357; *Spencer* v. *State*, 69 Md. 28, 13 Atl. 809; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *State* v. *Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178; *State* v. *Redemeier*, 8 Mo. App. 1; *State* v. *Haywood*, 61 N. C. (Phill. L.) 376; *Loeffner* v. *State*, 10 Ohio St. 599; *Nevling* v. *Com.* 98 Pa. 323; *Com.* v. *Farkin*, 2 Clark (Pa.) 208; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *Stuart* v. *State*, 1 Baxt. 178; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note; *Reg.* v. *Oxford*, 9 Car. & P. 525; *Reg.* v. *Townley*, 3 Fost. & F. 839; *Bellingham's Case*, 1 Collinson on Lunacy, 636; *Rex* v. *Offord*, 5 Car. & P. 169.

edge to his own acts.[70] Many well-considered cases look upon the question of knowledge of right and wrong, and that of capacity to know the nature of the act, as alternative; holding the test of criminal responsibility to be whether the accused, at the time of committing the act in question, was laboring under such incapacity as not to know the nature and quality of the act he was doing; or, if he did know, that he did not know he was doing wrong.[71]

177. Right and wrong test generally satisfactory.— Whatever may be the theory of responsibility we adopt, there is much to commend the "right and wrong" test to our acceptance. There are three theories on which punishment is based: 1st, that of retribution; 2d, that of prevention; and 3d, that of example. Whichever of these views we take, it seems proper to make a consciousness of right and wrong as to a particular act a condition of responsibility for that act. If we take the theory of retribution, we cannot, in justice, impose punishment where there is no guilt. *Punitur quia peccatum est* is the basis of that theory; there must be sin to sustain punishment, and sin involves a sense of wrong. On the retributive theory, therefore, we are justified in holding all persons, conscious of the wrongfulness of a particular act which they commit, responsible for that act. And on the prevention and example theories, the argument for punishment of persons who, however disturbed may be their minds, are conscious of the difference between right and wrong, as to the particular act, is still stronger. It is conceded by those having charge of lunatics that they are the subjects of discipline. In fact, the police system which prevails in all lunatic asylums assumes this, even should

[70] *State* v. *Gut*, 13 Minn. 343, Gil. 315; *State* v. *Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178; *State* v. *West*, Houst. Crim. Rep. (Del.) 371.

[71] *United States* v. *Young*, 25 Fed. 710; *People* v. *Coffman*, 24 Cal. 230; *People* v. *Walter*, 1 Idaho, 386; *State* v. *Lawrence*, 57 Me. 574; *State* v. *Klinger*, 43 Mo. 127; *Anderson* v. *State*, 25 Neb. 550, 41 N. W. 357; *State* v. *Martin* (N. J.) 3 Crim. L. Mag. 44; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *Flanigan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731; *People* v. *Kleim*, 1 Edm. Sel. Cas. 13; *Com.* v. *McCaulley*, 16 Phila. 502; *Webb* v. *State*, 5 Tex. App. 596; *Clark* v. *State*, 8 Tex. App. 350; *Smith* v. *State*, 19 Tex. App. 444. And see *Revoir* v. *State*, 82 Wis. 295, 52 N. W. 84.

The English law in this relation took definite and final shape in the answer of the fifteen judges to the question propounded to them by the House of Lords in June, 1843. "The jury," they said, "ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." *M'Naughten's Case*, 1 Car. & K. 134, note, 8 Scott N. R. 595, 10 Clark & F. 200.

we cast aside the abundant general testimony from experts that lunatics are, as a rule, open to the influence of fear of punishment. If so, do they differ, except in degree, from men who are the slaves of passion, or the victims of demoralizing education? Mitigation of guilt, indeed, and diminished responsibilty, may be claimed for them on account of their infirmity; but, as penal law can control their outbursts, the interests of society require that over them penal law should continue to assert its control.[72]

178. Time when tests are applied.— Tests as to the existence of insanity as a defense in a criminal prosecution are to be applied with reference to the exact time of the commission of the offense.[73] It is proper, however, in a prosecution for killing with poison, to submit to the jury the question of the sanity or insanity of the accused at the time when the poison was purchased as well as at the time when it was administered.[74]

IV. Partial insanity or monomania.

179. Definitions.—Partial insanity is mental unsoundness, always existing, though but occasionally manifested.[75] And monomania is a derangement of the mental faculties, confined to some particular idea or object of desire or aversion,[76]—a perversion of understanding in regard to a single object or a small number of objects.[77] Tempo-

[72]See Wharton, Crim. Law, 10th ed. § 1, *et seq.*

[73]See *State* v. *Coleman*, 27 La. Ann. 691; *State* v. *Hays*, 22 La. Ann. 39; *People* v. *Clendennin*, 91 Cal. 35, 27 Pac. 418; *State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249; *Clark* v. *State*, 8 Tex. App. 350; *Smith* v. *State*, 22 Tex. App. 317, 3 S. W. 684.

[74]*Laros* v. *Com.* 84 Pa. 200.

[75]Black, Law Dict. citing *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79.

The use of the word delusion in an instruction in a criminal action in which insanity was pleaded as a defense, when partial insanity was meant, the word delusion having no proper application to the facts, will not be deemed to have misled the jury, where the evidence and the connection in which the words were used make the meaning clear. *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204.

[76]*Owings' Case*, 1 Bland Ch. 370, 17 Am. Dec. 311.

A person may be insane upon one subject and yet be sane upon all others. *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895.

And presence of power of consecutive and rational thought does not disprove the existence of insanity. *Com.* v. *Meredith*, 17 Phila. 90; *Bennett* v. *State* (Wis.) 4 Crim. L. Mag. 378.

[77]*Re Gannon*, 2 Misc. 329, 21 N. Y. Supp. 960.

Under Indiana statutes as to mental unsoundness as a defense in a criminal prosecution, it cannot be said that a man is partially insane, and not wholly so, and partial insanity is not a defense; the mental capacity of the accused, whether weak or strong, not affecting the question of punishment, unless he was insane within the meaning of the law. *Warner* v. *State*, 114 Ind. 137, 16 N. E. 189; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856.

rary insanity consists of occasional fits of madness.[78] And recurrent insanity is insanity returning from time to time.[79]

180. Criminal responsibility.— Partial insanity does not confer criminal irresponsibility where the party was not instigated by his madness to perpetrate the criminal act.[80] Where it is relied upon as a defense the crime charged must have been the product of the insane condition, and connected with it as effect with cause; and not the result of sane reasoning or natural motives, of which the party was capable, notwithstanding his disorder.[81] Partial insanity is an excuse for crime only when it deprives the party of his reason in regard to the criminal act in question;[82] the test of responsibility being like that in other cases,—whether the accused had sufficient capacity at the time of committing the act to distinguish between right and wrong with reference to it.[83] And partial insanity will not excuse crime unless the accused did not have such knowledge,[84]

[78] *Reg.* v. *Richards*, 1 Fost. & F. 87.

[79] *Smith* v. *State*, 22 Tex. App. 316, 3 S. W. 684.

[80] *Bovard* v. *State*, 30 Miss. 600; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *Com.* v *Werling*, 164 Pa. 559, 30 Atl. 406; *Com.* v. *Cressinger*, 193 Pa. 326, 44 Atl. 433; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

And where a person accused of crime is not shown to have been insane generally, evidence as to unsoundness upon any subject except that which is under investigation is incompetent. *Com.* v. *McCaulley*, 16 Phila. 502.

But temporary insanity as a defense to crime is as fully recognized by law as is permanent insanity. *People* v. *Ford*, 138 Cal. 140, 70 Pac. 1075.

[81] *Guiteau's Case*, 10 Fed. 161; *Stevens* v. *State*, 31 Ind. 485, 99 Am. Dec. 634; *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

[82] *State* v. *Danby*, Houst. Crim. Rep. (Del.) 175; *State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *State* v. *Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703; *Com.* v. *McCaulley*, 16 Phila. 502.

Partial insanity which will excuse crime must control the will and make the commission of the act a duty of overruling necessity to the person committing it. *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v. *Freeth*, 5 Clark (Pa.) 455.

And it has been held that to escape criminal responsibility on the ground of partial insanity, the accused must not have had will power sufficient to restrain the impulse to commit crime which may arise from a diseased mind *Dejarnette* v. *Com.* 75 Va. 867; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356.

[83] *State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249; *People* v. *Hurtado*, 63 Cal. 288; *State* v. *Nixon*, 32 Kan. 205, 4 Pac. 159; *Grissom* v. *State*, 62 Miss. 167; *Giebel* v. *State*, 28 Tex. App. 151, 12 S. W. 591; *Riley* v. *State* (Tex. Crim. App.) 44 S. W. 498; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S E. 982; *United States* v. *Ridgeway*, 31 Fed. 144; *Kinloch's Case*, 25 How. St. Tr. 891, 997.

[84] *State* v. *Lawrence*, 57 Me. 574; *State* v. *Huting*, 21 Mo. 464; *Bovard* v. *State*, 30 Miss. 600; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *Com.* v. *Sayres*, 12 Phila. 553; *Com.* v. *Freeth*, 5 Clark (Pa.) 455; *Dejarnette* v. *Com.* 75 Va. 867; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382.

Where the partial insanity goes to the extent of breaking down the distinction between the knowledge of right and of wrong, as to the particular act, it is immaterial whether the sufferer was insane as to the other matters or not. *Grissom* v *State*, 62 Miss. 167; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665.

or did not know the nature or quality of the criminal act,[85] or did not have power sufficient to apply such knowledge to his own case.[86] Nor is temporary recurrent insanity a defense in a criminal prosecution where the person committing the crime was not afflicted with the malady at the time.[87] Where partial insanity is interposed as a defense to a criminal act, it must be proved that the act was committed during an attack of the disease to justify an acquittal, and the act itself is not evidence of such an attack.[88]

181. Question for jury.— The rule that the question as to how much intellect one must have to make him amenable to the criminal law is one for the court, and that the existence of insanity which will excuse crime is a question of fact, for the jury, applies to temporary or periodical insanity.[89] And it is a question for the jury whether the accused in a criminal prosecution labored under the influence of a delusion which rendered his mind insensible to the nature of his act.[90] All symptoms of delusion or mental disease are purely matters of fact, for the jury.[91] And so are questions as to the existence and effect on the mind of insanity, which subverts the freedom of the will and destroys the power of the victim to choose between right and wrong, though he may be able to perceive the difference between them.[92] So, where insanity is alleged as a defense in a prosecution for homicide, the question as to whether the accused was guilty of murder in the first or second degree should be submitted to the jury, as well as the question whether or not he was insane.[93]

182. Delusions defined.—An insane delusion, within the meaning of criminal law, is an unreasonable and incorrigible belief in the

[85]*State* v. *Lawrence*, 57 Me. 574; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *Com.* v. *Sayres*, 12 Phila. 553; *Com.* v. *Freeth*, 5 Clark (Pa.) 455; *Dejarnette* v. *Com.* 75 Va. 867; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382.

[86]*Com.* v. *Sayres*, 12 Phila. 553; *Com.* v. *Freeth*, 5 Clark (Pa.) 455; *Dejarnette* v. *Com.* 75 Va. 867; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382.

[87]*Bellingham's Case*, 1 Collinson on Lunacy, 636.

[88]*People* v. *Pine*, 2 Barb. 566.

Where a crime was committed by a person generally insane, during a lucid interval, he is responsible therefor if he was capable, at that particular time, of distinguishing good from evil. *Clark's Case*, 1 N. Y. City Hall Rec. 176.

[89]*Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *Reg.* v. *Richards*, 1 Fost. & F. 87.

[90]*Bowler's Case*, 1 Collinson on Lunacy, 673; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725.

And whether or not a criminal act was done by a person subject to temporary or recurrent insanity, during a fit of madness, is a question for the jury. *Reg.* v. *Richards*, 1 Fost. & F. 87.

[91]*State* v. *Hundley*, 46 Mo. 414.

[92]*Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242.

[93]*People* v. *Walter*, 1 Idaho, 386. And see *People* v. *Webster*, 59 Hun, 398, 13 N. Y. Supp. 414.

existence of facts which are either impossible absolutely, or impossible under the circumstances of the case;[94] a fixed belief which is contrary to universal experience and known natural laws;[95] a belief in the existence of facts in which no rational person would believe.[96] A belief founded upon reason and reflection, however, is not an insane delusion, however absurd it may be.[97]

183. Effect on responsibility generally.— One who is led to the commission of a criminal act by an insane delusion controlling his will and judgment is not criminally responsible therefor.[98] But delusion is not a legal test of insanity as an excuse for a criminal act, where the act is in no way connected with the delusion or produced by it.[99] And the fact that a person has an insane delusion upon one subject does not affect his responsibility for a crime with reference to other matters, not connected with the particular delusion, where he is capable of distinguishing between right and wrong as to the particular act.[100] It may be stated generally, therefore, that the test of criminal responsibility best supported, both by reason and authority, is the capacity to distinguish between right and wrong at the time of the commission of the criminal act in question, with respect to such act, and the absence of insane delusion with reference to that subject.[1] The question is, Did he do the act under a delusion, believing it to be other than it was?[2] And the delusion, to be a defense, must have been total, not merely partial.[3]

[94] *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Guiteau's Case*, 10 Fed. 161.

[95] *Com.* v. *Meredith*, 14 W. N. C. 188.

A belief on the part of a person accused of crime that he had not slept for eight years is an insane delusion on that subject. *United States* v. *King*, 34 Fed. 302.

[96] *Com.* v. *Meredith*, 17 Phila. 90.

[97] *Guiteau's Case*, 10 Fed. 161. And see *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351.

[98] *Stevens* v. *State*, 31 Ind. 486, 99 Am. Dec. 634; *State* v. *Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703; *Reg.* v. *Townley*, 3 Fost. & F. 839.

[99] *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Roberts* v. *State*, 3 Ga. 310; *State* v. *Lawrence*, 57 Me. 574; *Bovard* v. *State*, 30 Miss. 600; *State* v. *Simms*, 71 Mo. 538; *State* v. *Huting*, 21 Mo. 474; *Hawe* v. *State*, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452.

[100] *State* v. *Windsor*, 5 Harr. (Del.) 512; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *State* v. *Lawrence*, 57 Me. 574; *People* v. *Ferraro*, 161 N. Y. 365, 55 N. E. 931; *Sindram* v. *People*, 88 N. Y. 196; *Com.* v. *Mosler*, 4 Pa. 264; *Wileox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21; *United States* v. *Ridgeway*, 31 Fed. 144.

[1] *Casey* v. *People*, 31 Hun, 158; *People* v. *Pine*, 2 Barb. 566; *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *State* v. *Mewherter*, 46 Iowa, 88; *Fouts* v. *State*, 4 G. Greene, 500; *State* v. *Murray*, 11 Or. 413, 5 Pac. 55; *Wileox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *Bellingham's Case*, 1 Collinson on Lunacy, 636.

The existence of an insane delusion is important only in a criminal prosecution as it throws light upon the question of knowledge or capacity of the party to know right from wrong. *Guiteau's Case*, 10 Fed. 161.

[2] *Reg.* v. *Townley*, 3 Fost. & F. 839.

The existence of an insane delusion is no defense unless it renders the person incapable of knowing what he is doing, or forming a criminal intent. *Hall* v. *Com.* 22 W. N. C. 25.

[3] *Humphreys* v. *State*, 45 Ga. 190.

A common feature of delusions is a

184. Delusions must be objective.— Delusions, to constitute a defense, must be objective as distinguished from subjective. They must be delusions of the senses, or such as relate to facts or objects; not mere wrong notions or impressions; and the aberration in such case must be mental, not moral, so as to affect the intellect of the individual. It is not enough that they show a diseased or a depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong continuing to exist, although it may be in a perverted condition. To enable them to be set up as a defense to an indictment for a crime, they must go to such crime objectively; *i. e.*, they must involve an honest mistake as to the object at which the crime is directed.[4] Of this class are delusions of danger; and one is not criminally responsible for a homicide where it was committed under the delusion that the person killed was about to do him a serious personal injury, and that he was acting in self-defense.[5]

185. Distinction between objective and subjective delusions.—We have already noticed the distinction between objective delusions (*i. e.*, visual or other sensual mistakes) and subjective delusions (*i. e.*, delusions as to matters of personal duty). As to the first, we have seen that it is a defense if a person non-negligently does an act which, if his senses had not been mistaken, would not have been an infraction of the law. With regard to subjective delusions, we must take another test. Such delusions are no defense unless insane.

186. Where reason can dispel subjective delusions, responsibility exists.— If there be reason enough to dispel the delusion; if the defendant obstinately refuses, under such circumstances, to listen to arguments by which the delusion could be dispelled; if, on the contrary, he cherishes such delusion, and makes it the pretext of wrongs

belief on the part of the party that he is sane, and his assertion that he is so is not conclusive evidence against him in a criminal prosecution. *State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550.

[4] *Reg.* v. *Burton*, 3 Fost. & F. 772; *Reg.* v. *Townley*, 3 Fost. & F. 839; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Willis* v. *People*, 5 Park. Crim. Rep. 621.

The commission of a homicide for the purpose of being hanged shows a morbid state of mind only, and not an insane delusion which will relieve from criminal responsibility for the act. *Reg.* v. *Burton*, 3 Fost. & F. 772.

And an individual belief upon the part of a person as to right and wrong and as to the justifiableness of his acts, though mistaken and sincere, does not constitute a delusion which will excuse the criminal act. *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

But a delusion upon the part of one person that another was a robber, who had entered his house, under which he killed the supposed robber, is objective, and a good defense. *Levett's Case*, Cro. Car. 538.

[5] *People* v. *Pine*, 2 Barb. 566; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *Reg.* v. *Pate*, cited in Ray on Med. Jur. § 309; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21.

to others,—then he is responsible for such wrongs. The test, therefore, to which we are led is, Was the delusion pleaded as a defense the delusion of an insane person? If not, he has reason enough to dispel or correct it; and his refusal to do so does not invest him with irresponsibility. Thus, the Mormon prophets claim, it is said, a direct revelation, permitting them to practise polygamy. Would they be permitted to plead their delusion in this respect as a bar to an indictment? Certainly not. And the reason is that they are shrewd, sane men, and must, therefore, be held responsible for their delusions.[6] It is allowable, therefore, for the prosecution, when an insane "delusion" is set up for a defense, to offer evidence to show that the "delusion" was sane,—in other words, was an opinion which ordinary processes of reasoning might have produced.[7]

187. Delusion must be such as to excuse if true.—Nor will every delusion, though relating to the particular subject of the criminal act, and though objective, relieve from criminal responsibility; the party laboring under a particular delusion must be considered in the same situation with relation to criminal responsibility as if the facts with respect to which the delusion existed were real.[8] And criminal responsibility is relieved only when the facts, or the state of facts, believed in under the influence of the delusion, would, if actually existing, have justified the act, and rendered it excusable.[9] One is criminally responsible for an act committed while laboring under the delusion that he was redressing or avenging some injury, or grievance, or producing or obtaining some profit or public benefit, or that another was exercising a malign influence over him.[10] But one who

[6]Wharton, Crim. Law, 8th ed. §§ 84, 850. 1682, 1715, citing *Reynolds* v. *United States*, 98 U. S. 145, 25 L. ed. 244.

The act must be an insane act, and not merely the act of an insane person. *Freeman* v. *People*, 4 Denio, 27, 47 Am. Dec. 216.

And an instruction with relation to delusions as an excuse for crime should distinguish between those which are and are not insanity proper. *Gunter* v. *State*, 83 Ala. 96, 3 So. 600.

[7]*Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491.

[8]*State* v. *Mewherter*, 46 Iowa, 88; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

[9]*Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Smith* v. *State*, 55 Ark. 259, 18 S. W. 237; *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *Fouts* v. *State*, 4 G. Greene, 500; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *Thurman* v. *State*, 32 Neb. 224, 49 N. W. 338; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *Com.* v. *Freeth*, 5 Clark (Pa.) 455; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356; *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21; *Reg.* v. *Pate*, cited in Ray on Med. Jur. § 309. See also *Wesley* v. *State*, 37 Miss. 327, 75 Am. Dec. 62.

But an instruction that a delusion will not absolve one from guilt unless the facts, if real, would excuse the act, though technically correct, is incomplete, when it fails to tell the jury what facts would excuse. *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658.

[10]*Humphreys* v. *State*, 45 Ga. 190; *Hill* v. *State*, 64 Ga. 463; *M'Naghten's Case*, 10 Clark & F. 200, 2 Scott N. R.

commits a criminal act under the delusion that God had commanded him to do it is not criminally responsible therefor.[11]

188. Effect on degree of crime.— As a general rule there is not deemed to be any condition intermediate between sanity and insanity which will mitigate crime without excusing it.[12] And a conviction of a lower degree of crime cannot be had on the theory that the defendant's mind was unsound to a degree rendering him incapable of deliberation, where he knew the nature of the act.[13] But evidence of insanity is admissible to show the absence of any deliberative or premeditative design.[14] And it has been held that one who killed another when his mind was so far impaired as to render him incapable of a deliberate and premeditated murder, but who was not totally irresponsible by reason of his insanity, should be convicted of murder in the second degree only.[15] But where a person committing

595, 1 Car. & K. 130, note; *Reg.* v. *Pate*, cited in Ray on Med. Jur. § 309.

So, a person who kills another is not relieved from responsibility by a delusion that the latter was trying to marry his mother against her will, since that, if true, would not warrant the killing. *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658.

And an insane delusion entertained by a convict that another convict was acting as a spy with intent to betray his plans of escape from the prison, does not affect the consequences of his act in killing him. *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275.

[11]*Guiteau's Case*, 10 Fed. 161; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458.

But a belief in spirits upon the part of a person accused of crime, that spirits whispered to him and bade him do the criminal act, of itself furnishes no defense, though it may be evidence for the jury, upon which to base its judgment with regard to his understanding and comprehension. *People* v. *Waltz*, 50 How. Pr. 204.

[12]*Sage* v. *State*, 91 Ind. 141; *United States* v. *Lee*, 4 Mackey, 489, 54 Am. Rep. 293; *State* v. *Kotovsky*, 11 Mo. App. 584; *Sindram* v. *People*, 1 N. Y. Crim. Rep. 448.

[13]*State* v. *Kotovsky*, 11 Mo. App. 584; *State* v. *Holloway*, 156 Mo. 222, 56 S. W. 734; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Com.* v. *Hollinger*, 190 Pa. 155, 42 Atl. 548; *Com.* v. *Barner*, 199 Pa. 335, 49 Atl. 60; *Cornell* v. *State*, 104 Wis. 527, 80 N. W. 745.

Insanity is either a complete defense in a criminal prosecution, or no defense, and cannot reduce homicide from murder to manslaughter. *Horton* v. *United States*, 15 App. D. C. 310.

And where a person charged with murder was incapable of knowing that the act was wrong, a partial defect of understanding, which might cause him more readily to give way to passion than an ordinarily reasonable man, cannot be considered for the purpose of reducing the offense to manslaughter; the provocation to accomplish that result must have been such, at least, as to stir the resentment of a reasonable man. *People* v. *Hurtado*, 63 Cal. 288.

[14]*Sindram* v. *People*, 1 N. Y. Crim. Rep. 448; *Sage* v. *State*, 91 Ind. 141; *Hompton* v. *State*, 111 Wis. 127, 86 N. W. 596; *Youtsey* v. *United States*, 38 C. C. A. 562, 97 Fed. 937.

[15]*Anderson* v. *State*, 43 Conn. 514, 21 Am. Rep. 669; *Cottell* v. *State*, 12 Ohio C. C. 467, 5 Ohio Dec. 472; *Green* v. *Com.* 83 Pa. 75; *Jones* v. *Com.* 75 Pa. 403; *Pistorius* v. *Com.* 84 Pa. 158; *Willis* v. *Com.* 32 Gratt. 928. *Contra*, *Com.* v. *Hollinger*, 190 Pa. 155, 42 Atl. 548; *Com.* v. *Barner*, 199 Pa. 335, 49 Atl. 60; *Jarvis* v. *State*, 70 Ark. 613, Appx., 67 S. W. 76.

Evidence of excitement and abnormal sensitiveness resulting from sunstroke and a fall, and other accidents, though not sufficient to establish irresponsibility, is sufficient to reduce the crime from murder in the first degree to murder in the second degree. *People* v. *Conroy*, 33 Hun, 119.

And an instruction in a prosecution for homicide, that if the defendant was

a murder was conscious of what he was doing, and capable of distinguishing between right and wrong, and premeditated the commission of the act, he is guilty of murder in the first degree, though he was deranged.[16]

V. Irresistible impulse.

189. Definition.— An irresistible impulse, in the law of insanity, is an irresistible inclination to kill or commit some other offense, consisting of some unseen pressure on the mind, drawing it to consequences which it sees but cannot avoid, holding it under coercion, so that, while it clearly perceives the results, it is incapable of resisting.[17] "Irresistible impulse" is not convertible with passionate propensity, no matter how strong, in persons not insane.[18] In other words, the "irresistible impulse" of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does not confer irresponsibility. As this distinction is of great importance, we will now notice the reason on which it rests.[19]

not insane at the time of the shooting, he ought to be found guilty, as charged in the indictment, is not subject to the objection that it precludes the jury from finding a lesser degree of the offense, the shooting being admitted. *People* v. *Hobson*, 17 Cal. 424.

[16] *Nevling* v. *Com.* 98 Pa. 323.

But an instruction in a prosecution for homicide that if the accused was insane at the time of the act, the jury must declare him not guilty, without regard to the degree of the insanity, is too broad, and cannot be sustained. *People* v. *Best*, 39 Cal. 690.

And an instruction with reference to murder in the second degree is not reversible error where the homicide was murder in the first degree if the accused was sane, as such an instruction would be clearly beneficial to the defendant. *Boren* v. *State*, 32 Tex. Crim. Rep. 637, 25 S. W. 775.

An instruction in a prosecution for homicide, however, that if the accused was not in a frame of mind to deliberate and premeditate, the killing would not be murder, is objectionable as vague and ambiguous, and not showing the measure of criminal responsibility. *Dejarnette* v. *Com.* 75 Va. 867.

And an instruction in a prosecution for homicide that if the accused acted with malice he is guilty of murder, though he may have labored under partial insanity, is erroneous, since there can be no such thing as malice without mental accountability, and this cannot coexist with incapacity to distinguish right from wrong. *Grissom* v. *State*, 62 Miss. 167.

[17] *Dejarnette* v. *Com.* 75 Va. 867; *Flanagan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731.

[18] The impulse must be an insane one, as distinguished from passion. *McCarty* v. *Com.* 24 Ky. L. Rep. 1427, 71 S. W. 656.

[19] "Irresistible impulses" are recognized by all philosophers, profane and sacred. Ovid, in a well-known passage, thus speaks: —

Sed trahit invitam nova vis, aliudque cupido,
Mens aliud suadet; video meliora proboque.
Deteriora sequor.

And so St. Paul: "The good that I would I do not; but the evil which I would not, that I do. . . I see another law in my members, warring against the law of my mind, and bringing me into captivity to the law of sin which is in my members." No doubt the impulse, viewed thus as an isolated force, is irresistible in producing the sin. But, on the other hand, reason, in its right sense, is irresistible in sup

190. Insane uncontrollable impulse recognized in many states.—In Illinois, it is declared that a safe and reasonable test would be, that, whenever it should appear from the evidence that, at the time of doing the act charged the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he should be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them.[20] And in Pennsylvania it was held that "the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right and wrong, and the power to adhere to the right and to avoid the wrong?"[21] And in Indiana a similar view is accepted.[22] Likewise, in Ohio, insane irresistible impulse is regarded as a defense,[23] and such is the view in Minne-

pressing the impulse. Reason may operate either through love or fear; and hence it is incumbent on all systems of ethics to cherish these motives. No doubt it is a law of our nature that the will follows the strongest motive. But the irresistibility of the inferior motive, when unrestrained, is the crowning reason for promulgating and enforcing superior motives, as modes of restraining.

Griesinger doubts whether impulses are irresistible even among the insane. "Whether, and to what extent, certain directions of the will and impulses in the insane, particularly such as lead to criminal acts, are irresistible, is a question which can scarcely ever be answered with certainty. Few of the acts of the insane have the character of forced, purely automatic movements; in mania also, according to the testimony of individuals who have recovered, many of the wild desires could often be restrained; the criminal deeds of the insane are not generally instinctive. The loss of freewill (or, if we choose, irresponsibility), therefore, seldom depends on the fact of inability to have abstained from the act committed, or that the normal conditions of volition have been completely suspended. The causes of this loss of freewill chiefly depend on quite a different cause,—they depend on violent excitation of the emotions, or on incoherence, on false reasoning proceeding from delirious conceptions, hallucinations, etc." Griesinger, Mental Pathology, Sydenham's ed. (1867) § 47.

[20] See *Fisher* v. *People*, 23 Ill. 283; *Hopps* v. *People*, 31 Ill. 394, 83 Am. Dec. 231; *Dunn* v. *People*, 109 Ill. 635; *Dacey* v. *People*, 116 Ill. 555, 6 N. E. 165.

[21] *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491.

This must now be regarded as the settled rule in Pennsylvania. See *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Coyle* v. *Com.* 100 Pa. 573, 49 Am. Rep. 397; *Com.* v. *Freth*, 3 Phila. 105; *Brown* v. *Com.* 78 Pa. 122; *Sayres* v. *Com.* 88 Pa. 291.

[22] *Stevens* v. *State*, 31 Ind. 485, 99 Am. Dec. 634; *Sawyer* v. *State*, 35 Ind. 80; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856; *Bradley* v. *State*, 31 Ind. 492.

Within this rule an instruction in a criminal prosecution in which insanity is interposed as a defense, limiting the inquiry to the condition of the cogitative faculties, or power to comprehend by the understanding, is held to be erroneous, since mental disease may also involve the will. *Bradley* v. *State*, 31 Ind. 492.

[23] *Blackburn* v. *State*, 23 Ohio St. 146; *Farrer* v. *State*, 2 Ohio St. 54; *State* v.

sota,[24] and in Kentucky.[25] In Iowa similar views were expressed to the effect that the capacity to distinguish right and wrong is not, in all cases, a safe test of criminal responsibility, and that, if a person commit a homicide knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse, arising, not from natural passion, but from an insane condition of the mind, he is not criminally responsible.[26] To the same effect is a decision of the Supreme Court of the United States.[27] And this is also the rule in New Hampshire,[28] in Delaware,[29] in Connecticut,[30] in Texas,[31] in Alabama,[32] and in other states.[33] An exception to the general rule of criminal responsibility exists under that doctrine, where one has sufficient reason to distinguish between right and wrong as to the particular act to be committed, but, in consequence of some delusion, the will is overmastered, and there is no criminal intent.[34]

191. Limit to irresponsibility.— Even under this rule, however, irresistible impulse is not a defense in a criminal prosecution, unless it exists to such an extent as to subjugate the intellect, control the will, and render it impossible for the person to do otherwise than yield.[35] The test in such case is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient

Tyler, 7 Ohio N. P. 443, 5 Ohio S. & C. P. Dec. 588; *State* v. *Kalb*, 7 Ohio N. P. 547, 5 Ohio S. & C. P. Dec. 738.

[24] *State* v. *Gut*, 13 Minn. 341, Gil. 315.

[25] *Smith* v. *Com.* 1 Duv. 224; *Graham* v. *Com.* 16 B. Mon. 587; *Kriel* v. *Com.* 5 Bush, 362; *Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196, 23 Ky. L. Rep. 226, 62 S. W. 715.

[26] *State* v. *Felter*, 25 Iowa, 67; *Fouts* v. *State*, 4 G. Greene, 500.

[27] *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236. See also *Davis* v. *United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360; *United States* v. *Hewson*, 7 Law Rep. 361, Fed. Cas. No. 15,360; *Guiteau's Case*, 10 Fed. 161.

[28] *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 252; *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154.

[29] *State* v. *Windsor*, 5 Harr. (Del.) 512; *State* v. *Brown*, Houst. Crim. Rep. (Del.) 539; *State* v. *Cole*, 2 Penn. (Del.) 344, 45 Atl. 391.

[30] *State* v. *Johnson*, 40 Conn. 136.

[31] *King* v. *State*, 9 Tex. App. 515. And see *Warren* v. *State*, 9 Tex. App. 619, 35 Am. Rep. 745.

[32] *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *Lide* v. *State*, 133 Ala. 43, 31 So. 953.

[33] See *People* v. *Finley*, 38 Mich. 482; *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Butler* v. *State*, 102 Wis. 364, 78 N. W. 590; *Lowe* v. *State* (Wis.) 96 N. W. 417.

[34] *Taylor* v. *State*, 105 Ga. 746, 31 S. E. 764; *Flanagan* v. *State*, 103 Ga. 619, 30 S. E. 550; *Roberts* v. *State*, 3 Ga. 310; *Lide* v. *State*, 133 Ala. 43, 31 So. 953; *State* v. *Cole*, 2 Penn. (Del.) 344, 45 Atl. 391.

There are two constituent elements of legal responsibility for crime: First, capacity of intellectual discrimination; second, freedom of the will. *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *Farrer* v. *State*, 2 Ohio St. 54.

And to be criminally responsible one must have reason enough to be able to judge of the nature and consequences of the act committed, and he must not have been overcome by an irresistible impulse arising from disease. *State* v. *Johnson*, 40 Conn. 136; *State* v. *West*, Houst. Crim. Rep. (Del.) 371; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285.

[35] *State* v. *Windsor*, 5 Harr. (Del.) 512; *Hopps* v. *People*, 31 Ill. 385, 83 Am. Dec. 231; *Dunn* v. *People*, 109 Ill. 635;

power to control and govern his actions, and to resist his morbid inclination to perpetrate the offense.[36] An act is punishable though committed by one under an irresistible impulse, where his mental faculties were in a sound, normal condition.[37] And one who, with no mental disorder, commits a criminal act from overmastering anger, jealousy, or revenge, is responsible therefor.[38] The question whether the insane impulse was irresistible is one of fact, for the jury.[39]

Dacey v. *People*, 116 Ill. 555, 6 N. E. 165; *Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95; *Meyer* v. *People*, 156 Ill. 126, 40 N. E. 490; *Fisher* v. *People*, 23 Ill. 283; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Goodwin* v. *State*, 96 Ind. 550; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285; *State* v. *Mewherter*, 46 Iowa, 88; *State* v. *Felter*, 25 Iowa, 67; *Fouts* v. *State*, 4 G. Greene, 500; *Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Taylor* v. *Com.* 109 Pa. 262; *Hall* v. *Com.* 22 W. N. C. 25; *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *King* v. *State*, 9 Tex. App. 515; *Com.* v. *Jones*, 1 Leigh, 612.

In *Edmondson's Case*, Times, Jan. 17th, 1872, which was a poisoning case, the charge was to the effect that if the defendant did not know right from wrong at the time she committed the crime, she must be acquitted; and she must be acquitted if she was under a delusion which made the poisoning seem right to her; but that if not, she should be convicted; and her guilt was determined as against the theory that she was under the dominion of an irresistible impulse to poison, on the ground that she poisoned when she could do it with impunity, but controlled herself when she could not.

[36]*Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 195, 2 So. 854; *Lide* v. *State*, 133 Ala. 43, 31 So. 953; *Williams* v. *State*, 50 Ark. 517, 9 S. W. 5; *State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *State* v. *Windsor*, 5 Harr. (Del.) 515; *State* v. *Brown*, Houst. Crim. Rep. (Del.) 539; *State* v. *West*, Houst. Crim. Rep. (Del.) 371; *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *Plake* v. *State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285; *Farris* v. *Com.* 8 Ky. L. Rep. 417, 1 S. W. 729; *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475; *Shannahan* v. *Com.* 8 Bush, 464, 8 Am. Rep. 465; *Kriel* v. *Com.* 5 Bush, 363; *Graham* v. *Com.* 16 B. Mon. 587; *Smith* v. *Com.* 1 Duv. 224; *Baldwin* v. *State*, 12 Mo. 233; *State* v. *Hundley*, 46 Mo. 414; *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *Blackburn* v. *State*, 23 Ohio St. 146; *State* v. *Kalb*, 2 Ohio Legal News, 364; *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356; *Hall* v. *Com.* 22 W. N. C. 25; *Com.* v. *Platt*, 11 Phila. 421.

As to the Missouri rule, see later Missouri cases, *infra*.

The power to deliberate, premeditate, and design, in the absence of the power to determine upon the true nature and character of the act designed, its effect upon the subject, and the true responsibility therefor, and power to control the impulses of the mind and prevent the execution of the thought possessing it, is not a true test of criminal responsibility. *Bennett* v. *State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; *Kearney* v. *People*, 11 Colo. 258, 17 Pac. 782.

[37]*Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *State* v. *Mewherter*, 46 Iowa, 88; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

A person, though laboring under partial insanity, who understands the nature and consequences of his acts, and has mental power enough to apply his knowledge to his own case, and a will sufficient to restrain the impulse to commit crime that might arise from a diseased mind, is responsible for such act. *Dejarnette* v. *Com.* 75 Va. 867.

[38]*Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Smith* v. *State*, 55 Ark. 259, 18 S. W. 237; *Williams* v. *State*, 50 Ark. 517, 9 S. W. 5; *Plake* v. *State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *Goodwin* v. *State*, 96 Ind. 550; *Sanders*

192. Contrary rule in North Carolina and other states.—In North Carolina, on the other hand, it has been ruled that no impulse, however irresistible, is a defense, when there is a knowledge of the difference, as to the particular act, between right and wrong.[40] And there is no question that the position that an irresistible impulse can be a defense is inconsistent with the rule laid down in the great body of cases which sustain the "right and wrong" test as an exclusive standard. And many of the other states and jurisdictions have also adopted the North Carolina rule, that irresistible impulse alone is no excuse for crime, when the person is able to distinguish between right and wrong.[41]

v. *State*, 94 Ind. 147; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *State* v. *Felter*, 25 Iowa, 67; *State* v. *Mewherter*, 46 Iowa, 88; *State* v. *Stickley*, 41 Iowa, 232; *Fitzpatrick* v. *Com.* 81 Ky. 357; *People* v. *Burfee*, 62 Mich. 487, 29 N. W. 109; *People* v. *Finley*, 38 Mich. 482; *People* v. *Mortimer*, 48 Mich. 37, 11 N. W. 776; *Com.* v. *Freeth*, 5 Clark. (Pa.) 455; *Brown* v. *Com.* 78 Pa. 122; *Sayres* v. *Com.* 88 Pa. 291. And see *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771.

But an instruction in a criminal prosecution, giving the right and wrong test of criminal responsibility, is not erroneous where it does not forbid the jury to consider the question whether the accused was capable of self-control and choosing the right instead of the wrong. *Farrer* v. *State*, 2 Ohio St. 54.

[39]*State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *People* v. *Egnor*, 175 N. Y. 419, 67 N. E. 906.

But refusal to instruct in a criminal prosecution as to irresistible impulse, or as to moral insanity, is not error, where the tendency of the evidence is to support a wholly different theory, and there is no evidence tending to show incapacity to act upon the knowledge that the deed was wrong. *United States* v. *Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247.

And an instruction in a criminal prosecution should not be so framed as to create the impression that irresistible impulse or moral insanity was the sole object of inquiry, where the tendency of the evidence was to show latent hereditary insanity, developed into active existence by a shock. *Dejarnette* v. *Com.* 75 Va. 867.

[40]*State* v. *Brandon*, 53 N. C. (8 Jones L.) 463.

[41]*People* v. *Hoin*, 62 Cal. 120, 45 Am. Rep. 641; *People* v. *Ward*, 105 Cal. 335, 38 Pac. 945; *People* v. *Clendennin*, 91 Cal. 35, 27 Pac. 418; *Mareeau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *State* v. *Nixon*, 32 Kan. 205, 4 Pac. 159; *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *State* v. *Yarborough*, 39 Kan. 581, 18 Pac. 474; *State* v. *Knight*, 95 Me. 467, 55 L. R. A. 373, 50 Atl. 276; *Spencer* v. *State*, 69 Md. 28, 13 Atl. 809; *State* v. *Kotovsky*, 74 Mo. 247; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *State* v. *Williamson*, 106 Mo. 162, 17 S. W. 172; *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007; *State* v. *Dunn* (Mo.) 77 S. W. 848; *State* v. *Erb*, 74 Mo. 199; *Graves* v. *State*, 45 N. J. L. 347, 46 Am. Rep. 778; *Mackin* v. *State*, 59 N. J. L. 495, 36 Atl. 1040; *State* v. *Brandon*, 53 N. C. (8 Jones L.) 463; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *People* v. *Coleman*, 1 N. Y. Crim. Rep. 1; *People* v. *Waltz*, 50 How. Pr. 204; *Flanagan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731; *People* v. *Mills*, 98 N. Y. 176; *Walker* v. *People*, 88 N. Y. 81; *People* v. *Carpenter*, 102 N. Y. 238, 6 N. E. 584; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351; *Hurst* v. *State*, 40 Tex. Crim. Rep. 378, 46 S. W. 635, 50 S. W. 719; *United States* v. *Young*, 25 Fed. 710; *United States* v. *Faulkner*, 35 Fed. 730; *United States* v. *Holmes*, 1 Cliff. 98. Fed. Cas. No. 15,382; *Reg.* v. *Haynes*, 1 Fost. & F. 666; *Reg.* v. *Burton*, 3

193. Test of responsibility under the contrary rule.—The test of responsibility when irresistible impulse is not recognized is the usual one,—whether the accused could distinguish between right and wrong, and knew what he was doing, and that it was wrong.[42] But even under this rule where there is an uncontrollable impulse to do a criminal act, so great as to deprive the person of the ability to distinguish right from wrong in regard to that act, the person is irresponsible.[43]

194. Passion as a mitigating element.—It should be remembered, however, that while "irresistible impulse," the mind being sane, is no defense to crime, yet violent passion is to be taken into account as a mitigating element, and that the peculiar temperament of the offender is to be guaged for the purpose of estimating whether the provocation was such as to create hot blood, and whether there was adequate cooling time. A sane person may, from epilepsy, or from prior insanity, or from nervous or physical derangements, or from hereditary taint, be peculiarly susceptible to excitement; and, as the law treats assaults committed in hot blood as of a lower grade than those committed deliberately, this excitability may properly be consid-

Fost. & F. 772; *Reg.* v. *Barton*, 3 Cox C. C. 275; *Reg.* v. *Stokes*, 3 Car. & K. 185; *Reg.* v. *Pate*, cited in 1 Bennett & H. Lead. Cas. 96.

Under this rule a request to charge that if some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not sufficient reason to control the passions which prompted the criminal act, he was not responsible, is properly refused. *Anderson* v. *State*, 42 Ga. 9; *State* v. *Coleman*, 27 La. Ann. 691; *Flanagan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731; *People* v. *Carpenter*, 102 N. Y. 238, 6 N. E. 584.

Responsibility depends upon the possession of the will, and not the power over it, and an instruction based on ability to distinguish between right and wrong as to the particular act committed properly expresses the law. *Choice* v. *State*, 31 Ga. 424.

[42]*State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *United States* v. *Faulkner*, 35 Fed. 730; *United States* v. *Young*, 25 Fed. 710; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *State* v. *Scott*, 41 Minn. 365, 43 N. W. 62; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Cunningham* v. *State*, 56 Miss. 269, 21 Am. Rep. 360; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

[43]*Wright* v. *People*, 4 Neb. 407; *Hart* v. *State*, 14 Neb. 572, 16 N. W. 905; *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701; *People* v. *Sprague*, 2 Park. Crim. Rep. 43; *People* v. *Kleim*, 1 Edm. Sel. Cas. 13; *People* v. *Divine*, 1 Edm. Sel. Cas. 594; *Macfarland's Trial*, 8 Abb. Pr. N. S. 57; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *Bovard* v. *State*, 30 Miss. 600.

In *People* v. *Kleim*, 1 Edm. Sel. Cas. 13, the court charged the jury that if some controlling disease was in truth the acting power within the prisoner, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the criminal act, he was not responsible; but that it must not be a mere impulse of passion or an idle, frantic humor or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind, and that the moral as well as the intellectual faculties might be so disordered by disease as to deprive the mind of its controlling power.

ered in determining whether the blood at the time was hot. That, psychologically, this varies with temperament, is well known. The ordinary signs of passion (acceleration of arterial pulse, congestive flushings, increased activity of secretions and excretions) are different with different patients. Hence, epileptic, nervous, and cerebral diseases, and hereditary tendency, may be put in evidence to lower the grade of the offense, though they do not amount to insanity. In so doing, we but follow the authorities which declare that drunkenness, though no defense to crime, may be used to show that an assault was not deliberate.

VI. Moral insanity.

195. Definitions.—Moral insanity in law is defined to be a morbid state of the affections and passions, or unsettling of the moral system, the mental faculties remaining normal and sound;[44] an irresistible impulse to commit a criminal act coexisting with mental sanity.[45] At the outset it must be remembered that "moral insanity," as above defined, is to be distinguished from insane irresistible impulse, from transitory mania, and from occult insanity, with each of which it is sometimes confounded.

196. English rule.— In England the doctrine of moral insanity, so far as it involves the idea of irresponsibility based exclusively on moral, as distinguished from mental, derangement, is rejected by the courts.[46]

197. So in the United States generally.— In the United States there is almost equal judicial unanimity in refusing recognition to this theory, and in declaring that no amount of derangement of morals is a defense unless accompanied with mental insanity. To this effect are decisions in Massachusetts,[47] in Maine,[48] in Connecticut,[49] in New

[44] *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292.

[45] *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657.

[46] *Reg.* v. *Oxford*, 9 Car. & P. 525; *Reg.* v. *Goode*, 7 Ad. & El. 536; *Reg.* v. *Barton*, 3 Cox C. C. 275; *Reg.* v. *Higginson*, 1 Car. & K. 129; *Reg.* v. *Layton*, 4 Cox C. C. 149; *Reg.* v. *Burton*, 3 Fost. & F. 772; *Reg.* v. *Haynes*, 1 Fost. & F. 666; *Reg.* v. *Stokes*, 3 Car. & K. 185; *Reg.* v. *Pate*, cited in Bennett & H. Lead. Cas. 96; *Reg.* v. *Townley*, 3 Fost. & F. 839; *Reg.* v. *Leigh*, 4 Fost. & F. 915.

So, in *Watson's Case*, Times, Jan. 13th, 1872, which was the case of the killing by a clergyman of his wife, in which it was claimed that he had been lashed into fury by provocations which made his rage unendurable, the theory of moral insanity was rejected, and the test adopted that he was responsible if he knew what he was doing.

[47] *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Com.* v. *Heath*, 11 Gray, 303. See *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *United States* v. *Shults*, 6 McLean, 121, Fed. Cas. No. 16,286.

[48] *State* v. *Lawrence*, 57 Me. 574.

[49] *State* v. *Richards*, 39 Conn. 591.

York,[50] in New Jersey,[51] in Delaware,[52] in Virginia,[53] in North Carolina,[54] in Georgia,[55] in Ohio,[56] in California,[57] and in other jurisdictions where the question has been mooted.[58] In Pennsylvania, it is true, there is an apparent departure from this current of authority by the acceptance by Judge Lewis, in an early case, of "moral insanity" as a doctrine that could be, under certain circumstances, sanctioned by the courts. But a scrutiny of this case will show that he did not mean by "moral insanity" moral without mental lunacy, but insanity in its general sense, manifesting itself in irresistible impulse.[59] Mere moral obliquity of the propensities will not protect a person from punishment for a criminal act,[60] nor will a mere perversion of the affections;[61] criminal responsibility depending not upon the power to refrain from doing what is known to be wrong, but whether the accused, at the time of committing the act, knew its character and nature, and that it was a wrongful one.[62]

But see *Anderson* v. *State*, 43 Conn. 514, 21 Am. Rep. 669.

[50] *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *Shorter* v. *People*, 2 N. Y. 193, 51 Am. Dec. 286; *Macfarland's Case*, 8 Abb. Pr. N. S. 57; *Flanagan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731; *Walker* v. *People*, 88 N. Y. 86; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Casey* v. *People*, 31 Hun, 158, 2 N. Y. Crim. Rep. 187; *People* v. *Waltz*, 50 How. Pr. 204; *People* v. *Carpenter*, 102 N. Y. 238, 6 N. E. 584.

[51] *State* v. *Spencer*, 21 N. J. L. 196; *Graves* v. *State*, 45 N. J. L. 347, 46 Am. Rep. 778.

[52] *State* v. *Windsor*, 5 Harr. (Del.) 512.

[53] *Vance* v. *Com.* 2 Va. Cas. 132.

[54] *State* v. *Brandon*, 53 N. C. (8 Jones L.) 463; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657.

[55] *Choice* v. *State*, 31 Ga. 424; *Evans* v. *Arnold*, 52 Ga. 169; *Fogarty* v. *State*, 80 Ga. 450, 5 S. E. 782; *Anderson* v. *State*, 42 Ga. 9; *Loyd* v. *State*, 45 Ga. 57.

[56] *State* v. *Gardiner*, Wright (Ohio) 392. See *United States* v. *Shults*, 6 McLean, 121, Fed. Cas. No. 16,286; *Farrer* v. *State*, 2 Ohio St. 54.

[57] *People* v. *Coffman*, 24 Cal. 230; *People* v. *McDonell*, 47 Cal. 134; *People* v. *Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People* v. *Owens*, 123 Cal. 482, 56 Pac. 251; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *People* v. *Methever*, 132 Cal. 326, 64 Pac. 481.

[58] The courts, in varied terms, unite substantially in declaring, as the proposition is stated by a very able jurist, Judge Thurman (*Farrer* v. *State*, 2 Ohio St. 54), that "there is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."

And see *State* v. *Coleman*, 27 La. Ann. 691; *Spencer* v. *State*, 69 Md. 28, 13 Atl. 809; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *State* v. *Miller*, 111 Mo. 542, 20 S. W. 243; *State* v. *Yarborough*, 39 Kan. 581, 18 Pac. 474; *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Cawley* v. *State*, 133 Ala. 128, 32 So. 227; *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *Lide* v. *State*, 133 Ala. 43, 31 So. 953; *Davis* v. *State* (Fla.) 32 So. 822; *Schwartz* v. *State* (Neb.) 91 N. W. 190; *Harrison* v. *State* (Tex. Crim. App.) 69 S. W. 500; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973.

[59] The same may be said of the reference to moral insanity in *Com.* v. *Mosler*, 4 Pa. 264.

[60] *Taylor* v. *Com.* 109 Pa. 262.

[61] *Goodwin* v. *State*, 96 Ind. 550.

If, from evil association and indulgence in vice, a person's conscience ceases to control or influence his actions, but he is otherwise capable of committing crime, he is criminally responsible. *Green* v. *State*, 64 Ark. 523, 43 S. W. 973.

[62] *State* v. *Bundy*, 24 S. C. 439, 58 Am.

198. The contrary rule.— The rule was adopted by a divided court in an early Kentucky case that mentally man is a dualism, consisting of an intellectual and a moral nature; and that the existence of such a type of moral, contradistinguished from intellectual, insanity, as homicidal mania, or morbid and uncontrollable appetite for man-killing; and pyromania, or the like passion for house burning; kleptomania, or an irresistible inclination to steal,—may operate as an excuse for the criminal act.[63] So, the existence of moral insanity was recognized in *St. Louis Mut. L. Ins. Co.* v. *Graves,* 6 Bush, 268, which was an insurance case where the question was whether an insane suicide avoided the policy; and a Connecticut case, though denying the purpose of recognizing this form of insanity as an excuse for crime, did recognize it to the extent of holding that, when satisfied of its existence, a court should consider it in determining the degree of the crime, and give it such weight as it is fairly entitled to under the circumstances.[64] And though apparently confounded with irresistible impulse, the existence of moral insanity and the fact that it might operate as an excuse for a criminal act in a proper case have also been recognized in Pennsylvania.[65]

199. Rule applied with caution.— Even when admitted to exist, moral insanity, not being of common occurrence, cannot be tested by the general rules applicable to common and usual forms of insanity, and evidence of its existence is to be received with great caution.[66] And the utmost care should be taken by the court in presenting to the jury the legal principles relating to it.[67] The doctrine of moral insanity as a ground for relief from criminal responsibility is regarded as dangerous, and can be recognized only in the clearest cases, and the disturbance ought to be shown to have been habitual to be effectual.[68] And moral insanity ought never to be admitted as a defense in a criminal prosecution unless it appears that the propensity existed

Rep. 263; *Green* v. *State,* 64 Ark. 523, 43 S. W. 973; *Schwartz* v. *State* (Neb.) 91 N. W. 190; *Cole's Trial,* 7 Abb. Pr. N. S. 321; *United States* v. *Faulkner,* 35 Fed. 730; *Reg.* v. *Barton,* 3 Cox C. C. 275.

[63] *Smith* v. *Com.* 1 Duv. 224.

This doctrine is also acted upon in *Kriel* v. *Com.* 5 Bush, 362; *Clark* v. *Trail,* 1 Met. (Ky.) 35.

Under this rule an instruction in a criminal prosecution that the jury ought not to acquit upon the ground of moral insanity unless such insanity had manifested itself in former acts of a similar character is misleading and erroneous. *Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461.

[64] *Andersen* v. *State,* 43 Conn. 514, 21 Am. Rep. 669.

[65] See *Com.* v. *Mosler,* 4 Pa. 264, and other Pennsylvania cases cited below.

[66] *Com.* v. *Mosler,* 4 Pa. 264.

[67] *Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461.

[68] *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Mosler,* 4 Pa. 264.

with such violence as to subject the intellect, control the will, and render it impossible for the party to do otherwise than yield.[69]

VII. Kleptomania.

200. Definition and nature.—Kleptomania is that species of mania consisting of an irresistible propensity to steal.[70] When this species of insanity is clearly established it renders the person subject to it irresponsible for the theft.[71] But it makes no difference as to the guilt of the person committing the theft what kind of an impulse controlled him, or how strong it was, or what produced it, where it does not appear to have been a case of kleptomania, and that he was actually insane.[72]

VIII. Erotomania.

201. Definition and nature.— Erotomania is a morbid sexual propensity; when interposed as a defense in a criminal prosecution it is governed by the rules applicable to general or partial insanity, though it excuses crime only when it deprives the party of reason with regard to the act in question.[73]

IX. Incapacity of female as affecting rape.

202. Effect of, generally.— Sexual intercourse with a woman who is so destitute of mind as to be incapable of giving consent is rape, though she does not resist.[74] And where the man does not suppose he

[69]*Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461; *Com.* v. *Werling,* 164 Pa. 559, 30 Atl. 406; *Taylor* v. *Com.* 109 Pa. 262; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com.* v. *Mosler,* 4 Pa. 264.

Where the real motive of a crime was that the person committing it conceived himself to have been ill-used, and did it either from jealousy of one who was preferred before him, or from a desire for revenge, it cannot be excused, since these are the very passions which the law requires men to control. *Reg.* v. *Townley,* 3 Fost. & F. 839.

[70] Black, Law Dict.

[71]*Harris* v. *State,* 18 Tex. App. 287.

An instruction, in a prosecution for larceny in which the defense is kleptomania, on the general subject of insanity, is defective where it fails to define the peculiar symptoms of kleptomania as related to the general subject. *Looney* v. *State,* 10 Tex. App. 520, 38 Am. Rep. 646.

[72]*Henslie* v. *State,* 3 Heisk. 202.

A conviction for larceny will not be set aside as against the weight of evidence where the defense was kleptomania, except in an extreme case. *Com.* v. *Fritch,* 9 Pa. Co. Ct. 164.

[73]*State* v. *Simms,* 71 Mo. 538.

Evidence that a person accused of homicide was afflicted with erotomania is not admissible in the prosecution therefor, since there is no connection between that species of mania and that which leads to homicide. *Ibid.*

[74]*State* v. *Atherton,* 50 Iowa, 189, 32 Am. Rep. 134; *State* v. *Tarr,* 28 Iowa, 397; *State* v. *Enright,* 90 Iowa, 520, 58 N. W. 901; *State* v. *Trusty* (Iowa) 97 N. W. 989; *State* v. *Crow,* 1 Ohio Dec. Reprint, 586; *McQuirk* v. *State,* 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775; *Reg.* v. *Fletcher,* Bell C. C. 63, 8 Cox C.

has the consent of the woman, the force required and that which is involved in the carnal act, are sufficient.[75] But if the will is active, though perverted, the act is not rape, in the absence of force or unwillingness.[76] When consent is given from a mere animal passion or instinct, it is not rape,[77] and the burden of proof of insanity at the time of the act, and that carnal knowledge was obtained by force and without consent, rests with the prosecution;[78] and there must be some evidence that the woman was incapable of assenting or dissenting.[79] Under statutes defining rape to be sexual intercourse with a woman against her will, by force, threats, or fraud, however, the rule is that there can be no rape in the absence of force, threats, or fraud, whatever may have been the mental capacity of the woman;[80]

C. 131, 28 L. J. Mag. Cas. N. S. 85, 5 Jur. N. S. 179, 7 Week. Rep. 204; *Queen* v. *Ryan*, 2 Cox C. C. 115; *Rex* v. *Chater*, 13 Shaw's J. P. 766; *McNamara's Case*, Arkley, 521.

Mental weakness of the prosecuting witness in a rape case may be shown as bearing upon the question of consent, though not alleged. *State* v. *McDonough*, 104 Iowa, 6, 73 N. W. 357.

[75]*State* v. *Tarr*, 28 Iowa, 397; *Reg.* v. *Barratt*, 12 Cox C. C. 498, 43 L. J. Mag. Cas. N. S. 7, L. R. 2 C. C. 81, 29 L. T. N. S. 409, 22 Week. Rep. 136.

[76]*Crosswell* v. *People*, 13 Mich. 427, 87 Am. Dec. 774.

[77]*Reg.* v. *Connolly*, 26 U. C. Q. B. 317; *Reg.* v. *Fletcher*, 8 Cox C. C. 131, Bell C. C. 63, 28 L. J. Mag. Cas. N. S. 85, 5 Jur. N. S. 179, 7 Week. Rep. 204; *Lee* v. *State*, 43 Tex. Crim. Rep. 285, 64 S. W. 1047.

[78]*Baldwin* v. *State*, 15 Tex. App. 275.

In *State* v. *Tarr*, 28 Iowa, 397, however, it was held that intercourse might be rape where it appeared that the woman was of imbecile mind, and there was nothing to indicate that she desired it or consented to it.

And in *State* v. *Enright*, 90 Iowa, 520, 58 N. W. 901, it was held that a conviction for rape on the ground that the woman was incapable of consenting to sexual intercourse will not be reversed where there was evidence of imbecility, though the evidence was conflicting.

[79]*Reg.* v. *Connolly*, 26 U. C. Q. B. 317; *Reg.* v. *Fletcher*, 10 Cox C. C. 248, 35 L. J. Mag. Cas. N. S. 172, L. R. 1 C. C. 39, 12 Jur. N. S. 505, 14 L. T. N. S. 573, 14 Week. Rep. 774.

Evidence of connection and imbecility on the part of the woman are alone insufficient to establish rape. *Reg.* v. *Fletcher*, 10 Cox C. C. 248, 35 L. J. Mag. Cas. N. S. 172, L. R. 1 C. C. 39, 12 Jur. N. S. 505, 14 L. T. N. S. 573, 14 Week. Rep. 774.

And a conviction cannot be sustained for rape of a woman of imbecile mind, on the ground that she had not capacity to consent to sexual intercourse, in the absence of evidence as to her general character for chastity and decency, or anything else to raise a presumption that she did not consent. *Reg.* v. *Connolly*, 26 U. C. Q. B. 317.

Evidence of habits of decency on the part of a woman, though of imbecile mind, however, raises a presumption that she would not have consented if competent to dissent, and that sexual intercourse with her was rape. *Queen* v. *Ryan*, 2 Cox C. C. 115.

But the introduction of the prosecutrix as a witness for the state in a prosecution for rape, in which it was claimed that she was so mentally diseased as not to have power to oppose the act, is an indorsement of her competency; being in effect a statement to the jury that she was sane at the time of the events concerning which she was called upon to testify. *Thompson* v. *State*, 33 Tex. Crim. Rep. 472, 26 S. W. 987.

[80]*Baldwin* v. *State*, 15 Tex. App. 275; *Rodriguiz* v. *State*, 20 Tex. App. 542; *Crosswell* v. *People*, 13 Mich. 427, 87 Am. Dec. 774; *Bloodworth* v. *State*, 6 Baxt. 621, 32 Am. Rep. 546.

though under that rule, her mental capacity is a proper consideration in estimating the sufficiency of her resistance.[81]

203. Tests of capacity.— The test of mental capacity of a woman to consent to sexual intercourse, so that the sexual act would not be rape, is whether she was capable or incapable of exercising judgment in the matter,[82] and very slight proof of force is necessary when the woman lacked the intelligence to comprehend the nature and consequences of the act, and to distinguish morally and legally between right and wrong.[83] But the mere fact that a woman is weak-minded does not disable her from giving consent to the act.[84] One with less intelligence than is required to make a contract may consent to sexual intercourse, so that the act would not be rape on the part of the man.[85] And connection with a woman in a state of dementia, and not idiotic, but approaching it, having a predisposition to be with men, and a morbid desire for sexual intercourse, is not rape, in the absence of circumstances of either force or fraud.[86]

X. Insanity at or after the trial.

204. Effects generally.— The rule as generally stated is that no person in a state of insanity will be tried, sentenced, or executed for an alleged criminal act.[87] Inquiry into the guilt of a person accused of

[81] *Baldwin* v. *State*, 15 Tex. App. 275.

[82] *Reg.* v. *Barratt*, 12 Cox C. C. 498, 43 L. J. Mag. Cas. N. S. 7, L. R. 2 C. C. 81, 29 L. T. N. S. 409, 22 Week. Rep. 136; *Reg.* v. *Fletcher*, 8 Cox C. C. 131, Bell C. C. 63, 28 L. J. Mag. Cas. N. S. 85, 5 Jur. N. S. 179, 7 Week. Rep. 204; *Reg.* v. *Connolly*, 26 U. C. Q. B. 317. And see *Reg.* v. *Pressy*, 10 Cox C. C. 635, 17 L. T. N. S. 295, 16 Week. Rep. 142; *State* v. *Enright*, 90 Iowa, 520, 58 N. W. 901.

Intercourse with a woman who was capable of exercising her will sufficiently to control her personal actions is not rape. *State* v. *Tarr*, 28 Iowa, 397.

[83] *Stephen* v. *State*, 11 Ga. 225.

[84] *McQuirk* v. *State*, 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775; *State* v. *Tarr*, 28 Iowa, 397.

If there was a reasonable doubt whether force was used, the jury should acquit, though the woman was of weak mind. *McQuirk* v. *State*, 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775.

[85] *McQuirk* v. *State*, 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775.

Intercourse, without resistance, with a woman subject to epileptic fits, is not rape, where it does not appear that she was under the influence of a fit at the time. *Baldwin* v. *State*, 15 Tex. App. 275.

[86] *Crosswell* v. *People*, 13 Mich. 427, 87 Am. Dec. 774.

[87] *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *Taffe* v. *State*, 23 Ark. 34; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270; *United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555; *Kinloch's Case*, 18 How. St. Tr. 395.

If permanent insanity develops after the commission of a criminal act, the state cannot convict except during a lucid interval. *State* v. *Wade*, 161 Mo. 441, 61 S. W. 800.

The reason why an insane person should not be tried is that he is disabled by the act of God to make a just defense if he has one. *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

And where a person appears to be insane during his trial, but not at the time of the commission of the crime for which he is being tried, the jury may so find in their verdict, and the court will delay judgment, or execution, if issued,

crime must be postponed, where he is insane, until such time as he shall be able to properly model his defense.[88] And the judge is authorized to engraft upon a criminal proceeding in his court not yet closed, a proceeding for determination as to present sanity or insanity of the person on trial.[89] This was the rule at common law.[90] And the statutes of the different states upon the subject are generally in affirmance of the common-law power of the court,[91] and not in derogation of constitutional provisions securing to the accused a fair and impartial trial.[92] When a person accused of crime is called upon to plead, if there are circumstances that suggest that he is not in possession of his reason, there should be an inquiry made touching his sanity at that time, as to whether he is in a condition of mind to state the grounds of his defense.[93] And if it is found that he fails to plead, or

will be stayed. *Com.* v. *Taylor,* 16 Phila. 439.

[88]*Frith's Case,* 22 How. St. Tr. 307; *State* v. *Reed,* 41 La. Ann. 581, 7 So. 132.

Nor should one be tried or convicted for felony where he was so intoxicated that he had not reason enough to appreciate his peril or act advisedly and was not able to understand the facts of his case and could not communicate with his counsel with intelligence. *Taffe* v. *State,* 23 Ark. 34.

But the grand jury has no authority to ignore a bill for murder on the ground of insanity, though it appears from the testimony that he was insane; it is their duty to find a bill in such case if they believed the acts done would have been murder if done by a sane person. *Reg.* v. *Hodges,* 8 Car. & P. 195.

[89]*State ex rel. Chandler,* 45 La. Ann. 696, 12 So. 884; *People* v. *McElvaine,* 125 N. Y. 596, 26 N. E. 929.

[90]*Rex* v. *Dyson,* 7 Car. & P. 305, note; *Reg.* v. *Berry,* 34 L. T. N. S. 598, L. R. 1 Q. B. Div. 447, 45 L. J. Mag. Cas. N. S. 123, 13 Cox C. C. 189.

[91]*Freeman* v. *People,* 4 Denio, 9, 47 Am. Dec. 216; *State* v. *O'Grady,* 5 Ohio S. & C. P. Dec. 654; *State* v. *Harrison,* 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *French* v. *State,* 93 Wis. 325, 67 N. W. 706. And see *State* v. *Peterson,* 24 Mont. 81, 60 Pac. 809.

A person charged with felony who is at liberty on bail to answer is not in confinement within the meaning of a statute authorizing an inquiry as to the sanity of persons in confinement under indictment, with a view to their removal to the insane asylum. *Ex parte Trice,* 53 Ala. 546.

And a statute providing that if a defendant appears at any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question, refers to any stage of the trial on the indictment, and does not empower the commissioners of insanity to open the jail door and take out the defendant after the jurisdiction of the district court has attached by issue of an indictment and service of a warrant, and dispose of him as they may think best; after jurisdiction attaches the district court has control of it, not only for the purpose of criminal investigation, but for all matters incident thereto. *Stone* v. *Conrad,* 105 Iowa, 21, 74 N. W. 910.

[92]*French* v. *State,* 93 Wis. 325, 67 N. W. 706.

A construction of the statutes of a state on the subject of trial of insane persons accused of crime by state courts of last resort will be followed by the Federal court. *Nobles* v. *Georgia,* 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

[93]*Frith's Case,* 22 How. St. Tr. 311; *State* v. *Reed,* 41 La. Ann. 581, 7 So. 132.

Where a bill has been found against an insane person for murder, and he has been removed to a lunatic asylum, the court will, nevertheless, require that he be brought up and that his alleged insanity be inquired into by a jury, though the governor of the asylum

is unable to plead, by the act of God, the court will not proceed to try him.[94] And where the defendant, from insanity, is incapable of pleading, the court will disregard his plea of guilty, or any confessions of guilt he may offer. And even his protestations of "sanity" will be disregarded, if there be adequate proof that he is insane.[95] The defense of insanity may be taken by his counsel against his will, though he may be personally allowed to call witnesses to disprove it.[96] Inquiry as to present sanity of a person accused of crime, however, is based upon public propriety and decency, rather than upon any absolute right of the person.[97]

205. Methods of raising the question.—The question of insanity after the commission of an offense is usually raised when the accused is brought up to plead;[98] but it may be raised during the course of the proceeding whenever a doubt arises as to the sanity of the accused, it being the duty of the court in such case to suspend further proceedings, at whatever stage the doubt arises.[99] By statutes existing in

makes affidavit that he is in a helpless state of insanity; unless it be shown that it would be dangerous to bring him into court, in which case the witnesses will be bound over to appear when called upon. *Queen* v. *Dwerryhouse*, 2 Cox C. C. 446.

But the fact that a defendant in a criminal prosecution was insane when required, by the condition of his bail bond, to plead to an indictment, and had been taken out of the state and confined in an insane asylum of another state, to be treated for insanity, is no defense to his sureties in an action on the bond. *Adler* v. *State*, 35 Ark. 517, 37 Am. Rep. 48.

[94]*Com.* v. *Braley*, 1 Mass. 103; *Reg.* v. *Pritchard*, 7 Car. & P. 303.

But where a person, on being called upon to plead under indictment, remains mute, the court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty; a jury must be impaneled to try the question of malice, and it is upon their finding that the court is authorized to enter the plea. *Queen* v. *Israel*, 2 Cox C. C. 263.

[95]*Reg.* v. *Pearce*, 9 Car. & P. 667.

A person accused of crime who has pleaded guilty to the charge on arraignment should be permitted to withdraw that plea where there is evidence sufficient to raise a doubt respecting the condition of his mind at the time he interposed it. *People* v. *Scott*, 59 Cal. 341.

[96]*Reg.* v. *Pearce*, 9 Car. & P. 667; *State* v. *Patten*, 10 La. Ann. 299, 63 Am. Dec. 594. And see *Com.* v. *Hathaway*, 13 Mass. 299.

A person accused of crime who shows strong symptoms of insanity in court during the taking of an inquest to try whether he is insane or not need not be asked whether he wishes to cross-examine the witness or to offer any remarks or evidence. *Queen* v. *Goode*, 7 Ad. & El. 536.

[97]*Carr* v. *State*, 98 Ga. 89, 27 S. E. 148; *Spann* v. *State*, 47 Ga. 549.

[98]*Jones* v. *State*, 13 Ala. 153; *State* v. *Harris*, 53 N. C. (8 Jones L.) 136, 78 Am. Dec. 272.

[99]*People* v. *Ah Ying*, 42 Cal. 18; *People* v. *Farrell*, 31 Cal. 576; *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633; *Reg* v. *Berry*, 34 L. T. N. S. 598, 45 L. J. Mag. Cas. N. S. 123, L. R. 1 Q. B. Div. 447, 13 Cox C. C. 189.

The words "after conviction" in Georgia Code 1882, § 4666a, providing for determination of the question of insanity, are not limited to persons who have also been sentenced by force of the preceding section, which provides for an investigation after a convict has been sentenced. *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

But evidence that a person accused of

England and in some of the United States, it is competent for the defendant's counsel to formally plead insanity as a special preliminary defense, in which case an inquest is taken to determine the issue,—"sane or insane."[100] And generally the question may be raised by counsel for the accused;[1] or by suggestion of the prosecuting attorney;[2] or by suggestion from anyone;[3] or the court may suspend proceedings when the doubt arises, of its own motion.[4] Counsel for the accused cannot waive an inquiry as to his client's sanity where doubt exists.[5] And if the party is incompetent to conduct his own defense he is also incompetent to waive his rights.[6] It has been held, however, that present insanity at the time of the trial must be specially pleaded, and cannot be established like insanity at the time of the commission of the act, under a plea of not guilty,[7] though it has been asserted to be the better rule that the objection requires no formal pleading, but may be stated orally.[8]

206. Tests.— The test of present insanity which will prevent a trial in a criminal action is whether the person is mentally competent to make a rational defense.[9] And the question is whether the accused

crime is insane should be introduced at the time of the plea bearing upon that issue, where it was then known to counsel, and in such case a new trial will not be granted on the ground of insanity, under a statute providing that sanity must be shown before conviction. *Burton* v. *State*, 33 Tex. Crim. Rep. 138, 25 S. W. 782.

And the plea or suggestion that a person is now insane cannot be made in a criminal prosecution under the Pennsylvania statute providing that if, upon the trial, the accused shall appear to the jury to be a lunatic, the court shall order him into strict custody, where such plea was presented after a plea of not guilty had been entered, and the jury had been sworn on the merits, and the prisoner placed in jeopardy. *Com.* v. *Taylor*, 16 Phila. 439.

The New York statute contemplates two cases in which a commission may be appointed: First, after a plea on the merits, and before trial, to determine the mental condition of the accused at the time of the commission of the crime; and, second, when a person who is in confinement under an indictment, whether before or after conviction, appears to be insane, to determine his mental condition at the time of the examination. *People* v. *McElraine*, 125 N. Y. 596, 26 N. E. 929.

[100] See *Queen* v. *Goode*, 7 Ad. & El. 536; *Queen* v. *Dwerryhouse*, 2 Cox C. C. 446.

[1] *Reg.* v. *Southey*, 4 Fost. & F. 864; *Reg.* v. *Turton*, 6 Cox C. C. 385; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270.

[2] *State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884.

[3] *State* v. *Harris*, 53 N. C. (8 Jones L.) 136, 78 Am. Dec. 272; *Guagando* v. *State*, 41 Tex. 626.

[4] *People* v. *Ah Ying*, 42 Cal. 18; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270; *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *King* v. *Mercier*, 1 Leach C. L. 183.

[5] *People* v. *Ah Ying*, 42 Cal. 18.

[6] *State* v. *Patten*, 10 La. Ann. 299, 63 Am. Dec. 594.

But a waiver of objection to the organization of the grand jury or to regularity of the reception of the indictment, by failure to present it to the trial court by motion or plea in abatement, is not affected by the unsoundness of mind of the defendant. *Rinkard* v. *State*, 157 Ind. 534, 62 N. E. 14.

[7] *Danforth* v. *State*, 75 Ga. 614, 58 Am. Rep. 480; *Long* v. *State*, 38 Ga. 491; *Green* v. *State*, 88 Tenn. 614, 14 S. W. 430.

[8] *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132.

[9] *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *People* v. *Rhinelander*, 2 N. Y.

was sane enough to present to counsel the facts which ought to be stated and presented to the jury upon his trial.[10] The knowledge of right and wrong as a test of insanity does not apply to a collateral proceeding to ascertain the mental capacity of the person about to be put on trial for a criminal act.[11] A person arraigned for crime, however, who is capable of understanding the nature and object of the proceeding against him, and who comprehends his own condition in reference to it, and can conduct his defense in a rational manner, is to be deemed sane for the purpose of being tried, although on some other subjects his mind may be unsound.[12] A person deaf and dumb

Crim. Rep. 335; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270; *Guagando* v. *State*, 41 Tex. 626; *Humphreys* v. *State* (Tex. Crim. Rep.) 39 S. W. 679; *United States* v. *Lancaster*, 7 Biss. 440, Fed.. Cas. No. 15,555, *Rex* v. *Pritchard*, 7 Car. & P. 303; *Rex* v. *Dyson*, 7 Car. & P. 305, note; *Reg.* v. *Berry*, 34 L. T. N. S. 598, L. R. 1 Q. B. Div. 447, 45 L. J. Mag. Cas. N. S. 123, 13 Cox C. C. 189.

A conviction against a person accused of crime, though found guilty on the evidence, cannot be sustained, where he was not capable of understanding, and had not in fact understood, the nature of the proceedings against him. *Reg.* v. *Berry*, 34 L. T. N. S. 598, L. R. 1 Q. B. Div. 447, 45 L. J. Mag. Cas. N. S. 123, 13 Cox C. C. 189.

Neither the atrocity of the offense committed nor the supposed effect of the verdict in a preliminary examination as to the sanity of a person accused of crime, either on the prisoner or on the community, should be permitted to influence the jury in determining the question of present insanity. *People* v. *Lake*, 2 Park. Crim. Rep. 215.

[10]*State* v. *O'Grady*, 3 Ohio Legal News, 137, 5 Ohio S. & C. P. Dec. 654; *Frith's Case*, 22 How. St. Tr. 311; *State* v. *Helm*, 69 Ark. 167, 61 S. W. 915; *Taffe* v. *State*, 23 Ark. 34.

But a new trial will not be granted on the ground of insanity during the progress of a trial, in the absence of evidence of such insanity, where proper consultation with counsel was had. *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 359.

And evidence of mere incapacity to understand and comprehend all his legal rights, and to make known, in the most distinct and intelligent manner, to his counsel all the facts material to his defense, is not sufficient to warrant a reasonable doubt as to his sanity, upon which an inquiry into the mental condition of a person accused of crime must be instituted, under Iowa Rev. 1860, § 5019. *State* v. *Arnold*, 12 Iowa, 479.

[11]*Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

[12]*Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120.

The only reason why an insane person should not be tried for an alleged crime is that he is disabled by the act of God to make a just defense if he had one. *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120.

And it is not enough that he was so infirm as to render him incapable of managing his own affairs. *People* v. *Kleim*, 1 Edm. Sel. Cas. 13.

And, in a prosecution for forgery, an instruction in a proceeding to determine whether defendant was insane after conviction, that if so afflicted with mental disease that when informed of the nature of the indictment, his plea and the verdict, and of the consequences, he would not intelligently comprehend such matters, he might be found insane, is incorrect, as requiring more intelligence than necessary. *State* v. *Helm*, 69 Ark. 167, 61 S. W. 915.

So, one whose memory is unimpaired, and whose reasoning faculties are about the average, whose insanity is of a character which does not manifest itself in any apparent weakness of intellect or failure of memory, but consists of a chronic and latent disease of the brain, which, under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts, is not so insane as to be unable to make a defense in a criminal prosecution. *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120.

from nativity may be arraigned and tried for an offense, if intelligent questions can be conveyed to him by signs or symbols.[13]

207. Determination as to the submission of the issue.—Where a person accused of crime pleads present insanity, and the court entertains a doubt as to present sanity, it is its duty to award an inquest for trial of that fact, before any other proceedings are had.[14] But it is only in case of doubt as to such sanity that a preliminary inquiry is to be ordered.[15] And the doubt must be a reasonable one.[16] The court is not bound to stop, or justified in arresting, the progress of the trial on the mere suggestion of insanity, in the absence of substantial evidence as to its existence in a degree unfitting the accused from conducting his cause.[17] And in determining whether a reasonable doubt

[13]*King* v. *Jones*, 1 Leach C. L. 139.

But proof that a person accused of crime was deaf and dumb, and that she had been instructed in the dumb alphabet, but that she was not so far advanced as to put words together, and was then incapable of understanding the effect of the proceeding against her and making her defense, warrants a finding of insanity on a preliminary proceeding as to present sanity. *Rex* v. *Dyson*, 7 Car. & P. 305, note.

[14]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427; *Gruber* v. *State*, 3 W. Va. 699; *Jones* v. *State*, 13 Ala. 153; *Ley's Case*, 1 Lewin C. C. 239; *Bonds* v. *State*, Mart. & Y. 143, 17 Am. Dec. 795; *Sears* v. *State*, 112 Ga. 382, 37 S. E. 443; *Lee* v. *State* (Ga.) 43 S. E. 994.

In Ohio the duty is mandatory on the production of the prescribed certificates. *State* v. *Roselot* (Ohio) 68 N. E. 825, Affirming 23 Ohio C. C. 370.

A refusal to submit the question of present sanity on a plea submitted by affidavits filed before the trial is not cured by trying the issue after the trial and conviction. *Guagando* v. *State*, 41 Tex. 626.

[15]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427; *People* v. *Hettick*, 126 Cal. 425, 58 Pac. 918. And see *People* v. *Knott*, 122 Cal. 410, 55 Pac. 154.

Where the court has no doubt of sanity, and no request is made to have that issue submitted, it does its whole duty by admitting evidence of insanity before and after the commission of the offense, and bearing upon the question of sanity at that time, though there was evidence of insanity at the time of the trial. And the admission of such evidence does not indicate that the court had a doubt as to his sanity which would require the submission of the question of sanity to the jury as an issue separate and distinct from that of guilt or innocence. *People* v. *Lee Fook*, 85 Cal. 300, 24 Pac. 654.

[16]*State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982. And see *People* v. *Tobin* (N. Y.) 68 N. E. 359.

A plea of insanity in bar when a person accused of homicide is called for sentence, uncorroborated by affidavit, must be disregarded where there is nothing in it to raise a doubt in the mind of the court as to the prisoner's sanity. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

[17]*State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270; *People* v. *McElvaine*, 125 N. Y 596, 26 N. E. 929.

Neither the assertion of a person accused of crime, nor that of his counsel that he is insane, nor the production of affidavits, nor the entry of a plea of present insanity upon the record, can, of itself alone, suffice to produce the state of doubt which is a necessary prerequisite to an order of inquiry. *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

And evidence that a person accused of crime had been confined in a lunatic asylum, at which time he was in a state of maniacal irascibility, and that he was addicted to theft, and denied being insane, and that his conduct while in jail was different from that of others, does not show insanity which will render him incompetent to defend himself. *Reg.* v. *Robertson*, 1 Swinton, 15.

exists as to sanity, the court is not limited to the case made by the prisoner, but may, in its discretion, investigate the matter thoroughly and take into consideration all the circumstances.[18] And it may inspect the person and consider his actions, and read affidavits and make inquiries touching such condition.[19] The question as to the existence of a doubt as to the present sanity of a person accused of crime is one for the court itself,[20] resting within its sound discretion,[21] though an abuse of the discretion is not irremediable,[22] a total refusal to entertain the objection, or to hear evidence thereon, being error which will sustain a reversal.[23] And the absolute right of a person accused of crime to have the question of his sanity tried by a jury is not affected by the refusal of the court to order a preliminary inquiry.[24]

[18]*State* v. *Arnold*, 12 Iowa, 479.

[19]*State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *People* v. *McElvaine*, 125 N. Y. 596, 26 N. E. 929; *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

A jury, in a proceeding to determine present sanity or insanity of a person accused of crime, may form their own judgment of the present state of his mind from his demeanor during the inquest, though no evidence was given. *Queen* v. *Goode*, 7 Ad. & El. 536.

[20]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427; *State* v. *Klinger*, 46 Mo. 224.

And the jurisdiction given by Alabama Rev. Code, § 1060, to the circuit judge in certain cases to order an inquiry as to the sanity of prisoners in confinement under indictment vests in the judge, not in the court. *Ex parte Trice*, 53 Ala. 546.

But the court cannot find a person accused of crime to be insane, as that is a matter of fact, for the jury. *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

[21]*Spann* v. *State*, 47 Ga. 549; *Jones* v. *State*, 13 Ala. 153; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *Williams* v. *State* (Fla.) 34 So. 279; *State* v. *Peterson*, 24 Mont. 81, 60 Pac. 809. And see *People* v. *Tobin* (N. Y.) 68 N. E. 359; *People* v. *McElvaine*, 125 N. Y. 596, 26 N. E. 929.

So, where a trial has been postponed because of the insanity of the defendant, it is within the discretion of the court whether or not another preliminary investigation upon the question of insanity should be had, and, if allowed, to what extent, and in what manner it should be conducted. *Flanagan* v. *State*, 103 Ga. 619, 30 S. E. 550.

And refusal to permit a plea of not guilty to be withdrawn in order to determine the question of the present insanity of the accused, where, eight days after the plea, a jury was called, and the prisoner exercised his right of challenge and permitted them to be sworn, is not error, where the judge told the jury that if they should find the prisoner to be insane during the trial, but not at the commission of the crime, they should say so in their verdict, and then the court would either delay judgment or stay execution. *Taylor* v. *Com.* 109 Pa. 262.

[22]*State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *Sears* v. *State*, 112 Ga. 382, 37 S. E. 443; *Lee* v. *State* (Ga.) 43 S. E. 994.

[23]*State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *Guagando* v. *State*, 41 Tex. 626.

But the decision of a trial court on the question of the propriety of impaneling a jury to inquire as to the sanity of a person accused of crime preliminary to his trial for the criminal act will not be reversed on appeal unless it manifestly appears that the decision was wrong or that the discretion of the court was abused. *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

And it will not be found on appeal that a judge abused his discretion in a criminal prosecution in refusing a preliminary inquest as to the present sanity of the accused, where his act was justified, both by the verdict and his own freedom from doubt after hearing all the testimony. *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

[24]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

208. Disposition of the issue.— The method of settling a preliminary question as to the present sanity or insanity of a person charged with crime, when it is not the subject of statutory regulation, is within the discretion of the trial court.[25] And the rule is the same where the statute merely provides that an insane person shall not be tried.[26] And the court may proceed by inspection,[27] or it may act by the aid of a quasi commission in the nature of one *de lunatico inquirendo*.[28] But the general and the better practice is to submit the issue to a jury impaneled for that purpose.[29] And the court may proceed to the trial of the issue with the jury impaneled for the trial of the indictment as well as with a special jury,[30] the defendant not having the legal right to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for that purpose.[31] But such a proceeding is not a trial of an offense within

[25]*State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270; *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884.

[26]*People* v. *Kleim*, 1 Edm. Sel. Cas. 15; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

[27]*State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *Bonds* v. *State*, Mart. & Y. 143, 17 Am. Dec. 795.

But the defendant is not entitled to retire to the jury room with the jury for such inspection as they may see fit to make. *Lee* v. *State* (Ga.) 45 S. E. 628.

An agreement, entered into between the counsel in a criminal prosecution, in which the accused had entered the plea of guilty, that the evidence of the sheriff alone should be used under that plea, is not violated by the court in asking certain questions of the defendant in relation to his plea, where they are in conformity to a statutory requirement that a plea of guilty shall not be received unless it plainly appears that the accused is sane and is uninfluenced by any consideration of fear or any persuasion or delusive hope of pardon. *Burton* v. *State*, 33 Tex. Crim. Rep. 138, 25 S. W. 782.

[28]*People* v. *Kleim*, 1 Edm. Sel. Cas. 13.

[29]*State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *People* v. *Kleim*, 1 Edm. Sel. Cas. 13; *State* v. *Harris*, 53 N. C. (8 Jones L.) 136, 78 Am. Dec. 272; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *Gruber* v. *State*, 3 W. Va. 699; *State* v. *O'Grady*, 3 Ohio Legal News, 137; *Dyson Case*, 1 Lewin C. C. 64.

Where insanity at the time of the act in question is relied upon, the issue should be tried by the jury impaneled to pass upon the question of guilt or innocence. *State* v. *Peterson*, 24 Mont. 81, 60 Pac. 869.

[30]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427; *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270. And see *People* v. *Farrell*, 31 Cal. 576; *Ley's Case*, 1 Lewin C. C. 239.

The court in a criminal prosecution may, when a plea of present insanity is interposed during the progress of a trial, permit the trial to proceed, and submit the question of present insanity with that of guilt or innocence, to the jury. *State* v. *Reed*, 41 La. Ann. 581, 7 So. 132.

But in such case the verdict should be unanimous. *United States* v. *German*, 115 Fed. 987.

And insanity at the time of trial cannot be shown on the trial of the general issue of guilty or not guilty, for the purpose of procuring the confinement of the accused in a hospital until recovery. *Firby* v. *State*, 3 Baxt. 358.

And an inquiry by a jury of the panel as to the sanity or insanity of a person accused of crime, after the report of a medical commission appointed by the court to examine into the mental condition, is not an attempt to deprive him of his liberty without due process of law, in violation of constitutional right. *State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884.

[31]*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

In Wisconsin and West Virginia an-

the meaning of the statute securing peremptory challenges on such trial.[32] It devolves upon the accused to make out affirmatively that he is insane.[33] And the jury have nothing to do with the condition of the accused at the time of the commission of the offense or at any other time, except so far as it may aid in determining his present condition.[34] And where the issue is presented with the general issue, if the jury find the defendant insane, it should return such verdict by itself without passing on the general issue; though if it found him sane, it might pass upon both verdicts together.[35]

209. Effect of determination.—When an accused person is found to be sane upon a preliminary examination as to present sanity or insanity, the court will proceed to try him on the indictment,[36] pro-

other jury is required to try the issue of present insanity. *Gruber* v. *State*, 3 W. Va. 699; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982; *French* v. *State*, 85 Wis. 400, 21 L. R. A. 402, 39 Am. St. Rep. 855, 55 N. W. 566.

And in Georgia the practice is, where insanity at the time of the trial is set up in a criminal prosecution, to file a special plea to that effect, and try such plea by a special jury. *Fogarty* v. *State*, 80 Ga. 450, 5 S. E. 782.

And the Georgia statutes make no provision for the mode of trial, and it is the duty of the sheriff, with the concurrence of the inferior court, to summon a jury of twelve men to inquire into such insanity, and, if it appear by the inquisition that the prisoner is insane, the sheriff must suspend the execution and report the inquisition and suspension to the judges. *Spann* v. *State*, 47 Ga. 549; *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

[32]*Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

But challenges for cause are allowed on the trial of a preliminary proceeding for the determination of the question of present insanity. And the question for the determination of triers of such challenges is whether the juror is or is not indifferent between the parties to the controversy. *Ibid.*

So, testimony of a foreign witness cannot be taken on commission to be read in a criminal prosecution, not upon the trial of the indictment, but before commissioners appointed to examine and report as to the sanity of the accused. *People* v. *Haight*, 3 N. Y. Crim. Rep. 60.

[33]*State* v. *O'Grady*, 3 Ohio Legal News, 137; *People* v. *Kleim*, 1 Edm. Sel. Cas. 13; *Reg.* v. *Turton*, 6 Cox C. C. 385. But see *Reg.* v. *Davies*, 3 Car. & K. 328, 6 Cox C. C. 326.

[34]*State* v. *O'Grady*, 3 Ohio Legal News, 137; *State* v. *Arnold*, 12 Iowa, 479; *Walker* v. *State*, 46 Neb. 25, 64 N. W. 357.

But where there is evidence of present insanity alleged to have supervened after conviction, and proof that since conviction the accused presented by his appearance and conduct evidence of insanity, an inquiry may be made into his past life to see if he had been insane or in a previous condition of insanity tending to explain and illustrate his present condition. *Spann* v. *State*, 47 Ga. 549.

[35]*State* v. *Reed*, 41 La. Ann. 581, 7 So. 132.

But it is not proper to instruct the jury in a criminal prosecution to acquit if the accused is insane at the time of the trial, where no issue as to present insanity was submitted to them. *People* v. *Lee Fook*, 85 Cal. 300, 24 Pac. 654.

And refusal to charge the jury in a criminal prosecution that they might find a verdict either for or against a special plea of insanity, and an instruction that they might find the defendant guilty under the evidence, is not error, where the defendant filed a special plea of insanity, but did not insist that it should be first tried, but went to trial on the general issue, relying upon his insanity to show absence of guilt. *Anderson* v. *State*, 42 Ga. 9.

Under the Ohio statute the verdict on an inquiry as to present insanity of a person accused of crime need not be unanimous, the majority of three fourths only being required. *State* v. *O'Grady*, 3 Ohio Legal News, 137.

[36]*People* v. *Lake*, 2 Park. Crim. Rep.

ceeding in the usual manner.[37] And where a person called upon to plead stands mute and it is determined by a jury that he was mute from malice, the plea of not guilty will be entered.[38] And the trial of the question of guilt or innocence will not be postponed because of an appeal on the issue of insanity.[39] But a finding upon a preliminary issue that the accused was then sane cannot be taken into consideration upon the question of insanity set up as a defense to the prosecution,[40] though the jury in a subsequent proceeding should not again try questions settled by former verdicts.[41] And where the

215; *State* v. *O'Grady*, 3 Ohio Legal News, 137; *Gruber* v. *State*, 3 W. Va. 699.

A trial of the question of present sanity is not a trial of an indictment, but is preliminary to such trial, and the object is simply to determine whether the person charged with an offense and alleged to be insane, should be required to plead and proceed to the trial of the main issue of guilty or not guilty. *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

[37]*Reg.* v. *Whitfield*, 3 Car. & K. 121.

But the issue of insanity cannot be again tried upon the trial of the principal issue, after trial on a special issue, where the statute provides that in such event the court shall proceed to try upon the main issue. *French* v. *State*, 93 Wis. 325, 67 N. W. 706.

And all evidence of the present insanity of the accused in a criminal prosecution not intended to prove insanity at the time of the commission of the offense should be excluded on the trial of the issue as to guilt or innocence, where the question as to sanity at the time of the trial has been submitted to a jury, and he has been found to be sane. *Shultz* v. *State*, 13 Tex. 401.

But refusal to permit evidence to be given on the trial of an indictment that the person was insane at the time, after the finding of a verdict upon a preliminary issue to ascertain his mental capacity, in which he was found to be sane, and the exclusion of the opinions of medical witnesses formed from observation of the witness after that time, as to his sanity, are erroneous. *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

[38]*Reg.* v. *Schleter*, 10 Cox C. C. 409; *Reg.* v. *Whitfield*, 3 Car. & K. 121.

A verdict finding a person accused of crime, mute by the visitation of God, however, is not an absolute bar to her being tried upon the indictment, and she may be arraigned and sentenced; but great diligence and circumspection ought to be exercised, and if all means of conveying intelligence to her mind respecting the nature of the arraignment should prove ineffectual, the plea of not guilty should be entered for her, and it would then become the duty of the court to inquire concerning all those points of which the prisoner might take advantage, and examine the proceedings with a critical eye, and render her every possible service consistent with the rules of law. *King* v. *Steel*, 1 Leach C. L. 451.

A deaf and dumb person charged with crime may be detained to be instructed, if the jury find that she is too ignorant to be put on trial. *Dyson's Case*, 1 Lewin C. C. 64.

[39]*People* v. *Moice*, 15 Cal. 329.

[40]*Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216. *Contra*, *State* v. *Champoux* (Wash.) 74 Pac. 557.

But a motion in a criminal prosecution for a new trial on the ground that the defendant was insane at the time of the alleged commission of the crime, and at the time of his trial, which was overruled, does not operate as an estoppel or bar to a proceeding afterwards instituted on behalf of the convict for a trial before a jury on the question of his insanity after trial. *Sears* v. *State*, 112 Ga. 382, 37 S. E. 443.

And a severance of the cases of two defendants jointly indicted is effected where one of them is adjudged insane on a separate trial of that issue, and ordered confined in an insane hospital, and his trial postponed until his recovery, and the other is subsequently arraigned and tried alone. *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95.

[41]*Lee* v. *State* (Ga.) 45 S. E. 628; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596. And see *People* v. *Hettick*, 126 Cal. 425, 58 Pac. 918.

jury disagrees on the trial of a special plea of insanity, the trial that follows is to be conducted in the usual manner, and the general verdict will conclude the special plea of insanity.[42] A finding that the accused was insane at the time the offense was committed upon the trial of a special plea of insanity, however, is a good defense in bar of a further prosecution for the crime.[43] And in such case he is to be kept in close confinement until he is restored to reason, for the protection of society;[44] and the result should be certified to the proper court having jurisdiction, where it would be made the foundation of an order to commit him to an asylum.[45] A finding of insanity after

[42]*French* v. *State*, 93 Wis. 325, 67 N. W. 706.

[43]*Gruber* v. *State*, 3 W. Va. 699; *People* v. *Farrell*, 31 Cal. 576; *Kinloch's Case*, 18 How. St. Tr. 395. See also *State* v. *O'Grady*, 5 Ohio S. & C. P. Dec. 654.

A person accused of crime found insane at the time of trial cannot be kept in an asylum until his recovery, and then again tried, where the evidence as to his insanity related to the time of the criminal act charged, and not to the time of the trial. *Firby* v. *State*, 3 Baxt. 358.

But an inquiry by a commission of medical experts as to the mental condition of the person accused of crime, appointed at the suggestion of the assistant district attorney, and a report thereon which forms a part of the record of the case, do not estop the state from entering into any further investigation as to his mental condition, the report not being conclusive. *State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884.

[44]*People* v. *Lake*, 2 Park. Crim. Rep. 215; *Hill* v. *State*, 64 Ga. 453; *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 278, 61 Pac. 1120.

But a refusal to instruct the jury in a criminal prosecution that if the accused is proved to be *non compos mentis* the court is authorized to send him to an asylum is not error where they are fully instructed as to the law of insanity. *State* v. *Robinson*, 27 S. C. 615, 4 S. E. 570.

The imprisonment in a penitentiary of a person afflicted with epilepsy who had violated the penal laws of the state is not, in view of his affliction, unconstitutional, as cruel and unusual punishment. *Fogarty* v. *State*, 80 Ga. 450, 5 S. E. 782.

In England a finding of insanity of the accused in a proceeding to ascertain whether he was sane or insane warrants the issue of an order that he be detained in custody during Her Majesty's pleasure. *Reg.* v. *Davies*, 6 Cox C. C. 326, 3 Car. & K. 328; *Rex* v. *Pritchard*, 7 Car. & P. 303; *Rex* v. *Little*, Russ. & R. C. C. 430; *Turner's Case*, cited in Shelford, on Lunatics, 469.

Where the jury in a criminal prosecution are of the opinion that the person did not in fact do all that the law deems essential to constitute the offense charged, they must find him not guilty generally, and the court has no power to order his detention although the jury should be clearly of the opinion that he was in fact insane. *Reg.* v. *Oxford*, 9 Car. & P. 525.

[45]*State* v. *O'Grady*, 3 Ohio Legal News, 137; *Re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120. And see *Ex parte Trice*, 53 Ala. 546; *Com.* v. *Hathaway*, 13 Mass. 299; *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

In West Virginia, when a person accused of crime is found to be insane at the time of trial, the jury may then proceed to inquire as to his sanity at the time of the commission of the criminal act. *Gruber* v. *State*, 3 W. Va. 699.

And the fact that it appeared to the court, in a criminal prosecution, that there was a question as to the sanity of the accused at the time of the commission of the offense, does not create a manifest necessity for the discharge of the jury within the meaning of a statute authorizing it, in case of manifest necessity; and in case of such discharge the accused cannot be tried again by another jury, but is entitled to be released. *Ibid.*

the act, however, does not prevent a subsequent trial and conviction after recovery.[46]

210. Insanity after the verdict.—Sentence should be stayed in a criminal prosecution, where the accused, after the verdict and before sentence, becomes insane.[47] And where doubt arises as to sanity in such a case the court has power to cause an investigation to be made.[48] The question in an inquisition of insanity after a verdict of guilty is whether the defendant was capable of comprehending the dangerous position in which he is placed, and of taking intelligent measures to meet it.[49] And the burden of proof rests with the defendant to satisfy the jury that he is in fact insane;[50] though if the proof, when all taken together, leaves a reasonable doubt as to his sanity, he should have the benefit of such doubt.[51] The plea of insanity as a bar to a sentence, however, is a plea to the humanity of the court to postpone punishment until a recovery takes place.[52] And if satisfied of its falsity, the judge may pronounce sentence without impaneling a jury to ascertain the fact.[53] The mode of trial rests in the discretion of the court;[54] and no absolute right to trial by jury

[46]*Chase* v. *State*, 41 Tex. Crim. Rep. 560, 55 S. W. 833.

Where a court has jurisdiction of a criminal case, its jurisdiction to try such case cannot be taken away by proceedings in another court for the purpose of having the question determined whether the defendant was sane or insane. *State* v. *Gould*, 40 Kan. 258, 19 Pac. 739.

And affidavits in a criminal action, tending to show that at the preliminary examination the defendant was in a state of great nervous excitement and mental derangement and oblivious to what occurred, and others tending to show that he was merely simulating or putting on an appearance of mental derangement, do not raise a question of jurisdiction, and where such examination and the commitment and information based thereon are regular on their face, the court has full jurisdiction to try the case. *People* v. *Bawden*, 90 Cal. 195, 27 Pac. 204.

[47]*State* v. *Brinyea*, 5 Ala. 241; *State* v. *Vann*, 84 N. C. 722.

[48]*State ex rel. Chandler*, 45 La. Ann. 696, 12 So. 884. And see *State* v. *Helm*, 69 Ark. 167, 61 S. W. 915.

One convicted of murder, on arraignment and plea of guilty, whose insanity at the time of the plea was subsequently made one of the grounds for a motion for a new trial, may properly be rearraigned, where, upon the case being again called for trial, he requested permission to enter a plea of not guilty. *Shaw* v. *State*, 32 Tex. Crim. Rep. 155, 22 S. W. 588.

[49]*United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555.

[50]*United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555.

A new trial will not be granted in a criminal prosecution on the ground of the insanity of the accused during the progress of the trial preventing proper consultation with counsel, in the absence of evidence of such insanity. *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356.

[51]*United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555.

[52]*Laros* v. *Com.* 84 Pa. 200.

[53]*People* v. *Pico*, 62 Cal. 50; *Bonds* v. *State*, Mart. & Y. 143, 17 Am. Dec. 795.

It is not incumbent upon a judge in a criminal case at or after a judgment therein to allow or order a judicial investigation concerning the mental condition of one against whom the lawful verdict of guilty has been rendered in a capital case, and a refusal to do so is not a denial of due process of law. *Baughn* v. *State*, 100 Ga. 554, 38 L. R. A. 577, 28 S. E. 68.

[54]*Laros* v. *Com.* 84 Pa. 200.

The submission of the issue to a jury is a proper mode of ascertaining the

exists.[55] Nor will a jury be impaneled to determine the sanity of one convicted of crime, where the question of sanity was directly put in issue at the trial.[56] And where the question of insanity has been passed upon by the jury, no motion to stay sentence may be entertained.[57]

211. Insanity after judgment.— The general rule is that a person, though adjudged to punishment, cannot be punished for a public offense while insane.[58] And the court or judge has power, after the expiration of the term, to issue a writ for the reversal of a judgment of conviction in a criminal case, where it appears that the defendant was insane at the time of the trial, and that it was not then known.[59] And where no plea of present insanity was introduced, and there was nothing to create suspicion of such insanity in the court below, the appellate court may, on its own motion, inquire into the present mental state of the accused, and make proper recommendations in the premises.[60] But before the verdict of a jury and judgment and sentence of the court can be nullified in a proceeding as to present sanity or insanity, it should be found that the prisoner is actually insane, so as to be wholly unconscious of his situation.[61] And there

truth of an allegation that an accused person had become insane after the verdict against him. *State* v. *Vann*, 84 N. C. 722.

The provisions of the Georgia Code relating to inquisitions of lunacy are sufficiently comprehensive to cover all cases where the alleged insanity of a person accused of crime begins at any time after rendition of a verdict of guilty. *Baughn* v. *State*, 100 Ga. 554, 38 L. R. A. 577, 28 S. E. 68.

[55]*Laros* v. *Com.* 84 Pa. 200: *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

A denial of a jury trial on an issue of insanity after verdict is not a denial of due process of law. *Baughn* v. *State*, 100 Ga. 554, 38 L. R. A. 577, 28 S. E. 68, Affirmed in 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

[56]*Com.* v. *Baranski*, 36 Pittsb. L. J. 363, 9 Pa. Co. Ct. 264; *Stover* v. *Com.* 92 Va. 780, 22 S. E. 874.

So, alleged newly discovered evidence to the effect that the accused was of insane mind at the time of the motion, and not capable of committing the crime charged, is not a sufficient ground for a new trial upon an extraordinary motion, where the statutes afforded another legal method of ascertaining that fact. *Graham* v. *State*, 102 Ga. 650, 29 S. E. 582.

[57]*State* v. *Brinyea*, 5 Ala. 241; *State* v. *Vann*, 84 N. C. 722.

[58]*People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204.

[59]*Adler* v. *State*, 35 Ark. 517, 37 Am. Rep. 48.

This is so, though a motion for a new trial on the ground of insanity had been overruled. *Sears* v. *State*, 112 Ga. 382, 37 S. E. 443; *Lee* v. *State* (Ga.) 43 S. E. 994.

[60]*Green* v. *State*, 88 Tenn. 614, 14 S. W. 430.

In *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204, however, it was held that an appellate court cannot act in a criminal case upon the evidence furnished by the present mental condition of the accused, who has become insane, and upon that ground reverse a judgment against him which is otherwise legal, though there is nothing to prevent his being put into the state insane asylum.

[61]*Ex parte Schneider*, 21 D. C. 433; *Lee* v. *State* (Ga.) 45 S. E. 628; *Com.* v. *Hays*, 195 Pa. 270, 45 Atl. 728.

He must be in such a situation as not to comprehend why he is being punished. *Lee* v. *State* (Ga.) 45 S. E. 628.

A judgment of conviction in a crim

is no absolute right to trial by jury;[62] and a trial on the question of insanity after the verdict and sentence rests in the discretion of the judge.[63] If there is nothing to raise a doubt in the mind of the court as to the sanity of the accused, it is not only the right, but the duty, of the court to disregard the plea.[64] In Pennsylvania, however, the governor is the sole judge of the circumstances which may influence him to exercise clemency or enforce an execution for homicide, and the court cannot, after the conviction and sentence, control his action by the appointment of a commission or otherwise.[65] And in Georgia by a recent act it rests with the governor to take such steps for the examination and care of convicted criminals alleged to be insane as he may see fit.[66]

212. Appeals or reviews.— As a general rule no appeal from the determination in a proceeding to ascertain as to present sanity or in-

inal prosecution will not be reversed on appeal because of a refusal to grant a preliminary inquest as to the present sanity of the accused merely that the prisoner may be then arraigned to plead insanity, where the question as to his sanity at the time of the commission of the act and at the time of the trial were determined against him. *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

[62]*Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

[63]*Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Humphreys* v. *State* (Tex. Crim. App.) 39 S. W. 679. And see *Com.* v. *Wireback*, 192 Pa. 150, 44 Atl. 1102.

[64]*Com.* v. *Buccieri*, 153 Pa. 539, 26 Atl. 228; *Com.* v. *Hays*, 195 Pa. 270, 45 Atl. 728; *People* v. *McElvaine*, 125 N. Y. 596, 26 N. E. 929; *Bonds* v. *State*, Mart. & Y. 143, 17 Am. Dec. 795.

A refusal to permit a rearraignment of the accused in a criminal prosecution at the commencement of a new trial is not error where he had been indicted for murder, and on arraignment had pleaded to the indictment, and been tried and convicted, and upon appeal the judgment had been reversed and a new trial ordered. *People* v. *McElvaine*, 125 N. Y. 596, 26 N. E. 929.

And sentence will not be stayed in a criminal prosecution on the ground of the insanity of the accused where there is nothing to show that any change in his condition had taken place since the trial, as to stay it for the purpose of an inquisition would be in effect to arrest judgment for a reason which had been already unsuccessfully urged in defense of the criminal charge. *State* v. *Brinyea*, 5 Ala. 242.

[65]*Baranoski's Case*, 9 Pa. Co. Ct. 264.

Pennsylvania act May 14, 1874, Pub. Laws 160, providing for the disposition and custody of insane persons charged with and acquitted or convicted of crime, has no application to the case of a person convicted of murder in the first degree who is remitted to the control of the governor after sentence of death has been pronounced upon him, either for execution of the sentence or pardon in the manner prescribed by law. *Ex parte Briggs*, 14 W. N. C. 341; *Ex parte Wilson*, 19 W. N. C. 37; *Baranoski's Case*, 9 Pa. Co. Ct. 264.

And the supreme court in Pennsylvania will not appoint a commission to determine as to the sanity of a person accused of murder in the first degree upon the affidavits of physicians as to their belief that he was insane and in an unfit mental condition to undergo capital punishment, where the governor had previously declined to interfere. *Ex parte McGinnis*, 14 W. N. C. 221.

And Pennsylvania act May 8, 1883, Pub. Laws 21, § 29, relative to the supervision and control of hospitals and homes for the insane, has no application to a person convicted of murder in the first degree and remitted to the control of the governor after sentence, either for execution of the sentence or pardon in the manner prescribed by law. *Baranoski's Case*, 9 Pa. Co. Ct. 264.

[66]*Lee* v. *State* (Ga.) 45 S. E. 628.

sanity of a person accused of crime has been provided for; and, in the absence of such provision, the determination is conclusive, and no appeal, writ of error, certiorari, or other review can be maintained.[67] In some of the states, however, it would seem that an appeal may be taken.[68]

213. Effect of recovery.— One who commits a crime and becomes insane is amenable therefor upon restoration to sanity, upon the same footing as other persons committing criminal acts.[69] The postponement of the trial of such a person does not discharge him from future trial when his disability shall have been removed.[70] And in such case, though the accused had been sent to an asylum, he may be required to plead and be put upon trial upon his apparent restoration to sanity, without making a formal inquiry as to his later condition.[71] Discharge from an asylum, however, should not be had merely because of lucid intervals.[72]

[67] See *Carr* v. *State*, 98 Ga. 89, 27 S. E. 148; *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216; *State* v. *Vann*, 84 N. C. 722; *Inskeep* v. *State*, 36 Ohio St. 145; *Inskeep* v. *State*, 35 Ohio St. 482; *Darnell* v. *State*, 24 Tex. App. 6, 5 S. W. 522.

The intention of Texas Code of Criminal Proc. title 12, chap. 1, providing that when, upon the trial of an issue of insanity, it is found that the defendant is sane, a judgment of conviction should be enforced as if no inquiry had been made, is that such judgment of the trial court should be conclusive of that issue. *Darnell* v. *State*, 24 Tex. App. 6, 5 S. W. 522.

In *Spann* v. *State*, 47 Ga. 549, the question whether certiorari will lie to review a determination upon an inquisition as to the sanity of a party accused of crime under the Georgia statute was discussed but not decided; but it was strongly intimated that it would not lie, the court saying that it would be a perversion of terms to call an inquisition of this kind the act of the court, and that the whole proceeding is rather an inquiry based on public propriety and decency than a matter of right.

[68] See *People* v. *Moice*, 15 Cal. 329; *State* v. *Wade*, 161 Mo. 441, 61 S. W. 809; *Re Maas*, 10 Okla. 302, 61 Pac. 1057; *Maas* v. *Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960.

As to the Michigan practice, see *Re Maguire*, 114 Mich. 80, 72 N. W. 15; *Re Underwood*, 30 Mich. 502.

Refusal to grant an application to pass upon the question of the present insanity of a person accused of crime cannot be taken advantage of on appeal, though appeal is permitted, unless preserved in a bill of exceptions. *State* v. *Wade*, 161 Mo. 441, 61 S. W. 809.

[69] *State* v. *Pritchett*, 106 N. C. 667, 11 S. E. 357. And see *Brock* v. *State*, 22 Ohio C. C. 364; *Firby* v. *State*, 3 Baxt. 358.

[70] *Kinloch's Case*, 18 How. St. Tr. 395; *Jones* v. *State*, 13 Ala. 153.

But where a person was once found insane at the time of his proposed trial for a criminal offense, and is called for trial a second time, the court must proceed as before and try the question of insanity anew if there is then doubt as to his sanity, and so on as often as the occasion may require. *People* v. *Farrell*, 31 Cal. 576.

[71] *State* v. *Pritchett*, 106 N. C. 667, 11 S. E. 357; *People* v. *Farrell*, 31 Cal. 576.

The fact that the authorities of an insane asylum in which an insane person had been confined had not certified that he had recovered does not prevent his being required to plead and be put on trial for a criminal act committed before he became insane, upon his apparent restoration. *State* v. *Pritchett*, 106 N. C. 667, 11 S. E. 357.

But a judgment of a circuit court on an inquiry as to the sanity of a prisoner in confinement under indictment, under the provisions of a statute providing therefor, is invalid and a nullity unless notice is given to the person affected by the proceedings, and the record re-

XI. Proof required to establish.

214. General rules.— Positive and direct testimony is not required to establish insanity as a defense.[73] Nor is proof of specific acts of derangement.[74] And one may be acquitted on the ground of insanity though he objected to that defense and asserted that he was not insane, and called witnesses to establish his sanity, where the whole evidence justifies a finding of insanity.[75] The defendant's own testimony, however, that he did not know his act was wrong or criminal, is not sufficient to establish idiocy or lunacy;[76] especially where he testifies to a state of facts inconsistent with such conclusion.[77] It is the province of the jury to weigh and consider evidence of insanity in all its bearings.[78]

215. Previous and subsequent conditions.— Evidence, in a criminal prosecution, tending to prove that the accused was insane at some period either before or after the commission of the criminal act, is to be considered and weighed in connection with the acts of the party tending to establish the fact of insanity.[79] But proof of independent

cites the existence of every fact upon which jurisdiction is based. *Ex parte Trice*, 53 Ala. 546.

And a statute providing for the confinement in the insane asylum of the state prison of persons acquitted of murder or other high crime on the ground of insanity, until discharged by the governor on receipt of the certificate of the circuit judge and the medical superintendent of the state insane asylum, upon an examination made by him, that the person is no longer insane,—leaving the inspectors free to act or not as they see fit, and making no provision by which any of them could be compelled to act, —leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors, and is unconstitutional in failing to furnish means for the enforcement of the remedy provided, and is in violation of the safeguards against restraints of personal liberty without due process of law. *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633.

[73]*Caffey* v. *State*, 78 Miss. 645, 29 So. 396.

[74]*State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Simms*, 68 Mo. 305.

And a conviction will not be set aside on appeal because the evidence of insanity was affirmative while that of sanity was negative. *Rinkard* v. *State*, 157 Ind. 534, 62 N. E. 14.

[75]*People* v. *Tripler*, 1 Wheeler C. C. 48.

[76]*Reg.* v. *Pearce*, 9 Car. & P. 667; *State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550.

[77]*State* v. *Kluseman*, 53 Minn. 540, 55 N. W. 741; *Perry* v. *State*, 87 Ala. 30, 6 So. 425; *Knight* v. *Young*, 2 Ves. & B. 184.

[78]*Perry* v. *State*, 87 Ala. 30, 6 So. 425; *Knight* v. *Young*, 2 Ves. & B. 184.

[79]*People* v. *Burgess*, 153 N. Y. 561, 47 N. E. 889.

[80]*Murphy* v. *Com.* 92 Ky. 485, 18 S. W. 163; *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475; *People* v. *March*, 6 Cal. 543; *People* v. *Clendennin*, 91 Cal. 35, 27 Pac. 418; *Flanagan* v. *State*, 103 Ga. 619, 30 S. E. 550; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618. And see *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

The opinions of medical men who had seen the defendant in a criminal action subsequent to the commission of the offense, that his insanity was chronic, and, therefore, that he was insane at the time of the act, justify the submission of the case to the jury, though all the circumstances show premeditation, preparation, and design, and a conscious violation of the law. *Reg.* v. *Southey*, 4 Fost. & F. 864.

And the fact that an instruction in a criminal prosecution refers to the mental

acts or circumstances subsequent to the commission of the crime is not alone sufficient to establish insanity at the time of its commission.[80] And a reversal on the ground of the exclusion of evidence of subsequent acts is not warranted, unless it appears that they had some special significance indicating mental disease.[81] And a new trial will not be ordered on the ground that the verdict was against evidence, where there was little, if any, testimony tending to show insanity up to the time of the offense, upon evidence as to the conduct of the accused after confinement, it appearing by the testimony of intimate acquaintances that he was a person of ordinary intelligence.[82] Nor can the court act upon evidence furnished by present condition of the defendant on an appeal from a judgment of conviction, and upon that ground reverse a judgment otherwise legal, where his insanity had increased and developed since the trial.[83] So, sanity shortly before and shortly after the act in question is strong evidence of sanity at the time it was committed, which can only be rebutted by showing frenzy or madness at the very time of the act, with reference to it.[84]

216. Nature of crime.— The atrocious or terrible nature of a criminal act is not evidence of the insanity of the perpetrator.[85] Nor is the fact that the act was committed with barbarity,[86] or that the act was of an unnatural character.[87] Nor is the enormity of the crime

condition of the defendant at the date named in the indictment as that of the commission of the crime, when all the evidence was directed to another and later date, furnishes no ground for reversal as tending to mislead the jury. *Colee* v. *State*, 75 Ind. 513.

[80] *Murphy* v. *Com.* 92 Ky. 485, 18 S. W. 163.

The insanity of a person accused of crime cannot be proved by subsequent conversations with him, and evidence of the test applied during the interval to ascertain his sanity cannot be given. *Choice* v. *State*, 31 Ga. 424.

[81] *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241.

[82] *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470.

So, an affidavit for continuance on the ground of absent witnesses to prove the insanity of the accused should be clear as to his conduct for a considerable time before the crime, up to a recent period, so as to negative the idea that he was then of sound mind. *Bellingham's Case*, cited in 1 Collinson on Lunacy, 636.

[83] *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204.

But evidence may be introduced in a criminal prosecution to show the mental condition of the accused before and after a proceeding by a proper board or officer for an order finding the accused insane and to be a fit subject for treatment in an insane hospital. *Goodwin* v. *State*, 96 Ind. 550.

[84] *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 43 Atl. 542.

So, a minute recollection on the part of a person accused of crime of all the circumstances and details of the act a long time afterwards is strong evidence of his sanity at that time. *Pienovi's Case*, 3 N. Y. City Hall Rec. 123; *Ferrer's Case*, 19 How. St. Tr. 947.

[85] *Laros* v. *Com.* 84 Pa. 200; *State* v. *Coleman*, 20 S. C. 441.

[86] *State* v. *Stark*, 1 Strobh. L. 479; *United States* v. *Lee*, 4 Mackey, 489, 54 Am. Rep. 293.

[87] *Ball's Case*, 2 N. Y. City Hall Rec. 85; *Laros* v. *Com.* 84 Pa. 200.

So, insanity cannot be inferred in a prosecution for crime merely from the

proof of insanity.[88] The enormity of the crime, however, may be considered with other evidence in determining whether or not the accused was sane.[89] And while the act cannot be regarded as proof in itself of insanity, it is proper to examine it with all its attendant circumstances to determine whether it is most consistent with real or feigned insanity.[90]

217. Motive.—The mere fact that no motive for a crime appears is not, in itself, sufficient to establish insanity of the perpetrator.[91] And a conviction will not be disturbed on appeal where the mind of the accused does not appear to have been so diseased that he did not know right from wrong, and the consequences of his act, though there was little or no provocation.[92] But the presence or absence of a motive is a proper subject for consideration upon the question whether or not the accused was sane.[93]

218. Acts and conduct.— The fact that a person is unable to discriminate between right and wrong, so as to be criminally irresponsible, is best ascertained, not by any medical theory, but by the acts and conduct of the individual himself.[94] And they are usually of

oddness of the deed or the daring manner in which it was committed. *Com.* v. *Farkin*, 2 Clark (Pa.) 208.

[88]*Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228; *Com.* v. *Mosler*, 4 Pa. 264; *Singleton* v. *State*, 71 Miss. 782, 42 Am. St. Rep. 488, 16 So. 295.

And refusal to instruct as to sanity or insanity in a criminal prosecution is not error, where there is nothing to suggest insanity except the enormity of the crime. *Singleton* v. *State*, 71 Miss, 782, 42 Am. St. Rep. 488, 16 So. 295.

[89]*Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

[90]*People* v. *Lake*, 2 Park. Crim. Rep. 215; *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292. And see *Binyon* v. *United States* (Ind. Terr.) 76 S. W. 265.

[91]*Com.* v. *Mosler*, 4 Pa. 264; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *Reg.* v. *Dixson*, 11 Cox C. C. 341.

[92]*State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447.

Nor will a conviction be set aside on the ground of the insanity of the accused, where the question of sanity or insanity was fully submitted, and motives for the deed were clearly shown. *Shaw* v. *State*, 32 Tex. Crim. Rep. 155, 22 S. W. 588.

[93]*Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228; *People* v. *Barber*, 115 N. Y. 475, 22 N. E. 182; *Keffer* v. *State* (Wyo.) 73 Pac. 556.

The commission of a homicide without motive, which is unnatural and extraordinary, is, of itself, sufficient evidence of insanity to authorize the admission of testimony to show the insanity of the parents of the defendant. *Murphy* v. *Com.* 92 Ky. 485, 18 S. W. 163.

So, a jury in a criminal prosecution in which insanity is relied upon should determine whether the accused committed the act under, or in the absence of, such motive as would naturally influence the mind of a depraved man to acts of violence: and if it appears that he acted under the influence of anger, jealousy, or hate, that fact adds great strength to proof of his sanity; and if actual insanity is not made out the jury may infer revenge or passion rather than insanity. *People* v. *Messersmith*, 61 Cal. 246.

But an instruction in a criminal prosecution that the jury is not warranted in inferring insanity from the commission of a crime or from its enormity or from any apparent absence of motive, since the law presumes that it was prompted by malice, is erroneous as violating a statute prohibiting instructions upon the weight of evidence. *Kearney* v. *State*, 68 Miss. 233, 8 So. 292.

[94]*United States* v. *Shults*, 6 McLean, 121, Fed. Cas. No. 16,286.

more value than the opinions of witnesses, however learned or experienced they may be.[95] Acts, declarations, and conduct evidencing an aberration of mind may be sufficient to establish irresponsibility.[96] And any change in one's acts and conduct, and its extent and cause, and all other such circumstances exhibited at or about the date of the crime and previous thereto, are to be considered, and are entitled to more or less weight, according to their nature and their proximity to the act in question.[97] And a man's general habits constitute better evidence than particular acts.[98] The concealment of a criminal act, and an endeavor to escape, and a judicious use of the fruits thereof, all tend to show a knowledge of the nature of the offense and the ability to discriminate between right and wrong.[99] And evidence of preparation for the crime, and its commission pursuant to such preparation, shows criminal responsibility.[100] Likewise, the conduct of the family of a person committing crime may be considered on the question of his sanity, and evidence that he had previously been totally deranged, and that they had treated him as an

[95]*State* v. *Thomas,* Houst. Crim. Rep. (Del.) 511.

The fact that a person accused of homicide could not sleep nights, and went instinctively where he could lean against a bag of oats instead of lying down to sleep, is strong evidence of insanity, where he did not know that this was a symptom, and was not apparently feigning insanity. *People* v. *Lake,* 2 Park. Crim. Rep. 215.

And proof of the killing by a nurse girl of her employer's children of whom she had been very fond, and that she was weak-minded and showed no fear, anger, shame, or grief, or consciousness that she had done wrong, but seemed to be studying about something, sufficiently establishes her insanity. *Farrer* v. *State,* 2 Ohio St. 54.

[96]*State* v. *Brinyea,* 5 Ala. 241.

But proof that a person accused of crime, while sitting alone, just previous to its commission, rolled his eyes as if he were having some words with somebody, does not sustain the defense of insanity. *Ferris* v. *People,* 35 N. Y. 125.

And where, in a criminal prosecution, it was proven, to establish insanity, that the defendant consulted a boilermaker as to the feasibility of making a boiler so light by the use of aluminum that he could carry it upon his back on his prospecting tours, evidence may be given by an expert in rebuttal for the purpose of showing that his theory was not so impracticable as to indicate mental insanity. *People* v. *Goldsworthy,* 130 Cal. 600, 62 Pac. 1074.

[97]*Cole's Trial,* 7 Abb. Pr. N. S. 321.

Evidence that the mind of a person accused of crime had undergone a marked change, and that he had become irritable and unsocial and absent-minded and listless and forgetful, and that he believed himself crazy, and that he killed his friend and employer without apparent reason, making no effort to escape, is sufficient to establish his insanity and irresponsibility. *Massengale* v. *State,* 24 Tex. App. 181, 5 S. W. 650, 6 S. W. 35.

[98]*Snook* v. *Watts,* 11 Beav. 105, 12 Jur. 444. And see *State* v. *Dreher,* 137 Mo. 11, 38 S. W. 567.

[99]*United States* v. *Shults,* 6 McLean, 121, Fed. Cas. No. 16,286. And see *Lee* v. *State,* 116 Ga. 563, 42 S. E. 759.

[100]*State* v. *O'Neil,* 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287. And see *Lee* v. *State,* 116 Ga. 563, 42 S. E. 759.

Evidence that a man, upon learning of a provocation, moved about uneasily, behaved in an unusual manner, ate little dinner, and waited in ambush and shot and killed the defendant, does not furnish the slightest proof of insanity *Lacy* v. *State,* 30 Tex. App. 119, 16 S. W. 761.

insane person, is of considerable weight on the question of his insanity.[1] An attempt to commit suicide, however, is not of itself evidence of insanity, but is to be considered together with the other acts and circumstances bearing on the question.[2]

219. **Personal characteristics.**— The disposition and temperament of the defendant in a criminal prosecution, and any change therein, and the extent and cause of such change, are entitled to consideration on the question of his sanity, and are of more or less weight, according to their nature.[3] Mere eccentricity, however, does not show insanity which will operate as an excuse for crime,[4] though it has some bearing on the question.[5] And an irritable temper and excitable disposition do not show insanity which will confer irresponsibility.[6] Nor do suspicions of danger and apparent melancholy and peculiar deportment generally.[7] And a mere hallucination is not of itself

[1] *Kinloch's Case*, 25 How. St. Tr. 891, 997.

[2] *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Lutz*, 10 Kulp, 234; *People* v. *Owens*, 123 Cal. 482, 56 Pac. 251.

[3] *Cole's Trial*, 7 Abb. Pr. N. S. 321; *Pettigrew* v. *State*, 12 Tex. App. 225.

The possession of spasmodic abnormal muscular strength or unnatural physical power and great wakefulness and a deranged system and great restlessness and an abnormal bulging about the eyes, with a dryness about them, and a peculiar, vacuous expression, are all evidences of insanity. *United States* v. *Ridgeway*, 31 Fed. 144.

[4] *United States* v. *Young*, 25 Fed. 710; *Com.* v. *Meredith*, 17 Phila. 90; *Com.* v. *Cleary*, 148 Pac. 26, 23 Atl. 1110.

Nor will evidence of a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits and delirium tremens, upon the part of a person accused of crime, support a defense of insanity, where he was not laboring under the effect of such a fit at the time of the act, and there were circumstances showing deliberation and an understanding of the nature of the act. *Reg.* v. *Leigh*, 4 Fost. & F. 915.

And a defense of insanity is not established in a criminal prosecution by evidence that the defendant had written a letter in blood, and had strange religious notions, and had a wheel studded with nails upon which he prayed, and believed that he had discovered perpetual motion, and behaved in an eccentric manner, and caused a commotion in church, and was jealous of his wife, and believed that his life was threatened by her. *Reg.* v. *M'Leod*, 2 Swinton, 88.

[5] *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 25, 28 L. T. N. S. 562.

[6] *Sinbram* v. *People*, 1 N. Y. Crim. Rep. 448; *Willis* v. *People*, 32 N. Y. 715; *Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110. And see *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771; *Hoover* v. *State* (Ind.) 68 N. E. 591.

Evidence, in a prosecution for homicide, that the defendant was subject to a peculiar mental infirmity whereby, if unexpectedly touched behind, or in case of a sudden cluck from behind, he would become excited, lose control of his reason, and leap forward and strike the person nearest him, furnishes no defense, where at the time of the killing, he had not been thus excited. *Thomas* v. *State*, 71 Miss. 345, 15 So. 237.

[7] *State* v. *Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178.

An insane delusion upon the part of a person that those about him were seeking to injure him, which will render him irresponsible for a homicide, is not established by evidence that after the killing he warned people not to come near him, and said he had to defend himself, and that, upon being arrested, he put his hand to his hip and said something about his revolver, and wanted to get a butcher knife, and said he was afraid of being mobbed. *People* v. *Slack*, 90 Mich. 448, 51 N. W. 533.

evidence of insanity, though the inability to correct it might be.[8] And proof that the accused in a criminal prosecution was illiterate, ignorant, and passionate, does not justify an instruction as to insanity and the admission of evidence of weak-mindedness.[9] Nor does the fact that a person was deaf and dumb from infancy raise a presumption of idiocy.[10] And the fact that a person was a fit subject for treatment in an insane hospital, though evidence, is not conclusive of criminal irresponsibility.[11]

220. Causes of insanity.— The mere fact that a cause existed which might produce insanity is not sufficient to establish criminal irresponsibility,[12] though it is sufficient to go to the jury with a definition of insanity in its legal sense.[13] And evidence that the accused was an epileptic, and that the tendency of that disease is to weaken the intellect, and sometimes produce total insanity, is not sufficient to establish irresponsibility, where it failed to show that it had impaired his intellect to any serious extent.[14] But an instruction that

[8] *Com.* v. *Meredith*, 17 Phila. 90.

Nor are isolated instances, scattered through several years, of insane acts which might have resulted from the excessive use of liquor, sufficient to establish insanity in a criminal prosecution, as against evidence of competency to transact business, and that the person was treated by his friends and associates as a sane man. *Hoard* v. *State*, 15 Lea, 318.

[9] *Fitzpatrick* v. *Com.* 81 Ky. 357.

[10] *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41.

[11] *Pflueger* v. *State*, 46 Neb. 493, 64 N. W. 1094; *Goodwin* v. *State*, 96 Ind. 550; *Meyer* v. *People*, 156 Ill. 126, 40 N. E. 490.

And this is so though accompanied by the opinions of witnesses that he is still insane. *Meyer* v. *People*, 156 Ill. 126, 40 N. E. 490.

[12] *Sawyer* v. *State*, 35 Ind. 80; *State* v. *Graviotte*, 22 La. Ann. 587; *McAllister* v. *Territory*, 1 Wash. Terr. 360; *Taylor* v. *United States*, 7 App. D. C. 27.

Insanity or permanent mental disease as a defense to a charge of crime is not shown by evidence of habitual drunkenness contracted years before, and that the accused had delirium tremens, and was dull and nervous, and did not seem to be himself. *State* v. *Riley*, 100 Mo. 493, 13 S. W. 1063.

And proof of great excitement and enfeeblement of mind of a husband who killed his wife, caused by her association with people of bad character, does not warrant his acquittal, where he was capable of transacting business, and conversed rationally, and characterized her conduct and appreciated the danger to which his child would be exposed if brought up among her associates. *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207.

And testimony of a person charged with killing his wife and her paramour, that, just prior to the killing, his mind suddenly left him and became a blank, is not sufficient to show that he was incapable of forming an intent to murder, where he remembered all that took place at the interview in which the killing occurred, and had known their improper relations for some time. *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739.

[13] *Reg.* v. *Law*, 2 Fost. & F. 836.

But proof of an existing cause of an insane paroxysm should not be considered in a criminal prosecution unless the jury finds that there was latent insanity or a tendency to insane paroxysms which might be converted into actuality by the supposed cause. *Taylor* v. *United States*, 7 App. D. C. 27.

[14] *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228; *State* v. *Hayes*, 16 Mo. App. 560; *People* v. *Burgess*, 153 N. Y. 561, 47 N. E. 889; *Lovegrove* v. *State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191.

The court, in a criminal prosecution,

the fact that the accused had been subject to epilepsy, and that epilepsy is a disease which tends to produce insanity, is not sufficient to raise a reasonable doubt of his sanity, is erroneous as tending to mislead, and to interfere with the province of, the jury, to weigh the evidence.[15] And a defense in a prosecution for crime may be made out upon evidence that the accused was suffering from an attack of epilepsy at the time which rendered him unconscious and capable of acting only automatically, without any design or purpose of committing the act.[16]

221. Hereditary insanity.—Proof of hereditary insanity or of a taint of insanity in the ancestors or family of a man is not sufficient to relieve him from criminal responsibility, in the absence of actual insanity in himself.[17] But where there is evidence directly tending to prove insanity on the part of the accused, proof of hereditary insanity is admissible in corroboration thereof,[18] and as an additional link in the chain of circumstances.[19] It is a mere circumstance

will not assume as a fact that persons afflicted with epilepsy are easily excited to passion and revenge, and that they are afflicted with a morbid irritability which must impair moral responsibility, which is, of itself, sufficient to negative deliberation and premeditation, or that the testimony showing epilepsy is not contradicted, and instruct that this, of itself, should be sufficient to raise a doubt as to criminal responsibility, where it is contended that the accused had not had attacks for a long time, and that, from their light character, they had little, if any, effect on his mind. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

And evidence of the occurrence of an epileptic fit after the trial in a criminal prosecution in which there was testimony that the accused had fits in his infancy and a few later in life and one a week previous to the criminal act is merely cumulative, and not a ground for a new trial. *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207.

[15] *Guetig* v. *State*, 63 Ind. 278.

[16] *People* v. *Barberi*, 47 N. Y. Supp. 168.

[17] *Cole's Trial*, 7 Abb. Pr. N. S. 321; *People* v. *Pine*, 2 Barb. 566; *Bradley* v. *State*, 31 Ind. 492; *State* v. *Cunningham*, 72 N. C. 469; *State* v. *Kalb*, 2 Ohio Legal News, 364; *Guiteau's Case*, 10 Fed. 161.

But an instruction in a criminal prosecution that the fact that some or all of the defendant's ancestors had been insane does not of itself prove him insane, and that he cannot be excused in the absence of direct and preponderating evidence of insanity is objectionable as requiring direct proof. *State* v. *Simms*, 68 Mo. 305.

And an instruction in such a prosecution that evidence of insanity of the father and aunt of the accused cannot be considered unless the jury entertains a reasonable doubt of his own sanity is objectionable, since such a doubt would entitle him to an acquittal without such evidence. *Jones* v. *People*, 23 Colo. 276 47 Pac. 275.

Newly discovered evidence of the insanity of a sister of a person accused of crime is cumulative, where evidence of the insanity of his father and brother had been given, and is not, therefore, a ground for a new trial. *People* v. *Quimby* (Mich.) 10 Det. L. N. 618, 96 N. W. 1061.

[18] *State* v. *Cunningham*, 72 N. C. 469; *Com.* v. *Lutz*, 10 Kulp, 234; *Guiteau's Case*, 10 Fed. 161; *Reg.* v. *Vyse*, 3 Fost. & F. 247.

[19] *State* v. *Cunningham*, 72 N. C. 469.

And evidence of insanity in the family of a person accused of crime, and testimony of his family physician and persons who had long known him tending to show insanity, preponderate over opinions of persons not sufficiently qualified, and not substantiated by reasons, that he was sane, and warrant an ac-

however, and before any inference can be drawn from it the fact of insanity of the ancestors must be clearly established.[20]

quittal. *McLeod* v. *State*, 31 Tex. Crim. Rep. 331, 20 S. W. 749.

And evidence of a mania upon the part of a man for stealing ladies' shoes, without any apparent object, and that the insanity was hereditary, and that he had received an injury to his head, justifies an acquittal on a prosecution against him for robbing a lady of her shoe. *People* v. *Sprague*, 2 Park. Crim. Rep. 48.

[20] *People* v. *Pine*, 2 Barb. 566.

Evidence of the temporary insanity of the grandmother of the accused in a criminal prosecution, and of his having had fits while teething, is too remote and unreliable to show insanity on his part which will affect criminal responsibility. *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742.

CHAPTER IX.

INTOXICATION AS A DEFENSE TO CHARGE OF CRIME.

I. Insanity produced by intoxication.
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224. Nature of delirium tremens; an insane condition.
225. Responsibility in delirium tremens.
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I. Insanity produced by intoxication.

222. Permanent insanity from drunkenness.— The fact that it was caused by intoxication or habitual drunkenness does not prevent permanent insanity from relieving from criminal responsibility in a proper case.[1] Settled insanity which becomes fixed and established

[1] *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *Cavaness* v. *State*, 43 Ark. 331; *People* v. *Findley*, 132 Cal. 301, 64 Pac. 472; *Beck* v. *State*, 76 Ga. 452; *State* v. *Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *State* v. *Kavanaugh* (Del.) 53 Atl. 335; *Bradley* v. *State*, 31 Ind. 492; *Fisher* v. *State*, 64 Ind. 435; *Bailey* v. *State*, 26 Ind. 422; *Hill* v. *State*, 42 Neb. 503, 60 N. W. 916; *O'Grady* v. *State*, 36 Neb. 320, 54 N. W.

as a diseased condition of the mind, produced by habitual intoxication, affects criminal responsibility in the same way as insanity produced by any other cause.[2] Crime committed by a person while intoxicated, to be punishable, must be the immediate result of intoxication while it lasts, as distinguished from insanity remotely occasioned by previous bad habits.[3] And it is not necessary that the defendant in a criminal prosecution who interposes insanity induced by excessive drinking as a defense should have been actually drunk at the time.[4] And one who was insane when sober is not rendered criminally responsible by the fact that he was intoxicated when he committed a criminal act.[5] The question as to whether a person committing a crime was suffering from temporary insanity produced immediately by intoxication, or from fixed insanity, is for the jury, and its determination will not be disturbed unless clearly contrary to evidence.[6]

556; *Com.* v. *Baker*, 11 Phila. 631; *Cornwell* v. *State*, Mart. & Y. 147; *Ward* v. *State*, 19 Tex. App. 664; *Boswell* v. *Com.* 20 Gratt. 860; *United States* v. *Drew*, 5 Mason, 28, Fed. Cas. No. 14,993; *United States* v. *Clarke*, 2 Cranch C. C. 158, Fed. Cas. No. 14,811; *Burrow's Case*, 1 Lewin C. C. 75; *Rennie's Case*, 1 Lewin C. C. 76. And see *People* v. *Ferris*, 55 Cal. 588; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *State* v. *Coleman*, 27 La. Ann. 691; *Com.* v. *Crozier*, 1 Brewst. (Pa.) 349.

The rule that insanity may be interposed as a defense in a prosecution for a criminal act rests upon the principle that the law will not punish an act committed by an irrational or insane person, whether his condition was superinduced by drunkenness or proceeded from some other cause. *Fonville* v. *State*, 91 Ala. 39, 8 So. 688.

[2]*State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Fonville* v. *State*, 91 Ala. 39, 8 So. 688; *People* v. *Travers*, 88 Cal. 233, 26 Pac. 88; *State* v. *Riley*, 100 Mo. 493, 13 S. W. 1063; *Hill* v. *State*, 42 Neb. 509, 60 N. W. 916; *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Nevling* v. *Com.* 98 Pa. 323; *Com.* v. *Platt*, 11 Phila. 421; *United States* v. *Forbes*, Crabbe, 558, Fed. Cas. No. 15,129. And see the *State* v. *Dillahunt*, 3 Harr. (Del.) 551.

At common law permanent insanity produced by the use of liquor was not an excuse for crime, but was a complete defense, making out that there was no crime; though some of the old books called it an excuse. *Lyle* v. *State*, 31 Tex. Crim. Rep. 103, 19 S. W. 903.

[3]*State* v. *Hundley*, 46 Mo. 414; *United States* v. *Drew*, 5 Mason, 28, Fed. Cas. No. 14,993.

[4]*Territory* v. *Davis* (Ariz.) 10 Pac. 359.

[5]*Choice* v. *State*, 31 Ga. 424; *Bailey* v. *State*, 26 Ind. 422.

[6]*Upstone* v. *People*, 109 Ill. 169; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533.

And an instruction as to the effect of insanity on criminal responsibility is improper, when the evidence indicated not ordinary insanity, but irresponsible drunkenness. *State* v. *Desmond*, 109 Iowa, 72, 80 N. W. 214.

And one who sets up insanity from alcoholism as a defense in a prosecution for homicide is entitled to have all the facts and circumstances bearing upon the condition of his mind fairly submitted to the jury, who must determine as to his responsibility. *Territory* v. *Davis* (Ariz. Super. Ct.) 6 Lawson Crim. Def. 636.

And a general charge on the question of insanity, mentioning only the theory of delirium tremens, is not proper where there was testimony to show hereditary insanity, permanent insanity, produced by long and continued use of alcoholic spirits, and as to delirium tremens and temporary insanity or frenzy caused by an overdose of morphine administered as a medicine; equal

223. Degree of insanity from drunkenness which will excuse.—The test as to insanity as a defense in a criminal prosecution, that the mind must have been in such a condition at the time of the act that the person committing it did not know the consequences thereof, and did not know right from wrong with reference to it, applies to the defense of insanity from drunkenness.[7] It must amount to a deprivation of reason and judgment, and make the accused totally incapable of forming a deliberate and premeditated design, or of entertaining a rational thought or motive.[8] It must be settled insanity, and not merely a temporary condition, produced by the use of intoxicating liquors,[9] and must have resulted in a fixed mental disease or one of some material duration.[10]

224. Nature of delirium tremens; an insane condition.—Delirium

prominence should be given to each theory of defense. *State* v. *Rippy*, 104 N. C. 752, 10 S. E. 259.

So, the existence of such a disease as dipsomania is a question of science and fact, and not of law, and is one for the decision of the jury; and the question whether a homicide was the product of such disease is also a question of fact for the jury. *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533.

[7]*Casat* v. *State*, 40 Ark. 511; *Cavaness* v. *State*, 43 Ark. 331; *Beck* v. *State*, 76 Ga. 452; *Fisher* v. *State*, 64 Ind. 435; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *State* v. *Riley*, 100 Mo. 493, 13 S. W. 1063; *State* v. *Erb*, 74 Mo. 199; *Evers* v. *State*, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Burrow's Case*, 1 Lewin C. C. 75; *Rennie's Case*, 1 Lewin C. C. 76. And see *State* v. *Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *State* v. *McGonigal*, 5 Harr. (Del.) 510; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *O'Brien* v. *People*, 48 Barb. 274; *Ward* v. *State*, 19 Tex. App. 664; *United States* v. *Clarke*, 2 Cranch C. C. 158, Fed. Cas. No. 14,811; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Ross* v. *State*, 62 Ala. 224; *Reg.* v. *Davis*, 14 Cox C. C. 563.

[8]*State* v. *Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *Bailey* v. *State*, 26 Ind. 422.

Absence of self-governing power in the mind of a person committing a crime is a defense, whether it was caused by insanity or intoxication, but when the act resulted from wickedness or depravity, the absence of such power is immaterial. *Nevling* v. *Com.* 98 Pa. 323.

[9]*People* v. *Travers*, 88 Cal. 233, 26 Pac. 88; *State* v. *McGonigal*, 5 Harr. (Del.) 510; *Gunter* v. *State*, 83 Ala. 96, 3 So. 600.

A person committing a crime while drunk, who was peaceable and orderly and rational while sober, but quarrelsome while drinking, is not insane in the sense that will excuse crime. *McCarty* v. *Com.* 14 Ky. L. Rep. 285, 20 S. W. 229.

And refusal to instruct as to insanity induced by intoxication is not error in a criminal prosecution, where the entire proof shows that the accused was sober enough to fully comprehend the nature of his act, and that the act was not due to a sudden outburst of passion or excitement. *Carpenter* v. *Com.* 92 Ky. 452, 18 S. W. 9.

[10]*Lanergan* v. *People*, 50 Barb. 266.

Mental unsoundness brought on by excessive drinking, remaining after the intoxication has subsided, and existing to such an extent as to cause a loss of the government of reason, may be interposed as a palliation or excuse for crime. *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292.

But isolated instances scattered through several years, tending to show insanity which might be attributed to excessive use of liquor, and acts which are not necessarily signs of insanity, are not sufficient to establish it as against evidence of competency to transact business, and that the accused was treated by his associates as sane. *Hoard* v. *State*, 15 Lea, 318.

tremens "may be the immediate effect of an excess, or series of excesses, in those who are not habitually intemperate, as well as in those who are; but it most commonly occurs in habitual drinkers, after a few days' total abstinence from spirituous liquors. It is also very liable to occur in this latter class when laboring under other diseases, or severe external injuries that give rise to any degree of constitutional disturbance. The approach of the disease is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have obviously increased in severity, the patient ceases to sleep altogether, and soon becomes delirious. At first the delirium is not constant, the mind wandering during the night, but, during the day, when its attention is fixed, capable of rational discourse. It is not long, however, before it becomes constant, and constitutes the most prominent feature of the disease. Occasionally the delirium occurs at an earlier period of the disease, and may even be the first symptom of any disorder. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this period, the disease is fatal; and whether subjected to medical treatment or left to itself, neither its symptoms nor duration are materially modified. The character of the delirium in this disease is peculiar, bearing a stronger resemblance than any other form of mental derangement to dreaming. It would seem as if the dreams which disturb and harass the mind during the imperfect sleep that precedes the explosion of the disease continue to occupy it when awake, being then viewed as realities, instead of dreams. The patient imagines himself, for instance, to be in some peculiar situation, or engaged in certain occupations, according to each individual's habits and profession; and his discourse and conduct are conformed to this delusion, with this striking peculiarity, however, that he is thwarted at every step, and is constantly meeting with obstacles that defy his utmost efforts to remove. Almost invariably the patient manifests, more or less, feelings of suspicion and fear, laboring under continual apprehension of being made the victim of sinister designs and practices. He imagines that certain people have conspired to rob or murder him,

and insists that he can hear them in an adjoining apartment arranging their plans and preparing to rush into his room; or that he is in a strange place, where he is forcibly detained, and prevented from going to his own home. One of the most common hallucinations is to be constantly seeing devils, snakes, vermin, and all manner of unclean things around him and about him, and filling every nook and corner of his apartment. The extreme terror which these delusions often inspire produces in the countenance an unutterable expression of anguish, and, in the hope of escaping from his fancied tormentors, the wretched patient endeavors to cut his throat or jump from the window. Under the influence of these terrible apprehensions he sometimes murders his wife or attendant, whom his disordered imagination identifies with his enemies, though he is generally tractable, and not inclined to be mischievous. After perpetrating an act of this kind, he generally gives some illusive reason for his conduct, rejoices in his success, and expresses his regret at not having done it before." [11]

225. Responsibility in delirium tremens.—Delirium tremens which deprives one of the capacity to know what he is doing, or know right from wrong, operates to relieve him from criminal responsibility to the same extent as any other insanity,[12] although the diseased condition was temporary,[13] and though he was not intoxicated at the

[11] Ray, Med. Jur. 438.

See also an interesting case of *Oinomania* in 8 Am. Journal of Insanity, 3.

[12] *State* v. *Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *State* v. *Hurley*, Houst. Crim. Rep. (Del.) 28; *State* v. *Dillahunt*, 3 Harr. (Del.) 551; *State* v. *McGonigal*, 5 Harr. (Del.) 510; *State* v. *Kavanaugh* (Del.) 53 Atl. 335; *State* v. *Hand*, 1 Marv. (Del.) 545, 41 Atl. 192; *People* v. *Fellows*, 122 Cal. 233, 54 Pac. 830; *People* v. *Ferris*, 55 Cal. 588; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *O'Brien* v. *People*, 36 N. Y. 276. Affirming 48 Barb. 274; *People* v. *O'Connell*, 62 How. Pr. 436; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Maconnehey* v. *State*, 5 Ohio St. 77; *Com.* v. *Green*, 1 Ashm. (Pa.) 289; *Stuart* v. *State*, 1 Baxt. 178; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *Erwin* v. *State*, 10 Tex. App. 700; *De Aberts* v. *State*, 34 Tex. Crim. Rep. 508, 31 S. W. 391; *Territory* v. *Davis* (Ariz.) 10 Pac. 359; *United States* v. *Drew*, 5 Mason, 28, Fed. Cas. No. 14,993; *United States* v. *Forbes*, Crabbe, 558, Fed. Cas. No. 15,129; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Reg.* v. *Davis*, 14 Cox C. C. 563; *Rex* v. *Thomas*, 7 Carr. & P. 817; *Rex* v. *Meakin*, 7 Car. & P. 297; *Rennie's Case*, 1 Lewin C. C. 76.

The word "insanity" embraces every species of mental unsoundness, whatever may be its source or cause, including not only that derangement produced by disease of the brain, but also the condition of subverted reason which may be produced by intoxication. *Gunter* v. *State*, 83 Ala. 96, 3 So. 600.

And the jury in a criminal prosecution should be instructed as to the law applicable to delirium tremens in a clear and pointed manner where the evidence raises the issue as to whether the accused was, at the time of the criminal act, in a drunken frenzy or laboring under that disease. *Erwin* v. *State*, 10 Tex. App. 700.

[13] *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657.

time.[14] And an instruction in a criminal prosecution is erroneous when it confuses insanity and intoxication;[15] though failure of the court to define or charge as to *mania a potu,* or delirium tremens, in a criminal prosecution in which they are alleged as a defense, is not error, where the jury was charged correctly as to the degree of unsoundness which would relieve from criminal responsibility.[16] But when delirium tremens is set up as a defense, the prisoner must show that he was under a delirium at the time the act was perpetrated, there being no presumption of its existence from the antecedent fits from which he has recovered.[17]

226. Effect of particular susceptibility to insanity from drink.—The criminal responsibility of one who commits a criminal act while intoxicated is not affected by the fact that, by reason of a former injury or of constitutional infirmity, he was more likely to be maddened by liquor than other men.[18] But one having a dormant tendency toward insanity, who became voluntarily intoxicated, and thereby suffered an extravagant degree of mental derangement, during which he committed a crime, when he had no reason to believe that such effects were likely to follow, should not be held responsible where the act resulted from such tendency, and not from drunkenness or previously formed intentions,[19] though the rule would be different if he had good reason to believe that his intoxication would produce mental derangement.[20]

[14]*De Alberts* v. *State,* 34 Tex. Crim. Rep. 508, 31 S. W. 391.

[15]*People* v. *Kloss,* 115 Cal. 567, 47 Pac. 459.

[16]*Stuart* v. *State,* 1 Baxt. 178; *Spenee* v. *State,* 15 Lea, 539; *People* v. *Mills,* 98 N. Y. 176.

But where the testimony in a criminal prosecution tended to show hereditary insanity, permanent insanity produced by long-continued use of liquor, delirium tremens, and temporary insanity caused by an overdose of morphine, —a general instruction only mentioning the theory of delirium tremens is objectionable as tending to confine the deliberations of the jury to that particular phase of the defense, though it was sufficiently comprehensive to embrace every other view. *State* v. *Rippy,* 104 N. C. 752, 10 S. E. 259.

[17]*State* v. *Sewell,* 48 N. C. (3 Jones L.) 250. As to general presumption arising from prior insanity, see § 308.

An instruction in a prosecution for perjury, in which it was claimed that the defendant was insane from delirium tremens, that the jury might judge from his physical appearance and manner whether he could have been insane at the time of taking the oath in question, six months previous, is error, in the absence of proof that the disorder leaves an infallible mark of its existence. *Bowden* v. *People,* 12 Hun, 85.

And a great amount of senseless extravagance and absurd eccentricity, coupled with habits of intemperance, causing fits and delirium tremens, are not sufficient to support the defense of insanity in a criminal prosecution, where there were circumstances tending to show deliberation, and it does not appear that the accused was then laboring under the effects of such a fit. *Reg.* v. *Leigh,* 4 Fost. & F. 915.

[18]*Choice* v. *State,* 31 Ga. 424; *State* v. *Wilson,* 104 N. C. 868, 10 S. E. 315.

[19]*Roberts* v. *People,* 19 Mich. 401; *Blimm* v. *Com.* 7 Bush, 320; *Reg.* v. *Mountain,* Leed's Assizes, April, 1888, Pollock, B.

[20]*Roberts* v. *People,* 19 Mich. 401; *People* v. *Garbutt,* 17 Mich. 9, 97 Am.

II. Present intoxication.

227. Mere drunkenness does not avoid responsibility.—Drunkenness, so long as it does not prostrate the faculties, cannot be distinguished from any other kind of passion. If drunkenness so incapacitates the reason as to make it at least partially incapable of distinguishing between right and wrong, or else so inflames the passions as to make restraint insupportable, then comes in the familiar principle that the man who voluntarily assumes an attitude or does an act which is likely to injure others, is responsible for the consequences, even though he had at the time no specific intention to cause injury. It is the universal rule, therefore, that voluntary intoxication is no justification or excuse for crime;[21] and mere drunken excitement and rage

Dec. 162; *Upstone* v. *People*, 109 Ill. 169; *State* v. *Wilson*, 104 N. C. 868, 10 S. E. 315.

In such case he must be held to have intended the extraordinary derangement as well as the intoxication and the result produced by it, and the same degree of mental incapacity would be required to render him irresponsible whether the derangement was caused by the intoxication combined with the infirmity or by the intoxication alone. *Roberts* v. *People*, 19 Mich. 401.

[21]The cases stating or acting upon this rule are almost without number; among them are: *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *McLeroy* v. *State*, 120 Ala. 274, 25 So. 247; *Chrisman* v. *State*, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; *People* v. *Nichol*, 34 Cal. 212; *People* v. *Methever*, 132 Cal. 326, 64 Pac. 481; *State* v. *Johnson*, 41 Conn. 584; *State* v. *Johnson*, 40 Conn. 136; *People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *State* v. *Thomas*, Houst. Crim. Rep. (Del.) 511; *State* v. *Snow*, 3 Penn. (Del.) 259, 51 Atl. 607; *Harris* v. *United States*, 8 App. D. C. 20, 36 L. R. A. 465; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *Choice* v. *State*, 31 Ga. 424; *Cribb* v. *State* (Ga.) 45 S. E. 396; *Upstone* v. *People*, 109 Ill. 169; *Dawson* v. *State*, 16 Ind. 428, 79 Am. Dec. 439; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *State* v. *Hart*, 29 Iowa, 268; *State* v. *Roan* (Iowa) 97 N. W. 997; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *Shannahan* v. *Com.* 8 Bush, 464, 8 Am. Rep. 465; *Conley* v. *Com.* 98 Ky. 125, 32 S. W. 285; *State* v. *Coleman*, 27 La. Ann. 691; *Com.* v. *Gilbert*, 165 Mass. 45, 42 N. E. 336; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State* v. *Garvey*, 11 Minn. 154, Gil. 95; *Kelly* v. *State*, 3 Smedes & M. 518; *State* v. *Hundley*, 46 Mo. 414; *State* v. *West*, 157 Mo. 309, 57 S. W. 1071; *Territory* v. *Manton*, 8 Mont. 95, 19 Pac. 387; *O'Grady* v. *State*, 36 Neb. 320, 54 N. W. 556; *State* v. *Thompson*, 12 Nev. 140; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Territory* v. *Franklin*, 2 N. M. 307; *Flanigan* v. *People*, 86 N. Y. 554, 40 Am. Rep. 556; *State* v. *John*, 30 N. C. (8 Ired. L.) 330, 49 Am. Dec. 396; *State* v. *Kale*, 124 N. C. 816, 32 S. E. 892; *State* v. *Koerner*, 8 N. D. 292, 78 N. W. 981; *Pigman* v. *State*, 14 Ohio, 555, 45 Am. Dec. 558; *Cline* v. *State*, 43 Ohio St. 332, 1 N. E. 22; *Keenan* v. *Com.* 44 Pa. 55, 84 Am. Dec. 414; *Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *Evers* v. *State*, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *State* v. *Tatro*, 50 Vt. 483; *Longley* v. *Com.* 99 Va. 807, 37 S. E. 483; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Beverley's Case*, 4 Coke, 125a; *Reg.* v. *Dixon*, 11 Cox C. C. 341.

And the disease of oinomania, or dipsomania, consisting of an inordinate thirst for liquor, caused by a habit of drinking, does not affect criminal responsibility for acts committed by one becoming intoxicated after being thus impelled to drink. *Choice* v. *State*, 31 Ga. 424; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657.

And the fact that a party carrying

constitute no excuse.[22] Drunkenness is not insanity, and does not constitute unsoundness of mind, unless the derangement which it has caused has become fixed and continuous,[23] the character of the liquor drunk being immaterial.[24] And mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the commission of a criminal offense, is no excuse therefor or defense in a prosecution therefor.[25] Some of the cases, however, state the rule to be that drunkenness will not excuse criminal acts unless it destroys capacity to distinguish between right and wrong,[26] or unless it renders the party unconscious of what he is doing,[27] or unless it is such

brass knuckles was too drunk to know he had them at the time of discovery is not a defense to a prosecution therefor, where he was not innocently carrying them without knowing it. *Osborn* v. *State* (Tex. Crim. Rep.) 26 S. W. 625.

[22]*State* v. *Wilson*, 104 N. C. 868, 10 S. E. 315. And see *State* v. *Lowe*, 93 Mo. 547, 5 S. W. 889.

[23]*State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Re Johnson*, 57 Cal. 529; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *Choice* v. *State*, 31 Ga. 424; *People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *State* v. *Wells*, 54 Kan. 161, 37 Pac. 1005; *Wilkerson* v. *Com.* 88 Ky. 29, 9 S. W. 836; *Buckhannon* v. *Com.* 86 Ky. 110, 5 S. W. 358; *Com.* v. *Gilbert*, 165 Mass. 45, 42 N. E. 336.

Where a man and wife went to a neighboring town, where they drank together, after which they walked toward home, but before reaching it, and at a place within easy calling distance, the wife fell down on the ice, and the husband left her there all night, poorly clad and exposed to the cold, from the effects of which she died, his drunkenness is no excuse for his failure to take proper care of her. *Territory* v. *Manton*, 8 Mont. 95, 19 Pac. 387.

And where evidence in a criminal prosecution has been given of strange statements and actions of the accused on the day of the offense, claimed to indicate insanity, evidence may be given that he was intoxicated on that day, for the purpose of rebutting such inference. *People* v. *Miles*, 143 N. Y. 383, 38 N. E. 456.

[24]*Cribb* v. *State* (Ga.) 45 S. E. 396.

[25]*Fisher* v. *State*, 64 Ind. 435; *State* v. *Bulloek*, 13 Ala. 413; *People* v. *Lewis*, 36 Cal. 531; *People* v. *Williams*, 43 Cal. 344; *Beck* v. *State*, 76 Ga. 452; *Upstone* v. *People*, 109 Ill. 169; *Wright* v. *Com.* 24 Ky. L. Rep. 1838, 72 S. W. 340; *State* v. *Haab*, 105 La. 230, 29 So. 725; *State* v. *Hundley*, 46 Mo. 414; *Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *State* v. *Thompson*, 12 Nev. 140; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *People* v. *Krist*, 168 N. Y. 19, 60 N. E. 1057; *Longley* v. *Com.* 99 Va. 807, 37 S. E. 839; *Gustavenson* v. *State*, 10 Wyo. 300, 68 Pac. 1006.

This is so though the intoxication was such as to render the person incapable of distinguishing between right and wrong for the time being. *State* v. *Haab*, 105 La. 230, 29 So. 725; *Montag* v. *People*, 141 Ill. 75, 30 N. E. 337.

Insanity originating from the use of drugs is not regarded with the same leniency as an excuse for crime, as insanity not caused by the act of the party himself. *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312.

And the test of insanity as affecting criminal responsibility, that the accused must have labored under such a defect of reason as not to know the nature or the quality of the act, or, if he did know it, that he did not know he was doing wrong, does not apply to drunkenness. *People* v. *Ferris*, 55 Cal. 588.

[26]*Ross* v. *State*, 62 Ala. 224; *State* v. *Wells*, 54 Kan. 161, 37 Pac. 1005; *State* v. *Ford* (S. D.) 92 N. W. 18. And see *Territory* v. *Franklin*, 2 N. M. 307; *Com.* v. *Hart*, 2 Brewst. (Pa.) 546.

[27]*State* v. *Till*, Houst. Crim. Rep. (Del.) 233; *Pigman* v. *State*, 14 Ohio, 555, 45 Am. Dec. 558; *Osborn* v. *State* (Tex. Crim. App.) 26 S. W. 625. And see *State* v. *Wells*, 54 Kan. 161, 37 Pac. 1005.

as to prevent him from restraining himself from committing the act.[28] And some of the cases have regarded intoxication as an aggravation rather than an excuse for crime.[29] But the general rule seems to be that drunkenness neither aggravates, excuses, extenuates, nor mitigates crime.[30]

228. This view necessary to public safety.— The safety of the community in fact, requires that this rule should be observed. Every murderer would drink to shelter his intended guilt. There never could be a conviction for homicide if drunkenness should avoid responsibility. As it is, some of the most premeditated homicides are committed under the stimulus of liquor. The guilty purpose is at first sedately conceived, but there are few men whose temperaments are so firmly knit as to enable them to enter a scene of blood without first fortifying themselves for the task to be performed. The head dreads the heart's cowardice, and seeks to insure against it by drink. And, if the assassin did not take liquor to strengthen his nerves, he would take it to avoid conviction. There would be no species of deliberate homicide, under such a dispensation, that would not avoid punishment. It would be the undeliberate only that would be made responsible.

229. Right to show to indicate noncommission.— Intoxication may be shown in a prosecution for crime like any other fact; not as an excuse or defense, but to throw light upon the other facts and circumstances in the case,[31] or as tending to show that the accused was

[28] *Reg.* v. *Monkhouse*, 4 Cox C. C. 55; *People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *Com.* v. *Gilbert*, 165 Mass. 45, 42 N. E. 336.

[29] *United States* v. *Forbes*, Crabbe, 558, Fed. Cas. No. 15,129; *United States* v. *Cornell*, 2 Mason, 99, Fed. Cas. No. 14,868; *State* v. *Thompson*, Wright (Ohio) 617; *United States* v. *Claypool*, 14 Fed. 127.

And it has been held that it may raise homicide to murder in the first degree. *Willis* v. *Com.* 32 Gratt. 929.

But drunkenness cannot convert a mere accident into a felony. *State* v. *Cross*, 42 W. Va. 253, 24 S. E. 996.

And a remark by the court in the hearing of the jury in a criminal prosecution that drunkenness is more of an aggravation than an excuse, without an explanation, is improper. *State* v. *Donovan*, 61 Iowa, 369, 16 N. W. 206.

[30] *McIntyre* v. *People*, 38 Ill. 514; *Ferrell* v. *State*, 43 Tex. 503; *State* v. *Murphy*, 118 Mo. 7, 25 S. W. 95; *State* v. *Sneed*, 88 Mo. 138; *State* v. *Ramsey*, 82 Mo. 133; *State* v. *Edwards*, 71 Mo. 321; *State* v. *Cross*, 27 Mo. 332; *State* v. *Harlow*, 21 Mo. 446.

In Missouri, intoxication is not admissible in a criminal prosecution for any purpose. *State* v. *Sneed*, 88 Mo. 138.

It has been held, however, that transient insanity ensuing from intoxication caused by sensual ratification or social hilarity, though not an excuse for homicide, should mitigate it. *Smith* v. *Com.* 1 Duv. 224.

So, in *Conley* v. *Com.* 98 Ky. 125, 32 S. W. 285, evidence of drunkenness was held to be admissible for the purpose of mitigating the offense charged.

[31] *Jenkins* v. *State*, 93 Ga. 1, 18 S. E. 992; *Harvey* v. *State*, 68 Ga. 612; *Lanergan* v. *People*, 6 Park. Crim. Rep. 209; *Ferrell* v. *State*, 43 Tex. 503.

Where the jury in a prosecution for homicide is required to fix the punishment, the intoxication of the defendant

physically unable to commit the offense,[32] and also to enable the jury to determine whether the mental condition of the accused was such that he knew he was committing an offense.[33] Excuse for criminal acts because of drunkenness, however, is at all times to be received with great caution, on account of the ease with which it may be perverted.[34]

230. Right to show on question of intent generally.— Where a criminal act is one which can be committed only by doing a particular thing with a specific intent, it may be shown that at the time of doing it the accused was so drunk that he could not have entertained the intent necessary to constitute the offense.[35] And intoxication may

at the time of the commission of the criminal act should be considered as tending to give character to it. *Rafferty* v. *People*, 66 Ill. 118.

And proof of intoxication of a man who cut a boy's throat without motive, and talked and acted strangely at the time, is pertinent and admissible in a prosecution for the crime, as a circumstance helping to account for his act. *Blimm* v. *Com.* 7 Bush, 320.

[32] *Jenkins* v. *State*, 93 Ga. 1, 18 S. E. 992; *State* v. *Koerner*, 8 N. D. 292, 78 N. W. 981; *Ferrell* v. *State*, 43 Tex. 503.

[33] *People* v. *Harris*, 29 Cal. 678; *Pigman* v. *State*, 14 Ohio, 555, 45 Am. Dec. 558. And see *Fisher* v. *State*, 30 Tex. App. 502, 18 S. W. 90.

And the fact that a person accused of crime talked with his usual intelligence at the time is competent and material, where he claims to have been so under the influence of liquor at the time as not to know what he was doing. *White* v. *State*, 103 Ala. 72, 16 So. 63.

[34] *Kriel* v. *Com.* 5 Bush. 362.

A remark by the judge to the jury in a criminal prosecution, that there was some evidence of the defendant's drunkenness, is erroneous as liable to be understood as expressing an opinion as to the quantity and weight of the evidence on that question unfavorable to the accused, though without the qualifying word "some" the expression would not have been objectionable. *State* v. *Donovan*, 61 Iowa, 369, 16 N. W. 206.

And an instruction in a criminal prosecution that if the accused was intoxicated to such an extent that she was not conscious of what she was doing, still the law holds her responsible for her act, is not error, where there were no facts or circumstances in the case warranting an inference that she was in a state of unconsciousness or insensibility from intoxication. *People* v. *Robinson*, 2 Park. Crim. Rep. 235.

And an instruction in a criminal prosecution characterizing drunkenness as gross vice and misconduct is not reversible error, where the language was not applied to the defendant. *People* v. *Calton*, 5 Utah, 451, 16 Pac. 902.

And an expression by the court in a criminal prosecution, in instructing the jury, that "there is something said in regard to drunkenness," is not subject to the objection that the words had a tendency to make light of the plea of drunkenness. *Vann* v. *State*, 83 Ga. 44, 9 S. E. 945.

[35] This rule is now settled and supported by numerous cases, among which are: *McLeroy* v. *State*, 120 Ala. 274, 25 So. 247; *Chrisman* v. *State*, 54 Ark. 283, 26 Am. St. Rep. 44, 15 S. W. 889; *People* v. *Methever*, 132 Cal. 326, 64 Pac. 481; *State* v. *Fiske*, 63 Conn. 388, 24 Atl. 572; *State* v. *Faino*, 1 Marv. (Del.) 492, 41 Atl. 134; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *Malone* v. *State*, 49 Ga. 210; *Bartholomew* v. *People*, 104 Ill. 605, 44 Am. Rep. 97; *Booher* v. *State*, 156 Ind. 435, 54 L. R. A. 391, 60 N. E. 156; *State* v. *Pasnau*, 118 Iowa, 501, 92 N. W. 682; *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *Keeton* v. *Com.* 92 Ky. 522, 18 S. W. 359; *State* v. *Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *People* v. *Walker*, 38 Mich. 156; *State* v. *Garvey*, 11 Minn. 154, Gil. 95; *Kelly* v. *State*, 3 Smedes & M. 518; *O'Grady* v. *State*, 36 Neb. 320, 54 N. W. 556; *People* v. *Leonardi*, 143 N. Y. 360, 38 N. E. 372; *Swan* v. *State*, 4 Humph. 136; *Scott* v. *State*, 12 Tex. App. 31; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596; *Gustavenson* v. *State*, 10 Wyo. 300, 68

be shown for the purpose of determining the condition of the defendant's mind, and to throw light upon the inquiry whether there was malice,[36] and to show that the necessary intent did not exist, and, therefore, that the crime in question had not been committed.[37] And intoxication may also be considered in determining the purpose or motive or intent with which a crime was committed, in cases of crimes which are divided into degrees, or which are clearly so divided by inferential construction.[38] The mere fact of intoxication, however, is not conclusive against the existence of a criminal intent.[39] So long as the offender was capable of conceiving a design to commit the

Pac. 1006; *Reg.* v. *Monkhouse*, 4 Cox C. C. 55. And see also *State* v. *Cather* (Iowa) 96 N. W. 722.

The presumption that every one intends the natural consequences of his acts, arising in a prosecution for a criminal act involving the element of intent, would be rebutted by the fact that the accused was so drunk at the time that he did not know what he was doing. *State* v. *Barbee*, 92 N. C. 820. But see *State* v. *Cross*, 27 Mo. 334.

The rule that a man who, by intoxication, voluntarily puts himself into a condition to have no control of his actions, must be held to intend the consequences, includes only the consequences which actually ensue, and not an intent in addition thereto, where, at the time, the accused was incapable of entertaining such intent, and did not in fact entertain it. *Roberts* v. *People*, 19 Mich. 401.

[36]*Malone* v. *State*, 49 Ga. 210; *Moon* v. *State*, 68 Ga. 687; *Dawson* v. *State*, 16 Ind. 428, 79 Am. Dec. 439; *Golliher* v. *Com.* 2 Duv. 163, 87 Am. Dec. 493; *State* v. *Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *Kelly* v. *State*, 3 Smedes & M. 518.

In *Nicholas* v. *State*, 8 Ohio St. 435, however, it was held, that the intoxication of a person at the time of committing homicide has nothing to do with the question of malice.

And in *Estes* v. *State*, 55 Ga. 30, it was held that one who is sober enough to intend to shoot at another, and who actually does shoot at and hit him, without provocation or justification, must be considered sober enough to form the specific intent to murder.

And in *Marshall* v. *State*, 59 Ga. 154, it was held that one who can voluntarily shoot is capable of entertaining, and acting from, malice, unless he can plead some infirmity besides drunkenness: and that in order to be too drunk to form an intent to kill he must have been too drunk to shoot.

[37]*People* v. *Harris*, 29 Cal. 678; *State* v. *Di Guglielmo* (Del.) 55 Atl. 350; *State* v. *Garvey*, 11 Minn. 154, Gil. 95; *O'Grady* v. *State*, 36 Neb. 320, 54 N. W. 556; *People* v. *Robinson*, 2 Park. Crim. Rep. 235; *Cline* v. *State*, 43 Ohio St. 332, 1 N. E. 22; *Swan* v. *State*, 4 Humph. 136; *Scott* v. *State*, 12 Tex. App. 31; *Ingalls* v. *State*, 48 Wis. 648, 4 N. W. 785.

A person accused of crime, who was too intoxicated to be able to entertain the particular intent necessary to constitute the crime, would be incapable of committing it. *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *State* v. *Donovan*, 61 Iowa. 369, 16 N. W. 206; *People* v. *Haley*, 48 Mich. 495, 12 N. W. 671.

[38]*People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *People* v. *Young*, 103 Cal. 411, 36 Pac. 770; *O'Grady* v. *State*, 36 Neb. 320, 54 N. W. 556; *Wilson* v. *State*, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; *United States* v. *Meagher*, 37 Fed. 875; *Reg.* v. *Gamlen*, 1 Fost. & F. 90. And see *People* v. *Belencia*, 21 Cal. 544; *Conley* v. *Com.* 98 Ky. 125, 32 S. W. 285; *Kriel* v. *Com.* 5 Bush, 363; *Smith* v. *Com.* 1 Duv. 224.

A lesser provocation might suddenly heat and blind a man with angry passion while intoxicated than while sober, and for that reason intoxication may be considered in determining the question of malice with a view to reduce the killing from murder to manslaughter. *State* v. *Hurley*, Houst. Crim. Rep. (Del.) 28.

[39]*State* v. *White*, 14 Kan. 538; *State* v. *Avery*, 44 N. H. 392.

crime in question, the fact that he was intoxicated cannot be allowed to affect the legal character of his act,[40] and he will be presumed, in the absence of proof to the contrary, to have intended the actual consequences of his acts.[41] And where, without intoxication, the law would impute to the act a criminal intent, voluntary drunkenness is not available to disprove such intent.[42] Intoxication cannot be considered in any but cases involving the condition of the mind of the accused when the act was done,[43] and evidence as to whether the defendant was drunk or sober on a trial for an offense not involving any specific intent is immaterial and inadmissible.[44] The question whether one accused of crime, of which a specific intent is an essential element, who had interposed drunkenness as a defense, knew what he was doing or not, is one of fact for the jury.[45]

[40]*Friery* v. *People*, 54 Barb. 319; *King* v. *State*, 90 Ala. 612, 8 So. 856; *Chatham* v. *State*, 92 Ala. 47, 9 So. 607; *Tidwell* v. *State*, 70 Ala. 33; *White* v. *State*, 103 Ala. 72, 16 So. 63; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *Wilson* v. *State*, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428; *State* v. *Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *State* v. *Kale*, 124 N. C. 816, 32 S. E. 892.

An instruction in an action for knowingly and wilfully resisting an officer, that if the defendant was so drunk as to be incapable of forming the statutory intent, he would be free from the statutory guilt, but not otherwise, is sufficiently favorable to the defendant. *People* v. *Haley*, 48 Mich. 495, 12 N. W. 671.

[41]*Smurr* v. *State*, 88 Ind. 504; *People* v. *Fish*, 125 N. Y. 136, 26 N. E. 319; *Friery* v. *People*, 54 Barb. 319.

Drunkenness will not change the grade of an offense unless the evidence suggests some other motive for the act, to be compared by the jury with the state's theory of a malicious intent, and in the absence of such suggestion no charge with reference to drunkenness as a separate element in grading the offense need be given. *Estes* v. *State*, 55 Ga. 30.

[42]*Upstone* v. *People*, 109 Ill. 169; *Rafferty* v. *People*, 66 Ill. 118; *O'Herrin* v. *State*, 14 Ind. 420; *State* v. *Peterson*, 129 N. C. 556, 85 Am. St. Rep. 756, 40 S. E. 9; *Little* v. *State*, 42 Tex. Crim. Rep. 551, 61 S. W. 483.

Refusal to charge as to intoxication as affecting intent in a criminal prosecution is not error, where temporary insanity from the recent use of intoxicating liquor, incapacitating the party to form an intent, would not have reduced the grade of the crime. *Hernandez* v. *State*, 32 Tex. Crim. Rep. 271, 22 S. W. 972.

And drunkenness, no matter what the degree, is no excuse or defense for carrying a concealed weapon, since it is unimportant whether there was a particular intent to carry it concealed or not. *Fielding* v. *State*, 135 Ala. 56, 33 So. 677.

[43]*State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *People* v. *Nichol*, 34 Cal. 211; *State* v. *Lowe*, 93 Mo. 547, 5 S. W. 889; *Scott* v. *State*, 12 Tex. App. 31.

It is not a legitimate subject of inquiry as between murder in the second degree and manslaughter. *Wilson* v. *State*, 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428.

[44]*People* v. *Marseiler*, 70 Cal. 98, 11 Pac. 503; *Smurr* v. *State*, 88 Ind. 504; *State* v. *Welch*, 22 Minn. 22; *Friery* v *People*, 54 Barb. 319; *People* v. *Porter*, 2 Park. Crim. Rep. 14; *White* v. *State*, 103 Ala. 72, 16 So. 63. But see *People* v. *Harris*, 29 Cal. 678.

[45]*White* v. *State*, 103 Ala. 72, 16 So. 63; *State* v. *Bell*, 29 Iowa, 316; *Keeton* v. *Com.* 92 Ky. 522, 18 S. W. 359; *People* v. *Mills*, 98 N. Y. 176; *State* v. *Barbee*, 92 N. C. 820; *Cook* v. *Territory*, 3 Wyo. 110, 4 Pac. 887. And see *Armor* v. *State*, 63 Ala. 176.

All that a court ought ordinarily to do in a criminal prosecution is to state to the jury that drunkenness is one of the circumstances tending to show the

231. Intent in larceny, burglary, robbery, etc.— Larceny consists of a wrongful taking with a felonious intent; and where the taker was so intoxicated as to be unable to form such intent, he is not guilty of the crime.[46] The general condition of the accused as to drunkenness, therefore, is admissible in evidence, and to be taken into consideration in a prosecution for larceny, to enable the jury to determine his intention in taking the property,[47] and as throwing light upon the question whether or not the accused was in a condition to commit the crime at the time of the taking.[48] Drunkenness cannot be considered as a defense, however, unless it had the effect in some degree to deprive the accused of his reason.[49] It must appear that he was incapable of entertaining the intent to steal.[50] Likewise one who robbed another

state of the defendant's mind, as bearing upon the question of the presence or absence of a criminal intent. *State* v. *White*, 14 Kan. 538.

And refusal to instruct the jury in a prosecution for homicide that in fixing the grade of the crime evidence of intoxication is important, and must be carefully weighed, is not error, where the jury were required to weigh carefully all the evidence in the case, but were told that they themselves had to determine its importance. *People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9.

And an instruction that if the defendant committed the homicide in question under the influence of intoxication or the effects of previous habits of intoxication, and if the intoxication or the effect was not such as wholly to negative the legal inference of malice implied by law from the character and circumstances of the act and the want of provocation, he should be found guilty of murder in the second degree, is erroneous as a charge on the sufficiency and weight of evidence. *Gwatkin* v. *Com.* 9 Leigh, 678, 33 Am. Dec. 264.

[46]*Wood* v. *State*, 34 Ark. 341, 36 Am. Rep. 13; *Robinson* v. *State*, 113 Ind. 510, 16 N. E. 184; *People* v. *Cummins*, 47 Mich. 334, 11 N. W. 184, 186; *People* v. *Walker*, 38 Mich. 156; *State* v. *Schingen*, 20 Wis. 75. And see *Henslie* v. *State*, 3 Heisk. 202.

So, a person prosecuted for burglary with intent to commit larceny cannot be found guilty if his intoxication was such that he could not entertain a criminal intent at the time of the deed. *State* v. *Bell*, 29 Iowa, 316.

[47]*Loza* v. *State*, 1 Tex. App. 488, 28 Am. Rep. 416; *Wenz* v. *State*, 1 Tex. App. 36; *Bartholomew* v. *People*, 104 Ill. 605, 44 Am. Rep. 97; *Robinson* v. *State*, 113 Ind. 510, 16 N. E. 184; *State* v. *Koerner*, 8 N. D. 292, 78 N. W. 981.

The intoxication of the accused in a prosecution for larceny is a matter which ought to be submitted to the jury under proper instructions as bearing upon the question of his capacity to judge between right and wrong, the propriety of the instruction necessarily depending upon the peculiar circumstances of each case, as developed by the evidence. *Wenz* v. *State*, 1 Tex. App. 36.

[48]*Ingalls* v. *State*, 48 Wis. 647, 4 N. W. 785; *Jenkins* v. *State*, 93 Ga. 1, 18 S. E. 992.

So, intoxication may be considered upon the question of knowledge in a prosecution for knowingly receiving stolen property. *Com.* v. *Ault*, 10 Pa. Super. Ct. 651.

[49]*State* v. *Hart*, 29 Iowa, 268; *Robinson* v. *State*, 113 Ind. 510, 16 N. E. 184.

[50]*Bartholomew* v. *People*, 104 Ill. 605, 44 Am. Rep. 97.

A plea that larceny was committed in fun and while the accused was drunk will not protect him where the evidence as to the larceny itself was sufficient to warrant conviction. *People* v. *Wilson*, 55 Mich. 506, 21 N. W. 905.

So, in *O'Herrin* v. *State*, 14 Ind. 420, it was held that voluntary drunkenness is no excuse for larceny or other crime other than certain grades of homicide committed while the intoxication lasted, and being its immediate result, since such drunkenness is a wrongful act, and the law will hold the party responsible for the immediate consequences, without reference to intent.

while so drunk as not to know what he was doing will not be deemed to have taken property with felonious intent,[51] and the intent with which a building is entered is a necessary element of the crime of burglary, and the drunkenness of the accused may be considered in determining his purpose, motive, or intent in entering the building.[52] Nor can one be guilty of forgery with intent to defraud if he was so intoxicated as to be incapable of entertaining such intent.[53] Intoxication is no excuse for such acts, however, where the intent nevertheless existed.[54]

232. Intent in homicide cases.—While drunkenness does not excuse or palliate homicide, it may produce a state of mind in which one is incapable of entertaining or forming a design to take life.[55] And it may be taken into consideration in determining his purpose, motive, and intent in the commission of the act,[56] as bearing

[51] *Keeton* v. *Com.* 92 Ky. 522, 18 S. W. 359.

So, one person cannot be convicted for the murder of another, done by a third person, on the ground that he conspired with the third person to rob the person killed, and that the killing occurred in a robbery, where it appears that at the time he was not sufficiently sober to form the specific intent to commit the robbery. *McLeroy* v. *State*, 120 Ala. 274, 24 So. 374.

[52] *People* v. *Phelan*, 93 Cal. 111, 28 Pac. 855.

[53] *People* v. *Blake*, 65 Cal. 275, 4 Pac. 1; *Riley* v. *State* (Tex. Crim. App.) 44 S. W. 498.

And evidence tending to show that in consequence of protracted intemperance the accused had not capacity to distinguish between right and wrong, and that he did not know what he was doing at the time, is admissible in a prosecution for forgery, on the question of intent. *People* v. *Blake*, 65 Cal. 275, 4 Pac. 1.

And the condition of the accused, whether drunk or sober, at the time he signed a paper properly in evidence in a prosecution for forgery, for the purpose of a comparison of handwriting, is competent evidence. *People* v. *Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720.

So, one who passes counterfeit money when so drunk as not to know that he passed it, or that he was passing counterfeit money, is not criminally responsible therefor. *Pigman* v. *State*, 14 Ohio, 555, 45 Am. Dec. 558.

But intoxication is no defense in a prosecution for passing counterfeit notes, where the accused possessed reason enough to know whether the notes passed were good or bad, though in the absence of proof of such knowledge, he could not be found guilty. *United States* v. *Roudenbush*, Baldw. 514, Fed. Cas. No. 16,198.

In *State* v. *Welch*, 21 Minn. 22, however, it was held that intoxication is no defense in a prosecution for voting more than once, though the accused was so drunk when he voted the second time that he did not know what he was doing, did not remember that he had voted before; but the contrary was held in *People* v. *Harris*, 29 Cal. 678.

[54] *State* v. *Schingen*, 20 Wis. 75; *State* v. *Bell*, 29 Iowa, 316.

[55] *Fonville* v. *State*, 91 Ala. 39, 8 So. 688; *Morrison* v. *State*, 84 Ala. 405, 4 So. 402; *State* v. *Smith*, 49 Conn. 376. *Kelly* v. *State*, 3 Smedes & M. 518.

[56] *People* v. *Cassiano*, 30 Hun, 388; *Rogers* v. *People*, 3 Park. Crim. Rep. 633; *People* v. *Eastwood*, 14 N. Y. 562; *Lanergan* v. *People*, 50 Barb. 266; *People* v. *Hammill*, 2 Park. Crim. Rep. 223; *People* v. *Methever*, 132 Cal. 326, 64 Pac. 481; *People* v. *King*, 27 Cal. 507, 87 Am. Dec. 95; *People* v. *Nichol*, 34 Cal. 211; *People* v. *Kloss*, 115 Cal. 567, 47 Pac. 459; *Jenkins* v. *State*, 93 Ga. 1, 18 S. E. 992; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *Keeton* v. *Com.* 92 Ky. 522, 18 S. W. 359; *Kelly* v. *State*, 3 Smedes & M. 518; *State* v. *Roan* (Iowa) 97 N. W. 997; *State* v. *Williams* (Iowa) 97 N. W. 992;

solely upon the existence or nonexistence of malice.[57] A homicide committed when the accused was so intoxicated that no intent to commit the crime of murder existed is not murder in the first degree, but either manslaughter or murder in the second degree.[58] But intoxication cannot operate as an entire exemption from criminal responsibility.[59] At the utmost it only extenuates the crime from murder to manslaughter.[60] And it does not reduce the offense of murder to manslaughter as a matter of law.[61] It is to be left to the jury to determine whether the accused was capable of entertaining the specific intent.[62]

233. Degree of intoxication necessary to affect intent.—The intent with which a person commits a homicide, and not the motive or purpose of the act, is the test of his criminal responsibility in determin-

United States v. *Meagher*, 37 Fed. 875. And see *Jones* v. *State*, 29 Ga. 594; *Golliher* v. *Com.* 2 Duv. 163, 87 Am. Dec. 493.

An instruction in a prosecution for murder, in the language of California Penal Code, § 22, that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such a condition, would be erroneous if given alone, because of the omission of that portion of the section which qualifies it in cases where the actual existence of an intention is a necessary element in the offense, but is proper where the whole section is given, if the information includes the offense of manslaughter, to which that part is applicable. *People* v. *Lane*, 100 Cal. 379, 34 Pac. 856.

[57]*Ford* v. *State*, 71 Ala. 385; *State* v. *Johnson*, 40 Conn. 136; *Wilkerson* v. *Com.* 88 Ky. 29, 9 S. W. 836; *Shannahan* v. *Com.* 8 Bush, 464, 8 Am. Rep. 466; *Blimm* v. *Com.* 7 Bush, 320; *Golliher* v. *Com.* 2 Duv. 163, 87 Am. Dec 493; *Moon* v. *State*, 68 Ga. 687; *Kelly* v. *State*, 3 Smedes & M. 518.

[58]*Rogers* v. *People*, 3 Park. Crim. Rep. 633; *People* v. *Lane*, 100 Cal. 379, 34 Pac. 856; *Tidwell* v. *State*, 70 Ala. 33; *Smith* v. *State*, 4 Neb. 277; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Com.* v. *Baker*, 11 Phila. 631; *Tucker* v. *United States*, 151 U. S. 164, 38 L. ed. 112, 14 Sup. Ct. Rep. 299.

Unless the jury in a prosecution for murder is satisfied beyond a reasonable doubt that the accused was so free from intoxication that he could form an intention maliciously to kill, and did form such an intention, they cannot convict him of a higher crime than manslaughter. *Smith* v. *State*, 4 Neb. 277.

[59]*Kriel* v. *Com.* 5 Bush, 363; *Blimm* v. *Com.* 7 Bush, 320; *Cleveland* v. *State*, 86 Ala. 1, 5 So. 426; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *State* v. *Wilson*, 104 N. C. 868, 10 S. E. 315.

[60]*Blimm* v. *Com.* 7 Bush, 320.

[61]*State* v. *Johnson*, 40 Conn. 136; *White* v. *State*, 103 Ala. 72, 16 So. 63; *State* v. *Ashley*, 45 La. Ann. 1036, 13 So. 738. And see *State* v. *White*, 14 Kan. 538.

Evidence of drunkenness can only be considered in a prosecution for homicide for the purpose of determining the degree of the crime; and for this purpose it must be received with great caution. *People* v. *Lewis*, 36 Cal. 531.

And though drunkenness is a circumstance tending to show absence of malice in a prosecution for homicide, it should not be singled out from the other proof and laid before the jury with the statement that it mitigates the offense. *Shannahan* v. *Com.* 8 Bush, 464, 8 Am. Rep. 465.

[62]*United States* v. *Meagher*, 37 Fed. 879; *Chatham* v. *State*, 92 Ala. 47, 9 So. 607; *Armor* v. *State*, 63 Ala. 176; *King* v. *State*, 90 Ala. 612, 8 So. 856; *State* v. *Smith*, 49 Conn. 376; *People* v. *Mills*, 98 N. Y. 176; *Cook* v. *Territory*, 3 Wyo. 110, 4 Pac. 887.

Refusal to instruct in a murder case that if the defendant was so intoxicated that his drunken condition was observable, it is important on the question of his capacity to form an intent to commit the deed, is not error, where the court had previously instructed that in-

ing the degree of his guilt.[63] The drunkenness which will reduce homicide from murder to manslaughter must be of such a character and extent as to render the accused incapable of entertaining or forming a design to take life.[64] It must have been such as to result in a fixed mental disease of some duration;[65] or such as to effect a temporary destruction of the reason, mere nervous excitement not being sufficient.[66] One who, though intoxicated, knows what he is doing and selects the means naturally adapted to his purpose, and kills his victim by such means, will be deemed capable of entertaining the intent, and is responsible for his acts in the same manner and to the same extent as if he were sober.[67] And the fact that the accused was intoxicated, and that he was induced to conceive a design to kill more readily because of his intoxication, will not reduce the degree of his crime.[68]

toxication might destroy capacity to form an intent to kill. *State* v. *Smith*, 49 Conn. 376.

[63]*State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Reg.* v. *Dixon*, 11 Cox C. C. 341.

[64]*King* v. *State*, 90 Ala. 612, 8 So. 856; *Gillooley* v. *State*, 58 Ind. 182; *Roberts* v. *People*, 19 Mich. 401.

[65]*Lanergan* v. *People*, 6 Park Crim. Rep. 209; *Gillooley* v. *State*, 58 Ind. 182.

[66]*Casat* v. *State*, 40 Ark. 511; *Walker* v. *State*, 91 Ala. 76, 9 So. 87.

Voluntary intoxication, although amounting to a frenzy, of one who, without provocation, committed a homicide, does not exempt him from the same construction of his conduct, and the same legal inferences upon the question of intent as affecting the grade of his crime, as those applicable to persons entirely sober. *Flanigan* v. *People*, 86 N. Y. 554, 40 Am. Rep. 566.

[67]*Roberts* v. *People*, 19 Mich. 401; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *Warner* v. *State*, 56 N. J. L. 686, 44 Am. St. Rep. 415, 29 Atl. 505; *People* v. *Hammill*, 2 Park. Crim. Rep. 223; *People* v. *Jones*, 2 Edm. Sel. Cas. 88; *State* v. *Tatro*, 50 Vt. 483; *Reg.* v. *Dixon*, 11 Cox C. C. 341.

Where a killing was unprovoked, the fact that the perpetrator was intoxicated cannot be allowed to affect the legal character of the act. *Friery* v. *People*, 54 Barb. 319.

And one who was sober enough to force his way into a building where his intended victim was, and follow him from room to room, and to provide himself with a murderous weapon, and to announce his intentions, and finally execute his purpose by a repetition of fatal blows, and to plan and execute an immediate escape, was not sufficiently intoxicated to reduce the grade of the offense. *Kenny* v. *People*, 31 N. Y. 330.

And one who, at the time of committing a homicide, though intoxicated, was conscious of and understood what was done and said by himself and others so as to give an intelligent and true account of it at the trial, must be held responsible for his conduct. *Territory* v. *Franklin*, 2 N. M. 307.

And one who committed a homicide by mixing arsenic with the drink of the person killed, for the purpose of killing him, is guilty of murder without reference to the degree of intoxication under which he labored. *People* v. *Robinson*, 2 Park Crim. Rep. 235.

And while intoxication may be adverted to in a prosecution for homicide where no malicious intent is to be inferred, and where the accused had been aggravated, it cannot be done where the killing was caused by the use of a dangerous weapon. *Lanergan* v. *People*, 50 Barb. 266; *Rex* v. *Meakin*, 7 Car. & P. 297.

[68]*Warner* v. *State*, 56 N. J. L. 686, 44 Am. St. Rep. 415, 29 Atl. 505.

Deliberate intent unlawfully to take life constitutes malice necessary to murder in the first degree, whether it springs from hatred, ill-will, revenge, or a mere frenzy of drunkenness. *Beck* v. *State*, 76 Ga. 452.

234. Deliberation and premeditation in homicide cases.—Intoxication, though involuntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design;[69] not because *per se* it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear.[70] Drunkenness as evidence of want of premeditation is not within the rule which excludes it as an excuse for crime.[71] And a person who commits a homicide while so drunk as to be incapable of forming a premeditated and deliberate design to kill is not guilty of murder in the first degree.[72] Intoxication, however, raises

[69]*People* v. *Nichol*, 34 Cal. 212; *People* v. *Belencia*, 21 Cal. 544; *People* v. *Williams*, 43 Cal. 344; *State* v. *Johnson*, 40 Conn. 136; *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *Golden* v. *State*, 25 Ga. 527; *Jones* v. *State*, 29 Ga. 594; *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *State* v. *O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282; *Buckhannon* v. *Com.* 86 Ky. 110, 5 S. W. 358; *Curry* v. *Com.* 2 Bush, 67; *Golliher* v. *Com.* 2 Duv. 164, 87 Am. Dec. 493; *Hill* v. *State*, 42 Neb. 503, 60 N. W. 916; *Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *Smith* v. *State*, 4 Neb. 277; *People* v. *Batting*, 49 How. Pr. 392; *People* v. *Conroy*, 2 N. Y. Crim. Rep. 247; *Pigman* v. *State*, 14 Ohio 555, 45 Am. Dec. 558; *State* v. *Zorn*, 22 Or. 591, 30 Pac. 317; *State* v. *Weaver*, 35 Or. 415, 58 Pac. 109; *Cartwright* v. *State*, 8 Lea, 381; *Pirtle* v. *State*, 9 Humph. 663; *Haile* v. *State*, 11 Humph. 154; *Swan* v. *State*, 4 Humph. 136; *Norfleet* v. *State*, 4 Sneed, 345; *Ayres* v. *State* (Tex. Crim. App.) 26 S. W. 396; *Clore* v. *State*, 26 Tex. App. 624, 10 S. W. 242; *Williams* v. *State*, 25 Tex. App. 76, 7 S. W. 661; *Charles* v. *State*, 13 Tex. App. 658; *McCarty* v. *State*, 4 Tex. App. 468; *Colbath* v. *State*, 4 Tex. App. 76; *Brown* v. *State*, 4 Tex. App. 275; *Colbath* v. *State*, 2 Tex. App. 391; *Willis* v. *Com.* 32 Gratt. 929; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Cross* v. *State*, 55 Wis. 261, 12 N. W. 425; *Hopt* v. *Utah*, 104 U. S. 631, 26 L. ed. 873; *Rex* v. *Grindley*, cited in 1 Russell on Crimes, 2d Am. ed. *8. But see *Rex* v. *Carroll*, 7 Car. & P. 145.

The influence of voluntary intoxication upon the question as to whether or not there was sufficient premeditation to constitute a homicide—murder in the first degree—depends upon its degree and its effect on the mind and passions. *Golliher* v. *Com.* 2 Duv. 164, 87 Am. Dec. 493.

[70]*Buckhannon* v. *Com.* 86 Ky. 110, 5 S. W. 358; *Hill* v. *State*, 42 Neb. 503, 60 N. W. 916; *People* v. *King*, 27 Cal. 507, 87 Am. Dec. 95; *State* v. *Johnson*, 40 Conn. 136.

A conviction of murder in the first degree is not warranted where death was inflicted in a conflict while the defendant was excited by liquor, in the absence of evidence tending to show that after the conflict began, and before the stabbing, there might have been an instant of time for deliberation and premeditation. *State* v. *Sopher*, 70 Iowa, 494, 30 N. W. 917.

And a homicide committed in a sudden quarrel, by a blow inflicted by an iron bar suddenly caught up while the party was intoxicated, is not murder in the first degree unless done in an attempt to commit a felony. *Kelly* v. *Com.* 1 Grant Cas. 484.

[71]*People* v. *Belencia*, 21 Cal. 544.

[72]*Com.* v. *Perrier*, 3 Phila. 229; *Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110; *McGinnis* v. *Com.* 102 Pa. 66; *Com.* v. *Platt*, 11 Phila. 421; *Com.* v. *Hart*, 2 Brewst. (Pa.) 546; *Com.* v. *Baker*, 11 Phila. 631; *Cartwright* v. *State*, 8 Lea, 377; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State* v. *Williams* (Iowa) 97 N. W. 992.

A homicide committed without provocation, but while so intoxicated as to render the person incapable of doing a deliberate or premeditated act, is murder in the second degree. *Boswell* v.

no inference as to the absence of premeditation and deliberation in the commission of the crime as a matter of law,[73] and it cannot serve as an excuse for the offender.[74] The only purpose for which it is admissible in a prosecution for murder is to show an absence of premeditated design to kill, so as to reduce the homicide to a lower degree.[75] And it does not form a legitimate matter of inquiry as between murder in the second degree and manslaughter, unless the provocation was such as would, at common law, have reduced the degree to manslaughter;[76] or unless it existed to such an extent as to render the person incapable of forming a purpose or of intending the act.[77] The question whether drunkenness has incapacitated a person to form a premeditated design to murder is one for the jury.[78] And so is the question as to the weight to which the evidence is entitled.[79]

235. Degree of intoxication necessary to affect deliberation.—Murder in the first degree, in which malice and premeditation are distinguishing ingredients, cannot be committed by one who is inca-

Com. 20 Gratt. 860; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

[73]*People* v. *Mills*, 98 N. Y. 176; *O'Brien* v. *People*, 48 Barb. 274; *State* v. *Avery*, 44 N. H. 394; *Pennsylvania* v. *M'Fall*, 1 Addison (Pa.) 257. And see *People* v. *Williams*, 43 Cal. 344; *People* v. *Belencia*, 21 Cal. 544.

And while evidence of intoxication may reduce a homicide to murder in a lower degree, it should be received with great caution, even for that purpose. *People* v. *Vincent*, 95 Cal. 425, 30 Pac. 581; *People* v. *Belencia*, 21 Cal. 544.

[74]*People* v. *Fuller*, 2 Park. Crim. Rep. 16; *State* v. *Johnson*, 40 Conn. 136.

[75]*Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *People* v. *Vincent*, 95 Cal. 425, 30 Pac. 581; *State* v. *Johnson*, 40 Conn. 136; *Com.* v. *Crozier*, 1 Brewst. (Pa.) 349.

Murder in the second degree rests upon implied malice, and the jury may find the existence of implied malice which will subject the accused to a charge of murder in the second degree, though his intoxication was such as to disprove express malice. *State* v. *Johnson*, 41 Conn. 584.

[76]*People* v. *Langton*, 67 Cal. 427, 7 Pac. 843; *People* v. *Nichol*, 34 Cal. 211; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Davis* v. *State*, 25 Ohio St. 369; *State* v. *Weaver*, 35 Or. 415, 58 Pac. 109; *Pirtle* v. *State*, 9 Humph. 663; *Norfleet* v. *State*, 4 Sneed, 345; *Rex* v. *Carroll*, 7 Car. & P. 145.

Voluntary intoxication cannot reduce a homicide which would have been murder if committed by a sober man, to manslaughter. *Brown* v. *State*, 4 Tex. App. 275; *Harvey* v. *State*, 68 Ga. 612; *Com.* v. *Platt*, 11 Phila. 415.

[77]*Davis* v. *State*, 25 Ohio St. 369. And see *Keenan* v. *Com.* 44 Pa. 55, 84 Am. Dec. 414.

[78]*Pennsylvania* v. *M'Fall*, 1 Addison (Pa.) 255; *King* v. *State*, 90 Ala. 612, 8 So. 856; *State* v. *Smith*, 49 Conn. 376; *King* v. *State* (Tex. Crim. App.) 64 S. W. 245.

Drunkenness on the part of the accused in a prosecution for murder in the first degree should be submitted to the jury, whatever its degree. *Lancaster* v. *State*, 2 Lea, 575.

[79]*People* v. *Belencia*, 21 Cal. 544.

But where the question of the capacity of a person charged with murder to deliberate at the time of its commission is placed distinctly before the jury in a prosecution therefor, at his instance, it is not improper for the court to instruct them as to what might amount to deliberation and premeditation on his part. *People* v. *Williams*, 43 Cal. 344.

And an instruction as to intoxication in a prosecution for murder in the first degree should designate the effect of intoxication to a degree sufficient to render the accused incapable of forming a premeditated design to kill. *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835.

pacitated to think deliberately and determine rationally as to the quality, character, and consequences of the act; and intoxication depriving a person of the power to see and weigh the nature of the act is sufficient to reduce homicide from murder in the first, to murder in the second, degree.[80] The test of responsibility in such case is the question whether the accused was, at the time, rendered incapable of forming an intent, or exercising the deliberation and premeditation which are essential to the commission of the crime.[81] The only question is whether the accused was in such a condition as to be capable of forming a design to kill, and did kill in pursuance of that design.[82] But the intoxication need not go to the extent of depriving the person of the power of volition or of the ability to form an intent, in order to warrant a finding of the absence of the necessary degree of deliberation or premeditation to constitute murder in the first degree.[83] Nor need it be such as to deprive him of the capacity to form a premeditated and deliberate design to take life, where the question is between murder in the first, and murder in the second, degree.[84] But no proof of intoxication short of showing that the person charged with the murder was utterly incapable of free motive will shield him.[85] And one who is drunk may act with premeditation as well as one who is sober, and in such case is equally responsible.[86] Voluntary intoxication, in the absence of such mental incapacity resulting therefrom as

[80] *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *Jones* v. *Com.* 75 Pa. 403; *Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110; *Com.* v. *Hart*, 2 Brewst. (Pa.) 546; *Com.* v. *Perrier*, 3 Phila. 229; *State* v. *Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *Ayres* v. *State* (Tex. Crim. App.) 26 S. W. 326; *McCarty* v. *State*, 4 Tex. App. 461; *Willis* v. *Com.* 32 Gratt. 929; *Boswell* v. *Com.* 20 Gratt. 860; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. And see *State* v. *Bowen*, Houst. Crim. Rep. (Del.) 91.

[81] *Territory* v. *Davis* (Ariz. Super. Ct.) 6 Lawson, Crim. Defenses, 630; *Bernhardt* v. *State*, 82 Wis. 23, 51 N. W. 1009.

[82] *Nevling* v. *Com.* 98 Pa. 323; *State* v. *McDaniel*, 115 N. C. 807, 20 S. E. 622.

[83] *People* v. *Leonardi*, 143 N. Y. 360, 38 N. E. 372; *McIntyre* v. *People*, 38 Ill. 514.

The fact that a person was sober enough to form an intent raises no presumption that he was sober enough to form a premeditated design to kill. *Garner* v. *State*, 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835.

[84] *Haile* v. *State*, 11 Humph. 154; *Cartwright* v. *State*, 8 Lea, 377; *Lancaster* v. *State*, 2 Lea, 575.

[85] *Cluck* v. *State*, 40 Ind. 263; *State* v. *Bullock*, 13 Ala. 403; *State* v. *Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *Kenney* v. *People*, 27 How. Pr. 206.

Intoxication which will reduce homicide from murder in the first degree to murder in the second degree must be such as to deprive the person committing it of the power of judging of his acts and their legitimate consequences. *Com.* v. *Crozier*, 1 Brewst. (Pa.) 349.

[86] *People* v. *Belencia*, 21 Cal. 544; *People* v. *Williams*, 43 Cal. 344; *State* v. *Bullock*, 13 Ala. 417; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Com.* v. *McGowan*, 189 Pa. 641, 69 Am. St. Rep. 836, 42 Atl. 365; *State* v. *Tatro*, 50 Vt. 483; *Honesty* v. *Com.* 81 Va. 283; *State* v. *Douglass*, 28 W. Va. 297; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Rex* v. *Thomas*, 7 Car. & P. 817.

The intoxication of a person committing a homicide, though amounting to insensibility, will not repel an inference of malice and premeditation arising from

renders the party incapable of thinking deliberately or determining rationally upon the purpose of taking human life, and which leaves him full power to know the quality of his act, and abstain from doing it, cannot reduce homicide from murder in the first, to murder in the second, degree.[87]

236. Provocation.—Whether a party committing a homicide was sober or intoxicated cannot affect the question of the existence or non-existence of such an adequate cause of provocation as might reduce the offense to manslaughter.[88] But where a person committing a crime has received a provocation which, if acted upon instantly, would mitigate the offense of a sober man, evidence of intoxication may be considered in determining whether it was due to provocation or malice, whether it was done in the heat of passion, or with a deliberate purpose, or otherwise, and generally to explain his conduct.[89] The principle is that where, in prosecutions for violence, the encounter was sudden, and the defendant, prior to such encounter, had no malice or old grudge, intoxication at the time of the encounter can be taken into consideration to ascertain whether the defendant, when under a legal provocation, acted from malice or from sudden passion,[90] and whether the act done was specifically intended. But if

other facts in the case, or mitigate the offense to a crime of less degree. *State* v. *Dearing*, 65 Mo. 533.

[87] *Aszman* v. *State*, 123 Ind. 347, 8 L. R. A. 33, 24 N. E. 123; *People* v. *Fish*, 125 N. Y. 136, 26 N. E. 319; *State* v. *McDaniel*, 115 N. C. 807, 20 S. E. 622; *Keenan* v. *Com.* 44 Pa. 55, 84 Am. Dec. 414.

And a refusal to instruct the jury in a prosecution for homicide that if the accused and the person killed were engaged in a drunken brawl, and while so engaged the accused took the other's life, no premeditation can be inferred, and he cannot be convicted of murder in any degree, is not error, where there was evidence tending to show that he had threatened to kill the deceased, and that he sought the quarrel for the purpose of furnishing an occasion for the killing. *Cook* v. *Territory*, 3 Wyo. 110, 4 Pac. 887.

[88] *Gaitan* v. *State*, 11 Tex. App. 544; *McIntyre* v. *People*, 38 Ill. 514; *Com.* v. *Hawkins*, 3 Gray, 463; *Vann* v. *State*, 83 Ga. 44, 9 S. E. 945; *Keenan* v. *Com.* 44 Pa. 55, 84 Am. Dec. 414.

A murder committed by a drunken man from a sudden passion, imagining a provocation when there was none, or when it was not adequate, at a time when the offender was not in a frame of mind to deliberate and premeditate, is murder in the second degree. *Willis* v. *Com.* 32 Gratt. 929.

[89] *Jones* v. *State*, 29 Ga. 594; *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Eastwood* v. *People*, 3 Park. Crim. Rep. 25; *State* v. *McCants*, 1 Speers L. 389; *Cartwright* v. *State*, 8 Lea, 377; *State* v. *Mullen*, 14 La. Ann. 577; *Rex* v. *Thomas*, 7 Car. & P. 817; *Reg.* v. *Monkhouse*, 4 Cox C. C. 55.

A jury may consider the drunkenness of a person accused of homicide in grading the act, not to excuse or mitigate or extenuate it, but to assist in deciding, where there was a provocation, whether the intention to kill preceded the provocation or was produced by it. *Jones* v. *State*, 29 Ga. 594.

But an instruction in a trial for murder that if the accused, when he fired the fatal shot, was intoxicated and under the influence of liquor, the jury may consider that fact in determining whether he acted in passion and heat of blood or from excitement from a blow he had received, or from malice, is properly refused. *Morrison* v. *State*, 84 Ala. 405, 4 So. 402.

[90] See *Schaller* v. *State*, 14 Mo. 502; *Rex* v. *Thomas*, 7 Car. & P. 817.

malice or specific intent to do the criminal act is proved *aliunde,* then intoxication at the time does not lower the grade of offense.[91]

237. Self-defense.—Voluntary drunkenness does not enlarge the right of self-defense, and it is not available as a defense to a charge of murder when in consequence thereof the accused acted upon an exaggerated or unjustifiable belief as to the necessity for taking the life of another in defense of his own.[92] But one who kills another believing that he is acting in self-defense, but who errs in determining whether or not his peril is imminent, his error being due to the fact that he was intoxicated, is negligent in forming his belief, and will be guilty of manslaughter, since negligent homicide is manslaughter.[93] And the intoxication of a person committing a homicide alleged to be in self-defense may be considered on the question whether the apprehended danger was sufficient to justify the act.[94]

238. Intent in assault cases.—The voluntary drunkenness of the accused will not excuse an assault, though he was so intoxicated as to be unconscious of what he was doing, since the questions of malice and intent are not involved.[95] The crime of assault with intent to kill, however, is separable into degrees, so as to render evidence of the intoxication of the accused admissible on a trial therefor.[96] And in determining whether an assault was committed with intent to kill, it is material to inquire whether the defendant's mental faculties were so overcome by intoxication as to render him incapable of entertaining the intent.[97] But one charged with assault with intent to kill is

[91]See cases in Wharton Crim. Law, 8th ed. § 54 *et seq.*

[92]*Springfield* v. *State* 96 Ala. 81, 38 Am. St. Rep. 85, 11 So. 250.

[93]*United States* v. *King,* 34 Fed. 302.

[94]*Reg.* v. *Gamlen,* 1 Fost. & F. 90; *Rex* v. *Thomas,* 7 Car. & P. 817; *Marshall's Case,* 1 Lewin C. C. 76; *State* v. *Roan* (Iowa) 97 N. W. 997.

And a person is not bound to stand by and see his brother killed or suffer great bodily harm because the brother was so drunk as not to be mentally competent to know his duty to retreat and get out of the way of bodily harm, or as to be physically unable to retreat. *State* v. *Greer,* 22 W. Va. 800.

So, drunkenness may be taken into consideration in a prosecution for stabbing, to determine whether the accused acted under a bona fide apprehension that his person or property was about to be attacked. *Marshall's Case,* 1 Lewin C. C. 76.

[95]*Engelhardt* v. *State,* 88 Ala. 100, 7 So. 154; *Carter* v. *State,* 87 Ala. 113, 6 So. 356; *Com.* v. *Malone,* 114 Mass. 295; *Tyra* v. *Com.* 2 Met. (Ky.) 1.

But the jury on a prosecution for assault may look to the acts and declarations of the defendant and all the evidence in the case to determine whether he was drunk or insane. *Ross* v. *State,* 62 Ala. 224.

[96]*People* v. *Odell,* 1 Dak. 197, 46 N. W. 601; *Lancaster* v. *State,* 2 Lea, 575.

In an assault with intent to kill, the state and condition of the mind, and an ability to form the intent, are of the very essence of the crime. *State* v. *O'Connor,* 11 Nev. 416.

[97]*Roberts* v. *People,* 19 Mich. 491; *Mooney* v. *State,* 33 Ala. 419; *State* v. *Fiske,* 63 Conn. 388, 28 Atl. 572; *United States* v. *Bowen,* 4 Cranch C. C. 604, Fed. Cas. No. 14,629; *State* v. *O'Connor,* 11 Nev. 416; *Reg.* v. *Monkhouse,* 4 Cox C. C. 55; *Reg.* v. *Frances,* 4 Cox C. C. 57. But see *Donelson* v. *Poscy,* 13 Ala. 752.

But an instruction that drunkenness is no excuse for crime is not error in a

not entitled to acquittal upon proof that he was so drunk at the time as to be incapable of forming the necessary intent; it merely reduces the case to one of assault and battery.[98] And drunkenness will not reduce a voluntary assault with intent to murder to an aggravated assault and battery.[99] To be capable of entertaining an intent to kill, however, an intoxicated person need not have been capable of appreciating the moral qualities of his act.[100] And one who commits an assault, entertaining in fact an intent to kill, which intent he would not have entertained but for the intoxication, is responsible for the intent as well as for the act.[1] It is a question for the jury whether the accused was so far intoxicated as to be unable to form an intent to kill.[2] So, proof of intoxication may be considered in a

prosecution for assault with intent to kill, where the jury was told that if the accused was so frenzied from the use of liquor as to be incapable of knowing what he was doing they would be justified in acquitting him, and that they were to take all the circumstances into consideration together in determining if he acted with deliberation. *Cross* v. *State*, 55 Wis. 261, 12 N. W. 425.

And a person charged with assault with intent to kill may be held responsible therefor though he was so drunk at the time as to be incapable of forming an intent to kill, where the assault was made pursuant to a conspiracy, and the accused was actually present, aiding and abetting; but he would not be responsible if he was so drunk as to be incapable of understanding its nature and consequences at the time the conspiracy was formed. *State* v. *Pasnau*, 118 Iowa, 501, 92 N. W. 682.

[98]*Mooney* v. *State*, 33 Ala. 419; *Walker* v. *State*, 85 Ala. 7, 7 Am. St. Rep. 17, 4 So. 686; *People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *State* v. *Grear*, 29 Minn. 221, 13 N. W. 140.

But mere intoxication on the part of the defendant in a prosecution for assault with intent to kill does not authorize the court to charge the law applicable to a lesser grade of the offense. *Pugh* v. *State*, 2 Tex. App. 539.

And error in instructing that intoxication cannot reduce the degree of the offense of assault with intent to kill is harmless, where the accused received the lowest legal punishment for the offense. *Ayres* v. *State* (Tex. Crim. App.) 26 S. W. 396.

And refusal to charge on drunkenness in such case is not error. *Hernandez* v. *State*, 32 Tex. Crim. Rep. 271, 22 S. W. 972. And see *State* v. *Bowen*, Houst. Crim. Rep. (Del.) 91.

[99]*Jeffries* v. *State*, 9 Tex. App. 598.

[100]*Roberts* v. *People*, 19 Mich. 401.

To excuse, the drunkenness must amount to insanity. *Little* v. *State*, 42 Tex. Crim. Rep. 551, 61 S. W. 483.

But an instruction in a prosecution for assault with intent to kill that drunkenness is no excuse for crime is not error, where the court had charged that if the accused was so frenzied from the use of liquor as to be incapable of knowing what he was doing his acquittal would be justified. *Cross* v. *State*, 55 Wis. 261, 12 N. W. 425.

And a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation, may be considered in a prosecution for assault with intent to kill, though it was not so excessive as to render him absolutely incapable of forming a deliberate purpose. *Lancaster* v. *State*, 2 Lea, 575.

[1]*Roberts* v. *People*, 19 Mich. 401.

And ill-treatment of, and bad conduct toward, and threats against, the person injured, are admissible in evidence in a prosecution for an assault with intent to kill, to meet the theory of temporary insanity produced by the recent use of intoxicating liquors, as tending to show malice, ill-will, and motive, and as explanatory of the real purpose of the accused. *Hall* v. *State*, 31 Tex. Crim. Rep. 565, 21 S. W. 368.

[2]*Com.* v. *Hagenlock*, 140 Mass. 125, 3 N. E. 36. And see *State* v. *Barbee*, 92 N. C. 820; *State* v. *White*, 14 Kan. 538; *Crosby* v. *People*, 137 Ill. 325, 27 N. E. 49.

But the defendant in a prosecution for

prosecution for assault with intent to wound, since the intent is of the essence of the offense; but not as an excuse to show that the crime was not committed.[3] And the intention to do great bodily harm must in fact exist to justify a conviction for an assault with such intent, and in case of such intoxication as to render the accused incapable of forming such intent, he is not guilty.[4]

239. Intent in assault to rape.— Drunkenness is not an excuse for the crime of rape, though the mind of the party was so far overcome as to render him incapable of forming an intent.[5] But one who was so drunk at the time of the alleged criminal act as to be incapable of forming an intent to ravish cannot be found guilty of an assault with intent to commit a rape.[6]

assault with intent to kill in which the jury had been properly instructed with regard to the specific intent essential to the commission of the crime, who desires that the jury shall be informed as to the law with regard to the effect of intoxication upon such intent, must ask additional instructions covering the supposed defects. *Bramlette* v. *State*, 21 Tex. App. 611, 57 Am. Rep. 622, 2 S. W. 765.

And failure to charge as to the effect of intoxication on responsibility for an assault with intent to kill is not error, where the entire proof shows that the accused was sober enough to understand the nature of the act, and that it was not caused by a sudden outburst of passion. *Carpenter* v. *Com.* 92 Ky. 452, 18 S. W. 9.

[3]*Cline* v. *State*, 43 Ohio St. 332, 1 N. E. 22.

And when evidence of the intoxication of the defendant is admitted in a prosecution for maliciously stabbing with intent to wound, it is not error for the court to refuse to charge that it is proper to be taken into consideration and should have its just weight in determining as to the existence of a malicious intent. *Nichols* v. *State*, 8 Ohio St. 435.

So, refusal to instruct in a prosecution for assault with intent to do great bodily harm, that if the jury are not satisfied beyond a reasonable doubt that the defendant was guilty of the intent charged, they may find him guilty of an assault only, and a remark by the court that the only evidence of an assault is evidence tending to prove an assault for the purpose of doing great bodily harm, and if the defense of drunkenness is made out so as to render the defendant irresponsible it would cover a common assault as well as the other, are not reversible error, where it had charged upon the subject of intoxication that if the defendant was in such a condition of mind by reason of intoxication that he did not know what he was doing or whether the action were right or wrong, then he is irresponsible, since it gives the prisoner a chance of acquittal to which he is not entitled. *State* v. *Grear*, 29 Minn. 221, 13 N. W. 140.

[4]*State* v. *Garvey*, 11 Minn. 154, Gil. 95.

So, while voluntary intoxication is no excuse for crime, one who makes an assault while so drunk that he does not know what he is doing and is unable to form a criminal intent, should be acquitted upon a charge of assault with intent to rob. *Scott* v. *State*, 12 Tex. App. 31.

[5]*Crew* v. *State* (Tex. Crim. App.) 23 S. W. 14; *State* v. *Murphy*, 118 Mo. 7, 25 S. W. 95.

[6]*State* v. *Donovan*, 61 Iowa, 369, 16 N. W. 206; *Reagan* v. *State*, 28 Tex. App. 227, 19 Am. St. Rep. 833, 12 S. W. 601; *Whitten* v. *State*, 115 Ala. 72, 22 So. 483.

But an instruction in a prosecution for assault with intent to ravish, calling the attention of the jury to certain facts and circumstances in the case, and directing them that if the accused was in too imbecile a condition to form a design or purpose to ravish, they could not find him guilty, is objectionable as opening a field of inquiry as to his capacity to exercise his will and to distinguish between right and wrong. *State* v. *Donovan*, 61 Iowa, 369, 16 N. W. 206.

240. Intent in attempt to commit suicide.— Drunkenness is no excuse for an attempt to commit suicide, but it is a material fact for the consideration of the jury in arriving at a conclusion as to whether or not the accused really intended to destroy his life.[7]

241. Texas statute as to intoxication.—There is a statute in Texas providing that neither intoxication nor temporary insanity produced by the voluntary recent use of ardent spirits shall constitute an excuse for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of a crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced in mitigation of a penalty, and, in cases of murder, to determine the degree. The object of this statute is to eliminate mere intoxication as a defense in a criminal prosecution, regardless of the constituent elements of the crime, and to prevent temporary insanity produced by intoxication from being a defense, but to permit it to be introduced in murder cases to determine the degree, and in all criminal prosecutions, to mitigate or lessen the penalty.[8] And under it mere intoxication from the recent use of ardent spirits will not excuse or mitigate the degree of the crime unless the intoxication was such as to produce temporary insanity, depriving the person of capacity to distinguish between right and wrong as to the particular act charged.[9] A person committing a crime, however, whose intoxication was so excessive as to render him unconscious that he was doing a wrong act which would subject him to punishment, is not

[7] *Reg.* v. *Doody*, 6 Cox C. C. 463.

Evidence at the trial of an indictment for an attempt to commit suicide, that the accused was at the time so drunk that she did not know what she did, is sufficient to negative the intent to kill herself. *Reg.* v. *Moore*, 3 Car. & K. 319, 16 Jur. 750.

[8] *Evers* v. *State*, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Lyle* v. *State*, 31 Tex. Crim. Rep. 103, 19 S. W. 903; *Williams* v. *State*, 25 Tex. App. 76, 7 S. W. 661.

[9] *Evers* v. *State*, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744; *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343; *Kelley* v. *State*, 31 Tex. Crim. Rep. 216, 20 S. W. 357; *De Alberts* v. *State*, 34 Tex. Crim. Rep. 508, 31 S. W. 391; *Houston* v. *State*, 26 Tex. App. 657, 14 S. W. 352; *Clore* v. *State*, 26 Tex. App. 624, 10 S. W. 242. And see *Holloway* v. *State* (Tex. Crim. App.) 77 S. W. 14.

And refusal to charge with reference to temporary insanity produced by the recent use of intoxicating liquors, in a criminal prosecution, is not error, where the evidence shows a state of drunkenness short of temporary insanity only, and the court gives the defendant the same advantage he would have had in case of temporary insanity. *Delgado* v. *State*, 34 Tex. Crim. Rep. 157, 29 S. W. 1070.

And a continuance will not be granted in a prosecution for homicide, to procure the evidence of a witness by whom it is expected to prove that the accused was drunk previous to the homicide, there being no issue of temporary insanity produced by the recent use of intoxicating liquors. *Sherar* v. *State*, 30 Tex. App. 349, 17 S. W. 621.

And a person committing a homicide is not entitled to bail under the Texas statute because of his mere intoxication at the time he committed it. *Ex parte Evers*, 29 Tex. App. 539, 16 S. W. 343.

prevented from pleading his condition in defense.[10] And intoxication may be shown where the crime committed consists of an act combined with a particular intent, for the purpose of showing that the perpetrator's mental faculties were so far overcome as to render him incapable of entertaining the intent which is one of the necessary ingredients of the crime, without which it could not have been committed.[11] And temporary insanity produced by the voluntary recent use of ardent spirits may be considered in determining the degree of the crime in murder cases.[12] And insanity, though arising from intoxication, but not produced by the recent use of intoxicating liquors, is a good defense.[13] Nor does the statute apply to delirium tremens, or *mania a potu,* generally caused by abstinence from liquor after long indulgence, which is an absolute defense.[14]

242. Drinking for the purpose of crime.— Intoxication or drunkenness is entitled to no consideration in determining the degree of a homicide or other crime, where the accused drank liquor for the purpose of nerving himself for the deed, or to excite his animal courage.[15]

[10]*Evers* v. *State,* 31 Tex. Crim. Rep. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811, 20 S. W. 744.

But in order to raise the question of temporary insanity from the voluntary recent use of liquor, in a prosecution for homicide, the intoxication must have been operative on the mind of the accused at the time, to the extent of rendering him temporarily insane. *Gonzales* v. *State,* 31 Tex. Crim. Rep. 508, 21 S. W. 253.

[11]*Reagan* v. *State,* 28 Tex. App. 227, 19 Am. St. Rep. 833, 12 S. W. 601; *Fisher* v. *State,* 30 Tex. App. 502, 18 S. W. 90.

But evidence of intoxication at the time of the commission of a criminal act is admissible on a prosecution therefor only as bearing upon the question of criminal intent. *Scott* v. *State,* 12 Tex. App. 31.

[12]*Houston* v. *State,* 26 Tex. App. 657, 14 S. W. 352; *Ex parte Evers,* 29 Tex. App. 539, 16 S. W. 343; *Ward* v. *State,* 19 Tex. App. 664; *Rather* v. *State,* 25 Tex. App. 624, 9 S. W. 69.

Evidence tending to prove that a person was temporarily insane from the use of ardent spirits at the time he committed a homicide is sufficient to require the submission of the issue of murder in the second degree to the jury in a prosecution therefor. *Burkhard* v. *State,* 18 Tex. App. 599.

But it is no defense in a prosecution for murder in the second degree. *Tippett* v. *State,* 37 Tex. Crim. Rep. 186, 39 S. W. 120.

[13]*Ward* v. *State,* 19 Tex. App. 664; *Rather* v. *State,* 25 Tex. App. 623, 9 S. W. 69; *Williams* v. *State* (Tex. Crim. App.) 53 S. W. 859.

Intoxication short of insanity is not to be regarded by the jury for any purpose in a prosecution for crime; but if it renders the party incapable of distinguishing between right and wrong as to the particular act done, the jury may regard it in giving a lesser punishment, but not in an acquittal. *Kelley* v. *State,* 31 Tex. Crim. Rep. 216, 20 S. W. 357.

[14]*Kelley* v. *State,* 31 Tex. Crim. Rep. 216, 20 S. W. 357.

[15]*Willis* v. *Com.* 32 Gratt. 929; *Garner* v. *State,* 28 Fla. 113, 29 Am. St. Rep. 262, 9 So. 835; *Blimm* v. *Com.* 7 Bush, 320; *O'Grady* v. *State,* 36 Neb. 320, 54 N. W. 556. And see *State* v. *Robinson,* 20 W. Va. 713, 43 Am. Rep. 799.

But an instruction in a prosecution for homicide assuming that the fact of drunkenness at the time of the act is so inconsistent with malice that it becomes the duty of the state to trace its existence to a period anterior to the drunkenness, and show affirmatively that the drinking was for the purpose of committing the deed, is erroneous. *State* v. *Ashley,* 45 La. Ann. 1036, 13 So. 738.

Nor is it an excuse where it is done for the purpose of preparing an excuse for the killing.[16]

243. Involuntary intoxication.— Drunkenness which is involuntary excuses crime.[17] And drunkenness is an excuse for crime when brought about by the fraud, contrivance, or force of some other person or persons for the purpose of causing the perpetration of the offense.[18] But intoxication is not rendered involuntary, so as to affect criminal responsibility, by the fact that the accused became intoxicated in whole or in part upon liquor furnished by or at the request of the person or persons against whom the crime was committed.[19] And where one was only slightly under the influence of liquor, it is not a legal excuse for crime that the liquor was taken involuntarily.[20]

III. Intoxication of the person injured.

244. Effect of, generally.— Rape may be committed upon a person who is insensible from drunkenness, though no resistance is made, and the fact that the liquor was given her for the purpose of exciting

[16] *Smith* v. *Com.* 1 Duv. 224; *Blimm* v. *Com.* 7 Bush, 320.

Where intoxication is resorted to to blunt moral responsibility, it heightens the culpability of a criminal act. *United States* v. *Claypool*, 14 Fed. 127.

[17] *People* v. *Robinson*, 2 Park. Crim. Rep. 235; *Carter* v. *State*, 12 Tex. 500. 62 Am. Dec. 539.

Where a person from any cause, such as sickness, want of sleep, or the like, is reduced to such a condition that a smaller quantity of stimulant would intoxicate him than would be required if he were in health, he will not be held responsible for a criminal act while intoxicated by a small quantity, since his acts are not voluntary, but produced by disease. *Reg.* v. *Mary R.* (1887) Pallos, C. B. cited by N. Kerr on Inebriety, 2d ed. 395.

And the drinking of liquor not in sufficient quantities to produce intoxication, after which the party is struck a blow upon the head which puts him in such a condition as not to know what he is doing, and as not to be able to distinguish right from wrong, does not constitute voluntary intoxication, and is sufficient to relieve from criminal responsibility, where the liquor alone would not have produced such a condition. *Leggett* v. *State*, 21 Tex. App. 382, 17 S. W. 159.

[18] *People* v. *Nichol*, 34 Cal. 212; *People* v. *Robinson*, 2 Park. Crim. Rep. 235; *Bartholomew* v. *People*, 104 Ill. 605, 44 Am. Rep. 97.

But a person is not excused from criminal responsibility by the fact that others had given him liquor in a social way, with no intent at the time to induce him to commit a crime, but afterwards, when he had become so drunk that he did not know what he was doing, they did induce him to commit one. If it were done with a criminal intent, however, they, and not he, would be guilty. *McCook* v. *State*, 91 Ga. 740, 17 S. E. 1019.

[19] *State* v. *Sopher*, 70 Iowa, 494, 30 N. W. 917.

In *Com.* v. *French*, Thacher Crim. Cas. 163, however, it was held that a boy thirteen years of age, who was put in a state of mental derangement by drinking liquor and smoking a cigar, which the prosecutor sold him, who committed an offense while in that condition, should be acquitted, since it was a wrongful act for the prosecutor to sell liquor to such a child.

[20] *Com.* v. *Gilbert*, 165 Mass. 45, 42 N. E. 336.

her, only, does not affect the criminal nature of the act;[21] and a man may be guilty of adultery and be convicted alone therefor, though the participant was so stupefied by drink as to be incapable of giving consent, and the fact that the crime is also rape does not render it any the less adultery.[22] Likewise, evidence in a prosecution for homicide that the person killed was under the influence of intoxicating liquor is admissible generally,[23] and as tending to show that he was incapable either of attack or defense.[24] And on a prosecution for larceny it is competent to show that liquor drank by the prosecuting witness had been drugged, and the potency of the drug, and the condition to which it reduced him.[25] But evidence as to whether or not the witness had seen deceased drink is not admissible in a prosecution for homicide, on behalf of the prosecution, to rebut evidence offered by the defense to show that the deceased was intoxicated, to establish the theory of self-defense, though it is admissible to rebut evidence that he was boisterous, quarrelsome, and dangerous when intoxicated.[26]

IV. Effect of addiction to the use of drugs.

245. General rules.—The same rules seem to apply to the effect of morphine and other drugs on criminal responsibility as apply to the effect of intoxicating liquors; and the fact that insanity rendering one incapable of knowing the criminal nature of his act was caused by morphine or other drugs does not prevent it from being a complete defense.[27] And if the offense was one involving a criminal intent, a conviction cannot be had if it rendered the person unable to entertain the particular intent.[28] But one committing a crime

[21] *Reg.* v. *Camplin*, 1 Car. & K. 746. Den. C. C. 89, 1 Cox, C. C. 220.

[22] *Com.* v. *Bakeman*, 131 Mass. 577, 41 Am. Rep. 248.

[23] *Holmes* v. *State*, 11 Tex. App. 233.

[24] *State* v. *Horne*, 9 Kan. 119.

So, where a husband left his wife exposed to the cold all night, whereby her death was caused, her drunkenness is admissible in evidence in a prosecution against him for her homicide, as tending to shed light upon the question whether or not she was too violent to be controlled by him. *Territory* v. *Manton*, 8 Mont. 95, 19 Pac. 387.

[25] *State* v. *Buckley*, 72 N. C. 358.

[26] *State* v. *Abrams*, 11 Or. 169, 8 Pac. 327.

[27] *State* v. *Rippy*, 104 N. C. 752, 10 S. E. 259; *Edwards* v. *State*, 38 Tex. Crim. Rep. 386, 39 L. R. A. 262, 43 S. W. 112.

And the fact that a person committing a homicide was in a frenzy produced by an overdose of morphine administered as a medicine is a complete defense in a prosecution therefor. *State* v. *Rippy*, 104 N. C. 752, 10 S. E. 259.

And refusal to instruct in a prosecution for murder that if the defendant's alleged insanity was produced by the use of morphine, referring to morphine as a cause for the alleged insanity, is not error, where ample instructions with regard to insanity and diseases of the mind were given, without mentioning any specific drug or liquor as the cause. *State* v. *Mahn*, 25 Kan. 182.

[28] *Edwards* v. *State*, 38 Tex. Crim. Rep. 386, 39 L. R. A. 262, 43 S. W. 112.

And this is the rule although the

under the influence of a drug would be held guilty if he took the drug knowing the effect it would be likely to have.[29] So the probable effect of a customary supply of a drug upon the mental condition of a person addicted to its use is proper to be considered on a claim of irresponsible insanity caused by such deprivation.[30]

statute provides that insanity from voluntary use of intoxicating liquors shall be no defense. *Edwards* v. *State*, 38 Tex. Crim. Rep. 386, 39 L. R. A. 262, 43 S. W. 112.

[29] *Edwards* v. *State*, 38 Crim. Rep. 386, 39 L. R. A. 262, 43 S. W. 112.

[30] *Rogers* v. *State*, 33 Ind. 543.

CHAPTER X.

LIFE INSURANCE.

I. Lunacy.
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248. Condition against suicide, question one of construction.
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I. Lunacy.

246. Insanity as a breach of warranty.—A false answer to a question in an application for life insurance as to insanity of the applicant or in his family is, of course, a breach of warranty which will invalidate the policy.[1] But insanity is not, as a matter of law, a breach of warranty of sound health in an application for an insurance policy.[2] The question as to the extent to which mental disturbances will destroy or interfere with the functions of the body depends

[1] See *Newton* v. *Mutual Ben. L. Ins. Co.* 15 Hun, 595, Affirmed in 76 N. Y. 426, 32 Am. Rep. 335; *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283.

[2] *Jacklin* v. *National Life Asso.* 75 Hun, 595, 27 N. Y. Supp. 1112.

Failure of an insurance agent, who applied for insurance for himself, to state in the application that he had been insane, will not invalidate the policy, where he had apparently recovered, unless he knew that it was material; and such knowledge is not proved by the fact that he had been instructed not to insure insane persons. *Mallory* v. *Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410.

in such case upon the circumstances, and is a question of fact.[3] And a question in an application for insurance as to whether the relatives of the applicant died of, or had been afflicted with, insanity or other hereditary disease, includes insanity of a hereditary character only; and an answer in the negative does not constitute a breach of warranty because a relative died of temporary insanity.[4]

247. Insane homicide as breach of condition.— The killing of an insured person by an insane person is not within a condition in the insurance policy invalidating it if death should result from intentional injuries inflicted by the insured or any other person.[5] And the killing of the insured by the beneficiary in a policy, under such circumstances that it would be murder if he were sane, does not forfeit it or bar a suit thereon, where he was insane.[6]

248. Condition against suicide, question one of construction.—The clauses in the insurance policies which provide that the policies shall be void if the insured party kills himself are usually worded in one of two ways. Either the phrase "shall die by his own hand or act" is used, or the shorter phrase, "shall die by suicide." We shall now consider the constructions which have been put upon these phrases by the various courts to whose judgment they have been submitted.

249. General rule as to effect.— An insurance policy is not rendered void by the death of the assured by his own hand while insane, upon any principle of public policy, in the absence of a provision to that effect.[7] And the general rule is that the death of an insured

[3] *Jacklin* v. *National Life Asso.* 75 Hun, 595, 27 N. Y. Supp. 1112.

Evidence in an action on an insurance policy, given by the widow of the father of the insured, that her husband needed quiet and treatment, and went to an insane hospital, but was not confined with the patients, and that he had pains in his head where he had been hurt when a child, but that he always seemed to know what was going on, and proof that his brains were in a hardened state at death, is sufficient to send to the jury the question whether a statement in the policy that the father had died of brain disease caused by a hurt was true. *Newton* v. *Mutual Ben. L. Ins. Co.* 15 Hun, 595, Affirmed in 76 N. Y. 426, 32 Am. Rep. 335.

[4] *Newton* v. *Mutual Ben. L. Ins. Co.* 15 Hun, 595, Affirmed in 76 N. Y. 426, 32 Am. Rep. 335; *Peasley* v. *Safety Deposit L. Ins. Co.* 15 Hun, 227.

[5] *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

And an instruction in an action upon an insurance policy in which the insured was killed by another, that, if the person who killed him was impelled by an insane impulse which he could not resist, the injuries were unintentional within the meaning of the policy, will be construed as meaning that he was incapable of weighing the moral character of the act, and of determining whether it was right or wrong; and thus construed it will cause no injury to the defendant in an action on the insurance policy, where the court had carefully instructed as to the law of insanity. *Ibid.*

[6] *Holdom* v. *Ancient Order, U. W.* 159 Ill. 619, 31 L. R. A. 67, 50 Am. St. Rep. 183, 43 N. E. 772.

[7] *Horn* v. *Anglo-Australian Assur. Co.* 9 Week. Rep. 359, 4 L. T. N. S. 142, 30 L. J. Ch. N. S. 511, 7 Jur. N. S. 673.

person by his own hand while *non compos mentis* is regarded as being as much the result of disease as death by fever or consumption;[8] and that self-destruction in a fit of insanity cannot be deemed death by one's own hand within the meaning of an insurance policy containing a condition against suicide,[9] the words "suicide" and "die by his own hand," being of the same legal signification.[10] The act of suicide, however, must have been an insane act, and the immediate consequence and result of the insanity.[11] The suicide by one in possession of his ordinary reasoning faculties, from pride, anger, jealousy, shame, dread of exposure, or a desire to escape from the ills of life, is within such a proviso, and invalidates the policy.[12]

250. Degree of capacity; test of consciousness and intent. — The English rule is that a condition against liability in case of suicide in an insurance policy includes all cases of voluntary self-destruction, whether the insured was sane or not at the time,[13] and that a proviso in a policy that it shall be void if the assured shall die by his own hand includes all voluntary acts of self-destruction.[14] But to avoid

[8] *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41. And see *Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 92, 27 Am. Rep. 689; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623.

[9] *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Knickerbacker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743; *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482. Affirming 4 Hill, 73; *Life Asso.* v. *Waller*, 57 Ga. 533; *Scheffer* v. *National L. Ins. Co.* 25 Minn. 534; *Follmar* v. *Germania L. Ins. Co.* cited in Bliss on Life Insurance, § 242; *Horn* v. *Anglo-Australian & Universal Family L. Ins. Co.* 7 Jur. N. S. 673, 9 Week. Rep. 359, 30 L. J. Ch. N. S. 511, 4 L. T. N. S. 142.

[10] *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743.

[11] *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336.

[12] *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

[13] *Clift* v. *Schwabe*, 2 Car. & K. 134, 3 C. B. 437, 17 L. J. C. P. N. S. 2.

A person is not necessarily insane under this rule who voluntarily commits suicide, intending to do so, at a time when he is stated in general terms to be incapable of distinguishing between right and wrong, since he might be incapable of so distinguishing because of want of requisite knowledge or experience or want of reasoning powers equal to the occasion, though quite sufficient to sustain the character of a man of sense and understanding on ordinary occasions. *Dormay* v. *Borrodaile*, 10 Beav. 335, Affirmed in 5 C. B. 380, 11 Jur. 231.

[14] *Borradaile* v. *Hunter*, 5 Mann. & G. 639, 12 L. J. C. P. N. S. 225, 7 Jur. 443, 5 Scott N. R. 418; *Dormay* v. *Borradaile*, 5 C. B. 380, 11 Jur. 231.

[15] *Clift* v. *Schwabe*, 2 Car. & K. 134, 17 L. J. C. P. N. S. 2, 3 C. B. 437.

Where an insured person falls from a window, and there is evidence tending to show insanity, the question is not whether he threw himself out of the window, but whether, if so, he did it voluntarily, and not through confusion of his own senses. *Stormont* v. *Waterloo Life & C. Assur. Co.* 1 Fost. & F. 22.

a life insurance policy containing such a provision, it must appear that the assured, at the time he committed suicide, could distinguish between right and wrong to the extent of being able to understand and appreciate the nature and quality of the act.[15] Likewise in many of the American states the rule is adopted that a life insurance policy containing a condition that it shall be void if the assured shall die by his own hand is avoided by suicide committed when he understood the nature of the act and intended to take his own life, though he may have been insane,[16] and though he was not capable of judging between right and wrong,[17] or of understanding or appreciating the nature and quality of his act.[18] An act of self-destruction will invalidate an insurance policy containing such a condition when the insured had sufficient mind, reason, and judgment to rationally consider and determine whether he preferred to die or live, though his mind was somewhat unsound.[19] Suicide will invalidate such a policy in the absence of evidence of delirium or madness or that the act was involuntary,[20] the rule being that to take the case out of the proviso the assured must have been so mentally disordered as not to have understood that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist.[21]

[16]*Dean* v. *American Mut. L. Ins. Co.* 4 Allen, 96; *Cooper* v. *Massachusetts Mut. L. Ins. Co.* 102 Mass. 227, 3 Am. Rep. 451; *Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 561; *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 55 N. Y. 176, 14 Am. Rep. 215; *Mutual Ben. L. Ins. Co.* v. *Daviess*, 87 Ky. 541, 9 S. W. 812; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336; *Boorman* v. *Northwestern Mut. Relief Asso.* 90 Wis. 144, 62 N. W. 924; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Zimmerman* v. *Masonic Aid. Asso.* 75 Fed. 236. And see *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Scheffer* v. *National L. Ins. Co.* 25 Minn. 534.

Under this rule the question in an action upon an insurance policy containing a condition against self-destruction, in which the assured had committed suicide, is not whether the party was sane or insane, but whether the act of self-destruction was a criminal, intentional, and voluntary act, designed to take life, and the party was, at the precise time, competent to realize the consequences of the means employed to take his life. *Fowler* v. *Mutual L. Ins. Co.* 4 Lans. 202.

[17]*Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

[18]*Nimick* v. *Mutual Ben. L. Ins. Co.* 3 Brewst. (Pa.) 502; *Mutual Ben. L. Ins. Co.* v. *Daviess*, 87 Ky. 541, 9 S. W. 812; *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

[19]*Hathaway* v. *National L. Ins. Co.* 48 Vt. 336.

The act of self-destruction which will avoid an insurance policy containing a condition that it shall be void if the assured shall die by his own hand must be voluntary. *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268.

[20]*Cooper* v. *Massachusetts Mut. L. Ins. Co.* 102 Mass. 227, 3 Am. Rep. 451; *Mutual Ben. L. Ins. Co.* v. *Daviess*, 87 Ky. 541, 9 S. W. 812.

[21]*McClure* v. *Mutual L. Ins. Co.* 55 N. Y. 651; *Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 561; *Newton* v. *Mutual Ben. L. Ins. Co.* 76 N. Y. 426, 32 Am. Rep. 335; *Meacham* v. *New York State Mut. Ben. Asso.* 46 Hun, 363; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 335.

The rule that suicide caused by ir-

251. Test of responsibility for criminal acts.—The rule has been laid down that since suicide is a criminal act, the rule of responsibility for criminal acts should be applied to its effect upon an insurance policy containing a condition against self-destruction, and that suicide which will avoid such a policy must have been committed when there was mind enough to form a criminal intent,[22] the test being the capability of the assured to judge between right and wrong.[23] But it has been held that to understand the general nature, consequences, and effect of the act means more than merely to understand the act by which life was taken, covering suicide and its effect as an accomplished fact.[24] And the above test must be deemed to have been superseded either by the test of consciousness and intent or that of capacity to understand the moral character of the act, particularly in Federal jurisdictions.[25]

252. Test of capacity to understand moral character of the act.—The rule adopted by the United States Supreme Court and followed by a number of the state courts is, that the intentional killing of himself by an assured person when his reasoning faculties were so far impaired by insanity that he was unable to understand the moral character of his act, is not suicide, self-destruction, or dying by his own hand, within the meaning of such words in a condition in an in-

resistible impulse will not relieve the insurer has been adopted in New York courts, though they hold to the doctrine that the test is that of consciousness and intent rather than capacity to understand the moral character of the act, the rule being that a policy is invalidated by suicide unless the insured was so mentally disordered as not to understand that the act he committed would cause his death, or unless he committed it under the influence of some insane impulse which he could not resist; and it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act. *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215; *Meacham* v. *New York State Mut. Ben. Asso.* 46 Hun, 363; *Newton* v. *Mutual Ben. L. Ins. Co.* 76 N. Y. 426, 32 Am. Rep. 335.

[22] *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *Beyley* v. *Alexander*, East's Notes, Cas. 79, Morley's India Digest, 352.

Under this rule an insurance policy containing a condition that it shall be void if the assured shall die by his own hand is invalidated by suicide of the insured unless it be clearly shown that at the time his mental condition was such as to render him morally irresponsible for his acts. *Merritt* v. *Cotton States L. Ins. Co.* 55 Ga. 103.

[23] *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482.

The right and wrong test has been distinctly repudiated in New York. See *supra*, § 250.

[24] *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

[25] See preceding and succeeding sections.

For circuit court cases on this question deprived of their authority by the decision in *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236, see *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Nimick* v. *Mutual Ben. L. Ins. Co.* 3 Brewst. (Pa.) 502; *Coverston* v. *Connecticut Mut. L. Ins. Co.* 4 Bigelow Life & Acci. Ins. Rep. 169, Fed. Cas. No. 3,290. Following *Mutual L. Ins. Co.* v. *Terry* is *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

surance policy against liability for death thus caused, though he understood the physical nature, consequences, and effect of his act.[26] Suicide by the insured is not death by his own hand within the meaning of this rule, where he was incapable of forming a rational judgment at the time with respect to the act of self-destruction,[27] or where his reason, conscience, and will were overpowered.[28] But if the insured possessed sufficient mental capacity to form an intelligent intent to take his own life, and did so, being conscious that the act he was about to commit would effect that object, it avoids the policy.[29] Likewise, in order to work a forfeiture of an insurance policy within this rule under a clause excepting suicide, the act must have been performed voluntarily and with intent upon the part of the assured to end his life, and not from any uncontrollable influence resulting

[26]*Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Mutual L. Ins. Co.* v. *Leubrie*, 18 C. C. A. 332, 38 U. S. App. 37, 71 Fed. 843; *Ritter* v. *Mutual L. Ins. Co.* 42 L. R. A. 583, 17 C. C. A. 537, 28 U. S. App. 612, 70 Fed. 954; *Waters* v. *Connecticut Mut. L. Ins. Co.* 2 Fed. 892; *New Home Life Asso.* v. *Hagler*, 29 Ill. App. 437; *Michigan Mut. L. Ins. Co.* v. *Naugle*, 130 Ind. 79, 29 N. E. 393; *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *American L. Ins. Co.* v. *Isett*, 74 Pa. 176; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 92, 27 Am. Rep. 689.

To understand the general nature, consequences, and effect of the act means more than merely understanding the act by which life was taken, and covers suicide as an accomplished fact. *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

The above Pennsylvania cases practically overrule *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466, where Black, Ch. J., said that, standing alone, the words "die by his own hand," mean any sort of suicide.

[27]*Terry* v. *Life Ins. Co.* 1 Dill. 403, Fed. Cas. No. 13,839; *Hiatt* v. *Mutual L. Ins. Co.* 2 Dill. 572, note; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *American L. Ins. Co.* v. *Isett*, 74 Pa. 176.

And a warranty in an application for insurance that the applicant will not die by his own hand is of the same effect with relation to the effect of suicide upon the liability of the insurer as a similar condition in the policy. *Mutual L. Ins. Co.* v. *Leubrie*, 18 C. C. A. 332, 38 U. S. App. 37, 71 Fed. 843.

[28]*Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 96, 27 Am. Rep. 689.

One who takes an overdose of laudanum, which causes his death, while intoxicated, does not die by his own hand within the meaning of a condition invalidating an insurance policy if the insured should die by his own hand, though the mistake of taking the poison was in some sense occasioned by drunkenness; but if he took it with intent to destroy life, it would be, though it was the intent of a drunken man. *Equitable Life Assur. Soc.* v. *Paterson*, 41 Ga. 388, 5 Am. Rep. 535.

[29]*American L. Ins. Co.* v. *Isett*, 74 Pa. 176; *Ritter* v. *Mutual L. Ins. Co.* 42 L. R. A. 583, 17 C. C. A. 537, 28 U. S. App. 612, 70 Fed. 550.

To relieve from the consequences of suicide upon an insurance policy there must be something more than mere error of judgment,—there must at least be mental disorder. *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

from insanity.[30] And where suicide is thus impelled, the condition does not attach, and the insurer remains liable.[31]

253. "Sane or insane" is a good condition.— Of late the insurance companies have endeavored to guard themselves against insane suicide by extending the proviso to read "if the insured shall die by suicide, sane or insane," etc. That the companies have a right to do this is indubitable.[32] And a policy limiting payment, in case of insane suicide, to the legal reserve, is valid if not prohibited by law, if the reserve is ascertainable.[33] Such clauses, however, are to be strictly construed, and rejected when indefinite.[34] And it has been held that

[30]*Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

[31]*Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Waters* v. *Connecticut Mut. L. Ins. Co.* 2 Fed. 892; *New Home Life Asso.* v. *Hagler*, 29 Ill. App. 437; *Suppiger* v. *Covenant Mut. Ben. Asso.* 20 Ill. App. 595; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *American L. Ins. Co.* v. *Isett*, 74 Pa. 176.

A man was insane so as to prevent the forfeiture of an insurance policy conditioned against death by his own hand, where he was not capable of understanding that his design was unlawful or that his act was morally wrong, or where, understanding this, he was unable to control his conduct in the light of such knowledge. *Waters* v. *Connecticut Mut. L. Ins. Co.* 2 Fed. 892.

Knowledge that death will ensue, and deliberation on the part of an insured person, are not conclusive as to his power to determine his action, in an issue as to his responsibility as to suicide, since such knowledge and deliberation are consistent with his being impelled by an insane impulse which his reason could not resist. *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433.

So, in *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268, the question whether, if a paroxysm of moral insanity caused the death of the insured, the suicidal act would be voluntary, so as to render the policy void under a condition therein that it should be void if the assured should die by his own hand, was considered, two of the judges holding in the affirmative and two in the negative, though all concurred in the result of the decision of the whole case.

[32]*Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Jenkins* v. *National Union* (Ga.) 45 S. E. 449; *Dickerson* v. *Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. E. 694, Affirming 102 Ill. App. 280; *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215; *De Gogorza* v. *Knickerbocker L. Ins. Co.* 65 N. Y. 232; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Pierce* v. *Travelers' L. Ins. Co.* 32 Wis. 389; *Chapman* v. *Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606; *Kelley* v. *Mutual L. Ins. Co.* 75 Fed. 637; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918.

A condition in a life insurance policy against liability in case of self-destruction, felonious or otherwise, is equivalent to a condition against liability whether sane or insane. *Riley* v. *Hartford Life & Annuity Ins. Co.* 25 Fed. 315; *Jacobs* v. *National L. Ins. Co.* 1 MacArth. 632.

[33]*Frey* v. *Germania L. Ins. Co.* 56 Mich. 29, 22 N. W. 100; *Salentine* v. *Mutual Ben. L. Ins. Co.* 24 Fed. 159. And see *Dickerson* v. *Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. E. 694. Affirming 102 Ill. App. 280.

[34]See *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *Penfold* v. *Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660; *Jacobs* v. *National L. Ins. Co.* 1 MacArth. 632; *Kelley* v. *Mutual L. Ins. Co.* 109 Fed. 56.

the only construction to be given to these words is the one they bear on their face,—namely, that the company, in case of suicide, is to be exempt from all liability.[35] But they are not meant to cover the case of unintentional self-destruction.[36] The rule is that such a clause covers all conscious acts of the assured by which death by his own hand is accomplished, whether he was, at the time, sane or insane; and if the act was done with the purpose of self-destruction, it is immaterial whether or not he had a conception of the wrong involved in it.[37] And the same rule applies where the insured was temporarily insane.[38] No recovery can be had in such case if the assured committed the fatal act otherwise than accidentally.[39] The rule has been laid down, however, in several recent cases, that suicide will prevent a recovery upon such a policy, even though the insured killed himself intentionally while insane.[40]

[35] *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Chapman* v. *Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606; *Mallory* v. *Travelers' Ins. Co.* 54 N. Y. 651; *De Gogorza* v. *Knickerbocker L. Ins. Co.* 65 N. Y. 232; *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Adkins* v. *Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410.

And in a statutory provision prohibiting defense in an action on a life insurance policy, on the ground that the insured committed suicide, the words "committed suicide" comprehend all cases in which the insured took his own life, whether he was sane or insane. *Knights Templars' & M. Life Indemnity Co.* v. *Jarman*, 44 C. C. A. 93, 104 Fed. 638, Affirmed in 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108.

[36] *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Dickerson* v. *Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. E. 694, Affirming 102 Ill. App. 280.

[37] *Streeter* v. *Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779; *Sabin* v. *Senate of National Union*, 90 Mich. 177, 51 N. W. 202; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Adkins* v. *Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410; *De Gogorza* v. *Knickerbocker L. Ins. Co.* 65 N. Y. 232; *Tritchler* v. *Keystone Mut. Ben. Asso.* 5 Northampton Co. Rep. 301; *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Chapman* v. *Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606.

Under this rule, the question whether the insured was capable of appreciating the moral nature and quality of his purpose is not relevant further than it may help to illustrate the extent of his capacity to understand the physical character of the act. *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389.

And no degree of insanity on the part of one who intentionally took his own life will be sufficient to take the case out of a stipulation in a policy of insurance upon his life, relieving the insurer from liability if death results from suicide, sane or insane. *Billings* v. *Accident Ins. Co.* 64 Vt. 78, 17 L. R. A. 89, 33 Am. St. Rep. 913, 24 Atl. 656.

[38] *Dennis* v. *Union Mut. L. Ins. Co.* 84 Cal. 570, 24 Pac. 120.

[39] *Riley* v. *Hartford Life & Annuity Ins. Co.* 25 Fed. 315; *Chapman* v. *Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606; *Clarke* v. *Equitable Life Assur. Soc.* 55 C. C. A. 200, 118 Fed. 374.

But such a provision does not include accidental self-killing. *Union Mut. L. Ins. Co.* v. *Payne*, 45 C. C. A. 193, 105 Fed. 172; *Keels* v. *Mutual Reserve Fund Life Asso.* 29 Fed. 198; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414.

[40] *Sparks* v. *Knights Templars' & M. Life Indemnity Co.* 61 Mo. App. 109; *Union Cent. L. Ins. Co.* v. *Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Scarth* v. *Security Mut. L. Soc.* 75 Iowa, 346, 39 N. W. 658; *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 82 Wis. 255, 52

254. "In the known violation of the law of any state" does not extend to insanity.— It has been held that, in the absence of any stipulation, a policy taken out for the benefit of a third party will not be avoided by the subsequent suicide of the insured.[41] In a later case it was argued that the act would be covered by the proviso against the death of the insured, "in the known violation of the law of any state," but this was disallowed.[42]

255. Rule in case of exception as to assigned policies.—Insurance policies containing the condition sometimes found in England, that they shall be void if the assured shall commit suicide unless they are assigned to other parties for a valuable consideration before death, are not invalidated as against an assignee by the death of the insured by suicide while of unsound mind.[43] And the same rule applies where a policy was pledged as collateral security.[44] And this is the case though the insurers themselves are the ones to whom the policy is pledged.[45] But this rule does not apply to a policy assigned to trustees under a deed of settlement, the assured covenanting to pay premiums and to perform such acts as will be necessary to keep the policy on foot.[46]

256. Effect of insanity on accident insurance.— Suicide committed by the insured while insane and not conscious of what he was doing constitutes death effected through external and violent and accidental means within the meaning of an accident policy insuring against injuries thus caused.[47] And such an act is not within a condition in

N. W. 101; *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 87 Wis. 328, 58 N. W. 399. And see *Zimmerman* v. *Masonic Aid Asso.* 75 Fed. 236; *Kelley* v. *Mutual L. Ins. Co.* 75 Fed. 637.

[41]*Fitch* v. *American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372.

[42]*Patrick* v. *Excelsior L. Ins. Co.* 4 Hun, 263. See May on Insurance, 2d ed. § 324. There are two strong *dicta* in Pennsylvania to the effect that even in the absence of any stipulation, a suicide by the insured would be a fraud upon the company, and hence would avoid the policy. Black, Ch. J., in *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466, who comprehended in this the case of an insane suicide; and Trunkey, J., in *Bank of Oil City* v. *Guardian Mut. L. Ins. Co.* 6 Legal Gaz. 348, 5 Bigelow, Life Ins. & Acci. Rep. 478.

[43]*Dufaur* v. *Professional L. Assur. Co.* 25 Beav. 599, 4 Jur. N. S. 841, 27 L. J. Ch. N. S. 817.

A letter by an insured person to a creditor, charging an insurance policy with a floating balance due him, made three years previous to the death of the insured by his own hand, is within an exception to a proviso in the policy that it should be void if the assured died by his own hand unless it was assigned to other parties for a valuable consideration six months before his death. *Jones* v. *Consolidated Invest. Assur. Co.* 26 Beav. 256, 28 L. J. Ch. N. S. 66, 5 Jur. N. S. 214.

[44]*White* v. *British Empire Mut. Life Assur. Co.* 19 L. T. N. S. 306, 17 Week. Rep. 26, L. R. 7 Eq. 394, 38 L. J. Ch. N. S. 53.

[45]*White* v. *British Empire Mut. Life Assur. Co.* 19 L. T. N. S. 306, 17 Week. Rep. 26, L. R. 7 Eq. 394, 38 L. J. Ch. N. S. 53.

[46]*Dormay* v. *Borradaile*, 5 C. B. 380, 11 Jur. 231.

[47]*Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *Crandal* v. *Accident Ins. Co.* 27 Fed. 40.

such a policy that the insurance shall not extend to any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease.[48] A killing is accidental within the meaning of an accident insurance policy, unless the injury is the result of misconduct or participation of the injured party, and it is immaterial that it was caused by insanity or the drunkenness of a third party.[49]

257. Effect of insanity on mutual insurance.— Insanity is sickness or disability within the meaning of a by-law of a mutual benefit society providing for the payment of weekly benefits to members who, through sickness or other disability, are unable to follow their usual occupations.[50] And a member of a benevolent society who is removed from the jurisdiction thereof to an insane asylum becomes an absent member within the meaning of a by-law requiring an absent brother claiming benefits to send to a designated officer a true statement of his acts, attested in a specified manner,[51] although his legal status as a resident of his former place of abode remains unaffected. Subsequent mental incapacity, however, does not relieve a member of a mutual insurance society from compliance with its regulations, and performance of his contract, and he may be expelled for violation of its rules, though he has become insane,[52] though a judgment of expulsion of a member of a society is invalid where the member was insane at the time, and under guardianship, and his guardian was not a party to the proceeding for the expulsion.[53] The surrender by the assured of his certificate, however, and the substitution of a new beneficiary, is of no effect, where he was at the time so impaired in mind as to be incapable of transacting any business requiring the exercise of judgment and discretion.[54] Statutory prohibition

[48] *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; *Crandal* v. *Accident Ins. Co.* 27 Fed. 40.

[49] *Campbell* v. *Fidelity & C. Co.* 109 Ky. 661, 60 S. W. 492.

[50] *McCullough* v. *Expressmen's Mut. Ben. Asso.* 133 Pa. 142, 7 L. R. A. 210, 19 Atl. 355; *Burton* v. *Eyden*, L. R. 8 Q. B. 295, 42 L. J. Mag. Cas. N. S. 115, 28 L. T. N. S. 408, 21 Week. Rep. 593.

[51] *Walsh* v. *Consumnes Tribe, No. 14 I. O. R. M.* 108 Cal. 496, 41 Pac. 418.

[52] *Noel* v. *Modern Woodmen*, 61 Ill. App. 597.

A mutual insurance society may proceed against a person under its constitution and by-laws by preferring charges against him, and convict him under neglect to appear, and punish him by expulsion and loss of rights in the society, where he had not been adjudged insane, though he was apparently and actually of unsound mind. *Pfeiffer* v. *Weishaupt*, 13 Daly, 161.

But a waiver by a member of a society of the rules of procedure adopted by it, in an action involving the validity of a judgment of expulsion of a member, cannot be sustained if the member was insane at the time of the rendition of the judgment. *Hoeffner* v. *Grand Lodge, G. O. of H.* 41 Mo. App. 359.

[53] *Hoeffner* v. *Grand Lodge, G. O. of H.* 41 Mo. App. 359.

[54] *Ownby* v. *Supreme Lodge, K. of H.* 101 Tenn. 16, 46 S. W. 758.

against defending on the ground of suicide applies to mutual as well as ordinary insurance.[55]

258. Method of determining existence of insanity.—The question whether death by suicide of an insured person was voluntary or involuntary or the result of insanity is not determinable as a matter of law by the court, where there is evidence of insanity, but is one of fact for the jury.[56] And the weight of evidence of insanity in such cases is also a question for the jury, and not for the judge.[57] And the judge cannot properly take the case from the jury if there is any evidence tending to show that the assured was insane when he did the act which caused his death.[58] Nor will a finding of a jury on the question of mental incapacity of the assured at the time of his suicide be disturbed on appeal, where there was a conflict of testimony.[59] But acts and circumstances which are as consistent with sanity as with insanity will not authorize this submission of the question to the jury.[60]

259. Sufficiency of evidence to establish.— The mere fact that an insured person destroyed his own life is not sufficient to establish his insanity,[61] nor is mere proof that the insured was insane at times

[55]*Knights Templars' & M. Life Indemnity Co.* v. *Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511.

[56]*Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283; *Weed* v. *Mutual Ben. L. Ins. Co.* 3 Jones & S. 386; *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 82 Wis. 255, 52 N. W. 101. And see *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156.

[57]*Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232, 24 L. ed. 433; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336.

Where the evidence in an action on a life insurance policy as to the death being accidental or suicidal is so nearly balanced as to leave the question in doubt, the presumption is in favor of the theory of accident. *Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996.

And an instruction in such an action that the facts to show suicide must be irresistible, and that many doubts as well as a strong presumption of law would have to be overcome to show suicide, is erroneous as an invasion of the province of the jury. *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 82 Wis. 255, 52 N. W. 101.

[58]*Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232, 24 L. ed. 433; *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 82 Wis. 255, 52 N. W. 101.

[59]*New Home Life Asso.* v. *Hagler*, 29 Ill. App. 437; *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283.

[60]*Weed* v. *Mutual Ben. L. Ins. Co.* 70 N. Y. 561.

It is for the judge to weigh the evidence of insanity, and to decide whether it is sufficient to go to the jury and warrant a verdict. *Fowler* v. *Mutual L. Ins. Co.* 4 Lans. 202.

And where an insured person fell, injuring the base of his brain, and afterwards became insane and took his own life, the question whether the injury received by the fall was the cause of the killing is too conjectural to be submitted to the jury as a direct cause of self-destruction in an action on the policy. *Streeter* v. *Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779.

[61]*Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Coffey* v. *Home L. Ins. Co.* 44 How. Pr. 481; *Merritt* v. *Cotton States L. Ins. Co.* 55 Ga. 103; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 365, Fed. Cas. No. 9,755.

And the fact that a juror considered suicide as conclusive proof of insanity is a good cause for a challenge in an

sufficient to invalidate the policy,[62] though evidence of insanity is competent and material.[63] And a mere belief in spiritualism on the part of the insured will not warrant a legal conclusion that his death was by suicide, where there is nothing to show whether it was deliberate or accidental.[64] The declarations and conduct of the insured at or about the time of his death, however, all bear upon the question of his sanity or insanity, and may be sufficient to show insanity and irresponsibility at the time of committing the act.[65] And evidence of a sudden change of disposition by an insured person who had been genial and pleasant and apparently happy, to listlessness, nervousness, sleeplessness and apparent unhappiness, together with an erratic manner and pain in the head, after which he killed himself, is sufficient to require the submission of the question of insanity to a jury;[66]

action on an insurance policy conditioned against liability in case of suicide. *Hiatt* v. *Mutual L. Ins. Co.* 2 Dill. 572, note.

The sudden disappearance of and failure to discover any trace of a man, however, who, if living, would not go unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends, tend to establish his death in an action upon a policy insuring his life. *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41.

[62] *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414.

[63] *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *New Home Life Asso.* v. *Hagler*, 29 Ill. App. 437.

[64] *Continental Ins. Co.* v. *Delpeuch*, 82 Pa. 225.

[65] See *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336; *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41.

A letter written by a man to his wife immediately before committing suicide, in which he states that a voice called upon him to die, and that he thinks it is his mother, signing himself "no more your unworthy husband, but almost a corpse," and asking that the revolver which he intended to use should be preserved as a keepsake for his child, furnishes sufficient evidence to warrant a jury in finding that he acted under the control of an insane impulse caused by disease, which deprived him of the capacity of governing his conduct in accordance with reason. *Meacham* v. *New York State Mut. Ben. Asso.* 46 Hun. 363.

And the fact that a man fifty years of age had sought to rid himself of his wife, with whom he had lived pleasantly many years, and marry a young girl fifteen years of age, to whom he made improper proposals, and that he committed suicide upon learning that she had been sent away, is sufficient to require the question of his sanity to be submitted to the jury in an action upon a policy insuring his life, as well as the question whether the act was done with intent to terminate his life. *Buchmeyer* v. *Mutual Reserve Fund Life Asso.* 87 Wis. 328, 58 N. W. 399.

So, evidence that an insured person left his bedroom very early in the morning and fell over the banisters the day before his death, and that later he complained of giddiness and pains in his head, and was found falling out of a window, his wife being in the room at the time, supports a plea of insanity as an excuse for self-destruction, to some extent. *Stormont* v. *Waterloo Life & C. Assur. Co.* 1 Fost. & F. 22.

But the mere fact that an insured person set fire to his own building is not sufficient to establish his insanity in an action on the insurance policy. *Karow* v. *Continental Ins. Co.* 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27.

[66] *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156.

But such evidence does not tend to prove insanity upon the part of the insured person, where the proof shows that he was greatly embarrassed financially, and had appropriated trust moneys and committed forgeries, and could no longer prevent their discovery, but rather shows a knowledge of his deplorable condition resulting from his dishonesty. *McClure* v. *Mutual L. Ins. Co.* 55 N. Y. 651.

So, the fact that an insured person

and so is evidence that the assured labored under a disease of the brain leading to insanity, together with evidence of his disappearance.[67]

II. Drunkenness.

260. Effect as a breach of warranty or condition.— A habit of using intoxicating liquor within a warranty or condition against such use in an insurance policy is defined to be a disposition or condition of mind or body, or a tendency or aptitude for the performance of such actions, acquired by custom or frequent repetition, which is held or retained.[68] And a statement in an application for life insurance as to whether the applicant used intoxicating liquors refers to the customary and habitual use, and not to a single or accidental one.[69] An occasional use of intoxicating liquors by the accused, or an exceptional case of excess, does not render him a man of intemperate habits within the meaning of a warranty that he is a person of temperate habits.[70] And this is the rule though the applicant may have had an attack of delirium tremens resulting from an exceptional

was in good health and had a wife and children at the time of committing suicide is entitled to consideration with other circumstances in determining whether the act was voluntary or involuntary. *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283.

[67] *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41.

And a letter written by an insured person upon committing suicide, telling his brother that he suffered from fear of becoming insane, and had concluded to end his sufferings, together with proof of a disease which tended to produce a morbid mental state, and that he was a spiritualist and appeared somewhat excited, absent-minded, and morose, is sufficient to establish that his suicide was a deliberate act, designed to take life, which would invalidate a policy containing a condition against death by his own hand. *Fowler* v. *Mutual L. Ins. Co.* 4 Lans. 202.

[68] *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141.

[69] *Van Valkenburgh* v. *American Popular L. Ins. Co.* 9 Hun, 583; *Ætna L. Ins. Co.* v. *Davey*, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. Rep. 331.

[70] *Knickerbocker L. Ins. Co.* v. *Foley*, 105 U. S. 350, 26 L. ed. 1055, 11 Fed. 766, note; *Swick* v. *Home L. Ins. Co.* 2 Dill. 160, Fed. Cas. No. 13,692; *Bacon* v. *New England Order of Protection*, 123 Fed. 152; *Holtum* v. *Germania L. Ins. Co.* 139 Cal. 645, 73 Pac. 591; *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 238, 24 N. E. 283; *Union Mut. L. Ins. Co.* v. *Reif*, 36 Ohio St. 596, 38 Am. Rep. 613.

An inquiry as to whether an applicant for insurance was temperate suggests moderation, and not abstinence, and the warranty is to the effect that his habit is to refrain from excessive indulgence, and not abstain from all use. *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 237, 24 N. E. 283.

There is a distinction with reference to the effect of intemperance upon insurance between periodical sprees and habitual intemperance, unless the sprees were frequent and aroused an uncontrollable appetite while they continued, which might amount to a habit of intemperance. *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141.

And an application for insurance, stating that the insured used no narcotics, is a representation, and not a warranty, and is not violated by occasional, but not frequent, use by the accused, shortly before his death, of a narcotic as a remedy, where it was not made with a purpose to deceive, and it is not claimed that such use of narcotics increases the risk. *Continental L. Ins. Co.* v. *Thoena*, 26 Ill. App. 495; *Higbee*

indulgence in drink prior to the issuance of the policy.[71] It is not necessary to the existence of intemperate habits, however, within the meaning of a warranty against such habits in an application for insurance, that the excessive use of intoxicating liquors should have been continuous or daily.[72] The question is whether or not the habits of the insured were so far intemperate as to increase the risk.[73] And a warranty is broken, and the insurance is forfeited, by habitual intemperance, though the health of the insured remained good and his constitution remained unimpaired, and though his habits were not such as to injure him.[74] But intemperance within a condition against death by intemperance in an insurance policy, to invalidate it, must have been the proximate cause of death; it is not sufficient that it merely contributed to it.[75] Though death from sickness caused by intoxication, in consequence of neglect, is within a condition against death from the use of intoxicating drinks.[76]

v. *Guardian Mut. L. Ins. Co.* 66 Barb. 462.

And this is true though the drug was administered by a physician in the course of medical practice and though death was thereby caused. *Ranney* v. *Mutual Ben. L. Ins. Co.* U. S. C. C. First Jud. Dist. Mass., cited in May on Insurance, 3d ed. § 302.

[71]*Knickerbocker L. Ins. Co.* v. *Foley,* 105 U. S. 350, 26 L. ed. 1055, 11 Fed. 766, note; *Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank,* 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221.

An instruction, in an action upon an insurance policy on an issue as to breach of warranty against drunkenness, defining the term "delirium tremens" as signifying a diseased condition of the brain, produced by an excessive use of spirituous liquors, is not unfair to the insurer. *Ætna L. Ins. Co.* v. *Deming,* 123 Ind. 384, 24 N. E. 86, 375.

[72]*Union Mut. L. Ins. Co.* v. *Reif,* 36 Ohio St. 596, 38 Am. Rep. 613.

[73]*United Brethren Mut. Aid Soc.* v. *O'Hara,* 120 Pa. 256, 13 Atl. 932.

While a single or occasional excess in the use of intoxicating liquor does not make a man an habitual drunkard within the meaning of a warranty against habitual drunkenness in an insurance policy, if the habit and rule of his life are to indulge periodically, with increasing frequency and violence, in excessive fits of intemperance, he is an habitual drunkard. *Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank,* 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221.

And a daily or frequent use of intoxicating liquors is an habitual use within the meaning of a warranty in an insurance policy against such use. *Ætna L. Ins. Co.* v. *Davey,* 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. Rep. 331.

[74]*Southcombe* v. *Merriman,* Car. & M. 256; *McGinley* v. *United States L. Ins. Co.* 77 N. Y. 495; *Furniss* v. *Mutual L. Ins. Co.* 14 Jones & S. 467; *Fox* v. *Penn. Mut. L. Ins. Co.* (Pa.) 4 Bigelow Life & Acci. Ins. Rep. 458. And see *Mar's Case,* cited in 2 Taylor on Principles of Med. Jur. 2d ed. 627.

The fact that one's habits were intemperate shortly before an application for insurance was made is evidence on the question as to his habits at that time, on an issue as to breach of warranty of temperate habits. *Daly* v. *John Hancock Mut L. Ins. Co.* (Ind.) 8 Ins. L. J. 319.

[75]*Miller* v. *Mutual Ben. L. Ins. Co.* 31 Iowa, 218, 7 Am. Rep. 122; *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141.

[76]*New York L. Ins. Co.* v. *La Boiteaux* (Ohio) 5 Bigelow Life & Acci. Ins. Rep. 395.

One accustomed to taking laudanum, who drinks to intoxication, and while in that condition, by accident, takes an overdose of laudanum, and dies therefrom, does not die by his own hand, within the meaning of a condition against such death, in an insurance pol-

261. Subsequently acquired habits of intoxication.— Habits of intoxication acquired subsequently to the insurance do not invalidate a policy containing a warranty against the use of stimulants, in the absence of an express provision therefor, even though they were the direct cause of the death of the insured.[77] But provisions in an insurance policy that the insured shall not become so far intemperate as to impair his health do not necessarily imply habitual intemperance producing habitual impairment of health; any intemperance producing such impairment renders the policy void, though it does not amount to habitual intemperance.[78] And acquiring habits of intemperance is within a condition in a policy that it shall be void if the habits of the insured change so as to increase the risk.[79] The impairment of health, however, to come within a condition that the policy shall be void if the insured shall become so far intemperate as to impair his health seriously or permanently, or to induce delirium tremens, must have been not only serious, but permanent.[80]

icy, though the accident was, to some extent, caused by his drunkenness. *Equitable Life Assur. Soc.* v. *Paterson*, 41 Ga. 338, 5 Am. Rep. 535.

[77] *Reichard* v. *Manhattan L. Ins. Co.* 31 Mo. 518; *Horton* v. *Equitable L. Assur. Soc.* (N. Y.) 2 Bigelow Life & Acci. Rep. 108; *Shader* v. *Railway Pass. Assur. Co.* 5 Thomp. & C. 643; *Ætna L. Ins. Co.* v. *Davey*, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. Rep. 331; *Bacon* v. *New England Order of Protection*, 123 Fed. 152.

[78] *Ætna L. Ins. Co.* v. *Davey*, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. Rep. 331.

An excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, whereby the health of the insured is impaired, is within a condition against such intemperance as to impair health, though the insured may not have had delirium tremens, and though, previous to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. *Ibid.*

And the insurer in a policy containing such a condition would be entitled to know it if the insured had been recently afflicted with delirium tremens, and had required the services of a physician on account of his excessive drinking. *Hutton* v. *Waterloo L. Assur. Co.* 1 Fost. & F. 735. And see *Forbes* v. *Edinburgh Life Assur. Co.* 10 Shaw & D. 451.

It has been held that a declaration by the insured in his application that he does not and will not practise any habit that tends to shorten life is a mere declaration, and not a statement of fact or warranty, the violation of which will effect the forfeiture of the policy. *Knecht* v. *Mutual L. Ins. Co.* 90 Pa. 118, 35 Am. Rep. 641. But see *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141.

[79] *Boyce* v. *Phœnix Mut. L. Ins.* 14 Can. S. C. 723.

[80] *Ætna L. Ins. Co.* v. *Deming*, 123 Ind. 384, 24 N. E. 86, 375.

A proper, specific, and special stipulation in an insurance policy in which no other subject is mentioned, that if the insured becomes habitually intemperate, or so far intemperate as to impair health or induce delirium tremens, his policy may be canceled, and the insurer absolved from liability except for the surrender value,—is to be given preference over a general stipulation that in such case the policy shall become null and void, so that it would remain in full force if no steps were taken to cancel it. *Northwestern Mut. L. Ins. Co.* v. *Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582.

And drinking sufficiently to impair the health cannot be shown, in the absence of any showing that it was actually impaired.[81]

262. Accident and mutual insurance.— Provisions in an accident insurance policy against liability for injury happening while the accused was intoxicated, or in consequence of intoxication, relieve from liability for injury sustained while the insured was intoxicated, whether the intoxication caused or contributed to the injury or not;[82] though the rule would not apply if the intoxication was caused by the use of spirituous liquors, opium, or other drugs administered to the person while sick by a physician.[83] And the drinking of intoxicating liquors by a member of a society for the insurance of its members and for the enforcement of total abstinence among them, having a by-law to the effect that any member violating his pledge shall be, by the very act, suspended and expelled when proved guilty, the expulsion to take effect from the day of the violation, effects a self-executed suspension of membership, requiring no trial or adjudication of expulsion, depriving him of his rights, benefits, and privileges therein, though his violation was not known until after his death.[84]

263. Habits; a question for the jury.— The question whether an insured person was of intemperate habits at the time of the issue of a policy containing a warranty with reference thereto, and whether he became habitually intemperate after its issue, is one of fact for the jury in an action on the policy;[85] and so is the question whether an alleged moderate use of intoxicating liquors by the insured amounts to a breach of a condition of the policy that he was of correct and temperate habits, as well as the question whether he died from dissipation.[86] And a judgment in such an action upon a policy conditioned against liability in case the insured became so far intemperate as to impair his health seriously or permanently, or as to in-

[81] *Odd Fellows Mut. L. Ins. Co.* v. *Rohkopp*, 94 Pa. 59.

[82] *Standard Life & Acci. Ins. Co.* v. *Jones*, 94 Ala. 434, 10 So. 530; *Shader* v. *Railway Pass. Assur. Co.* 5 Thomp. & C. 643.

And a provision of an accident policy exempting the company from liability for injury occurring while under the influence of, or affected by, intoxicants, applies to being so far under the influence of intoxicants as to constitute a state of intoxication. *Campbell* v. *Fidelity & C. Co.* 109 Ky. 661, 60 S. W. 492.

[83] *New York L. Ins. Co.* v. *La Boiteaux* (Ohio) 5 Bigelow Life & Acci. Ins. Rep. 437; *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141.

[84] *Smith* v. *Knights of Father Mathew*, 36 Mo. App. 184.

[85] *Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221; *Swick* v. *Home L. Ins. Co.* 2 Dill. 160, Fed. Cas. No. 13,692; *John Hancock Mut. L. Ins. Co.* v. *Daly*, 65 Ind. 6; *Holterhoff* v. *Mutual Ben. L. Ins. Co.* 5 Ohio Dec. Reprint, 141; *Mowry* v. *Home L. Ins. Co.* 9 R. I. 346.

[86] *Meacham* v. *New York State Mut. Ben. Asso.* 120 N. Y. 238, 24 N. E. 283.

duce delirium tremens, will not be reversed as not sustained by evidence, where the testimony as to the fact of intoxication was conflicting.[87]

[87] *Ætna L. Ins. Co.* v. *Hanna*, 81 Tex. 487, 17 S. W. 35; *Sutherland* v. *Standard Life & Acci. Ins. Co.* 87 Iowa, 505, 54 N. W. 453.

CHAPTER XI.

TORTS.

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I. Lunacy.

264. Lunatic liable for torts.—A lunatic is liable for his torts so far as to subject his estate to a suit for damages worked to others by its negligent management.[1] And insanity will not avail to defeat a

[1] *Weaver* v. *Ward*, Hob. 134; *Cross* v. *Andrews*, Cro. Eliz. pt. 2, p. 622; *McIntyre* v. *Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140, 13 N. E. 239; *Williams* v. *Hays*, 143 N. Y. 442, 26 L. R. A. 153, 42 Am. St. Rep. 743, 38 N. E. 449; *Cross* v. *Kent*, 32 Md. 581; *Jewell* v. *Colby*, 66 N. H. 399, 24 Atl. 902; *Brink* v. *Wolf*, 24 Pa. Co. Ct. 197, 7 Northampton Co. Rep. 283; *Re Wolf*, 9 Kulp, 523; *Ward* v. *Conatser*, 4 Baxt. 64; *Morse* v. *Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Taggard* v. *Innes*, 12 U. C. C. P. 77; 1 Hale, P. C. 15; 1 Hawk. P. C. chap. 1, § 5; Bacon, Abr. And see *Behrens* v. *McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24.

At common law, insanity is no ground for discharging a person from imprisonment under execution in a civil suit. *Bush* v. *Pettibone*, 4 N. Y. 300; *Ex parte Leighton*, 14 Mass. 207; *Kernot* v. *Norman*, 2 T. R. 390; *Nutt* v. *Verney*, 4 T. R. 121.

And a justice wrongfully issuing a warrant is not excused by his insanity from liability for false imprisonment, but the proper measure of damages is compensation only. *Krom* v. *Schoonmaker*, 3 Barb. 647.

And the unsoundness of mind of a co-conspirator at the time of the trial of an action to recover for injuries caused by the conspiracy is no defense to any of the guilty parties. *Tucker* v. *Hyatt*, 151 Ind. 332, 44 L. R. A. 129, 51 N. E. 469.

In *Brown* v. *Howe*, 9 Gray, 84, 69 Am. Dec. 276, however, damages for the tort of an insane ward, causing injury to his guardian's property, were refused, but not upon the ground that the insane person would not be liable for his torts, but upon the ground that these

judgment for a criminal act, though amounting to a felony.[2] Nor is it a defense in an action for libel and slander; but may be sufficient to defeat a recovery where well known by disproving damage as well as malice.[3] And for the negligence as well as for the active torts of an insane person resulting in damages to others, his insanity constitutes no defense.[4] On principle, however, he cannot be held liable for malicious acts in cases where he is not *capax doli*.[5] And when the wrong lies in the intent, and the condition of the person is such that no intent exists, there can be no recovery.[6] And it would appear to be misfeasance, as distinguished from nonfeasance,—affirmative torts which in sane persons would have been wilful or negligent conduct, as distinguished from mere failure to act,—for which a

matters were not included in the trust of the guardian, and were matters for an action at law.

[2]*McIntyre* v. *Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140, 13 N. E. 239, Affirming 24 Ill. App. 605; *Jewell* v. *Colby*, 66 N. H. 399, 24 Atl. 902.

In *Jewell* v. *Colby*, 66 N. H. 399, 24 Atl. 902, it was held that an insane person is civilly liable for a wrongful act causing death, although it be in law such an act as constitutes a felony; and that evidence of insanity is not admissible to defeat the right to recover, unless the plaintiff claims punitive or exemplary damages, or a sum greater than mere compensation for the actual loss sustained.

In *Christian* v. *Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216, however, the liability of a railroad company for the killing of a person by an insane station agent was made to depend on the negligence of the employer in hiring a servant or agent, with knowledge of his insanity, or of his being subject to fits of insanity; but the question was decided under the law of master and servant.

[3]See *Yeates* v. *Reed*, 4 Blackf. 463, 32 Am. Dec. 43; *Gates* v. *Meredith*, 7 Ind. 440; *Dickinson* v. *Barber*, 9 Mass. 225, 6 Am. Dec. 58; *Mordaunt* v. *Mordaunt*, 39 L. J. Prob. N. S. 59.

In *Bryant* v. *Jackson*, 6 Humph. 199, however, it was said that it is not controverted that insanity is a good plea in slander, but the question was as to the sufficiency of proof.

And in *Horner* v. *Marshall*, 5 Munf. 466, it was held to be a ground for an injunction against proceedings on judgments for defamation that the defendant was insane at the time of speaking the defamatory words.

[4]*Williams* v. *Hays*, 143 N. Y. 442, 26 L. R. A. 153, 42 Am. St. Rep. 743, 38 N. E. 449; *Morain* v. *Devlin*, 132 Mass. 87, 42 Am. Rep. 423.

The insanity of a part owner of a vessel does not relieve him from liability to the other owners for negligence in her management, at least, unless his insanity was produced wholly by efforts made for the benefit of the vessel. *Williams* v. *Hays*, 143 N. Y. 442, 26 L. R. A. 153, 42 Am. St. Rep. 743, 38 N. E. 449.

But the charterer of a vessel who is in command is not liable for her loss because of a lack of care or skill in her navigation after he has become irresponsible on account of physical and mental exhaustion resulting from his being on duty almost continuously for three days and nights in efforts to save the vessel during a storm. *Williams* v. *Hays*, 157 N. Y. 541, 43 L. R. A. 253, 68 Am. St. Rep. 797, 52 N. E. 589.

And the question of negligence of the mate of a vessel in failing to resort to strong measures to obtain command of the ship because the captain had become mentally deranged is for the determination of the jury. *Ibid.*

[5]See the cases collected in Ewell, Leading Cases, pp. 635, 638, 642, n.; Wharton, Neg. §§ 87, 88, 306, 307. As to responsibility for malicious acts, see Wharton, Crim. Law, 8th ed. § 82 *et seq.*

[6]*Jewell* v. *Colby*, 66 N. H. 399, 24 Atl. 902.

lunatic is liable.[7] And in any event the damages cannot be punitive, but must be compensatory only.[8] The rule that an insane person is responsible for compensatory damages for his torts, however, does not apply where the insanity was caused by the violence or wrong of the person damaged.[9]

265. Effect of insanity of person injured.— It would seem that an insane act—an act of one in such a mental condition as not to understand its nature and probable consequences—could not be an act of contributory negligence any more than could an act of a child too young to use judgment and discretion with reference to it; and when a negligent act of another inflicts an injury causing an uncontrollable frenzy of insanity in which the person causes his own death without knowledge or appreciation of the physical nature of his act, the one causing the injury is liable for his death.[10] But when the person injured retained sufficient mental capacity to form a conscious purpose to end his life, and to adapt the means to the end, his death is deemed to be due to a new intervening cause for which the one inflicting the injury is not responsible, though the one injured was so far insane as not to be morally responsible for his conduct; and the burden of proof rests with the one asserting it to show that the death was caused by the injury.[11]

II. Drunkenness.

266. Effect of liability generally.—Drunkenness is not an excuse for the commission of a tort, such as slander,[12] though evidence of drunkenness is admissible to disprove malice and damages.[13] And self-imposed disability by intoxication affords no more excuse under the law of negligence than it does under the criminal law.[14]

[7]*Williams* v. *Hays*, 157 N. Y. 541, 43 L. R. A. 253, 68 Am. St. Rep. 797, 52 N. E. 589.

Insanity, even if proved, is no defense in an action founded on trover, which is *ex delicto*, and not *ex contractu*, and a sale of land made under execution on a judgment in such an action is not vitiated by the mental status of the defendant either at the time of the judgment or of the sale. *White* v. *Farley*, 81 Ala. 563, 8 So. 215.

[8]*McIntyre* v. *Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140, 13 N. E. 239.

[9]*Jenkins* v. *Hankins*, 98 Tenn. 545, 41 S. W. 1028.

[10]See *Daniels* v. *New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L. R. A. 751, 67 N. E. 424.

[11]*Daniels* v. *New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L. R. A. 751, 67 N. E. 424.

[12]*McKee* v. *Ingalls*, 5 Ill. 30; *Reed* v. *Harper*, 25 Iowa, 87, 95 Am. Dec. 774.

[13]*Gates* v. *Meredith*, 7 Ind. 440.

[14]*Smith* v. *Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923.

One who falls by accident against a stove in a public bar-room, striking against a vessel of hot water, which upsets and scalds another, is responsible for the injury, where the fall was the result of intoxication. *Sullivan* v. *Murphy*, 2 Miles (Pa.) 298.

And the proprietor of a saloon or tavern open for the entertainment of the public is bound to see that a customer

267. Employment of persons having the habit of intoxication, generally.— One who employs a servant or agent of intemperate habits, and retains him in his employ with knowledge thereof, is guilty of negligence in so doing, which will render him liable for injuries caused by intoxication on the part of the employee, where the duties were such as could not be properly performed by a person of such habits.[15] And the selection of servants by a superintendent is an executive act which will render the master liable for injuries caused by the negligence of drunken servants employed by him.[16] So, where persons are employed who afterwards become incompetent and unfit for the duties of the employment, from habits of intoxication subsequently acquired, and this is brought to the knowledge or notice of the employer, and he fails to discharge such persons, he is liable for injury resulting from such habits.[17] And proof of drunkenness on the part of a servant so habitual as to be generally known in the community is sufficient to raise a presumption of knowledge on the part of the master which will render him responsible for an injury thereby caused.[18] And exemplary damages may be given in a case of gross negligence.[19] An employer cannot be held liable for negligence in retaining an employee with habits of intoxication, however, where he exercised due care and diligence in ascertaining as to the employee's competency, but failed to learn of such habits.[20] And it

is properly protected from assaults or insults, as well of those who are in his employ as of drinking and vicious men whom he may choose to harbor, and is liable for damages for injury to a customer to whose clothes an intoxicated companion attached a piece of paper, and set fire to it, seriously burning him. *Rommel* v. *Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779.

A railroad company will not be held liable for damages to goods destroyed by fire in its warehouse, however, upon the ground of negligence, upon evidence that the night operator who had charge of the telegraph office in the warehouse was addicted to drink, and was drunk at the time. *Young* v. *Wilmington & W. R. Co.* 116 N. C. 932, 21 S. E. 177.

[15]*Crew* v. *St. Louis, K. & N. W. R. Co.* 20 Fed. 87.

[16]*Brickner* v. *New York C. R. Co.* 2 Lans. 506, Affirmed in 49 N. Y. 672; *Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

[17]*Chapman* v. *Erie R. Co.* 55 N. Y. 579; *Hilts* v. *Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878.

[18]*Sawyer* v. *Sauer*, 10 Kan. 466.

And habits of intoxication on the part of a railroad conductor which were so noticeable and so long continued that they must have been known to the division superintendent are sufficient to render the railroad company, which retained him in its employ, liable for an injury resulting therefrom. *Chicago & A. R. Co.* v. *Sullivan*, 63 Ill. 293.

[19]*Frink* v. *Coe*, 4 G. Greene, 555, 61 Am. Dec. 141; *Cleghorn* v. *New York C. & H. R. R. Co.* 56 N. Y. 45, 15 Am. Rep. 375.

[20]*Hilts* v. *Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878. And see *Earnmoor S. S. Co.* v. *Union Ins. Co.* 44 Fed. 374.

The Pennsylvania statute of 1885, requiring that an engineer employed must be a sober and competent person, is satisfied if the employer believes him to be sober and competent. *Mulhern* v. *Lehigh Valley Coal Co.* 161 Pa. 270, 28 Atl 1087.

But where the attention of the officers of a railroad company was called to the fact that a yard master had at times

rests with those asserting it to show by a preponderance of evidence that the accident was caused by the incompetency of the employee, and that due care and diligence had not been exercised in his selection.[21]

268. In case of injury to fellow servant.— A master is liable for injuries to a servant caused by incompetency, from habits of intoxication, of a fellow servant, where the master had not used due care in selecting or retaining in his employ the servant causing the injury.[22] And the rule is the same if the employer is negligent in failing to ascertain the habits, as to drinking, of his employees.[23] And it is immaterial whether the incompetency of the fellow servant existed at the time of hiring or has since accrued, where he was continued in the service with notice or knowledge or means of knowledge on the part of the master of his incompetency.[24] Where a servant knows of the habits of intoxication of another servant as fully as the master, however, and he continues in the employment of the master without

used beer, if not stronger drink, in view of the great danger liable to result from the use of intoxicating liquors by one in his position, it became their duty to make frequent and careful investigations upon the subject; the weight of the evidence of their knowledge, therefore, being for the consideration of the jury. *Michigan C. R. Co.* v. *Gilbert*, 46 Mich. 176, 9 N. W. 243.

[21]*Crew* v. *St. Louis, K. & N. W. R. Co.* 20 Fed. 87; *Hilts* v. *Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878.

[22]*Michigan C. R. Co.* v. *Gilbert*, 46 Mich. 176, 9 N. W. 243; *Kean* v. *Detroit Copper & Brass Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; *Poirier* v. *Carroll*, 35 La. Ann. 699; *Gilman* v. *Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *Neilon* v. *Kansas St. J. & C. B. R. Co.* 85 Mo. 599; *Maxwell* v. *Hannibal & St. J. R. Co.* 85 Mo. 95; *Williams* v. *Missouri P. R. Co.* 109 Mo. 475, 18 S. W. 1098; *Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Sizer* v. *Syracuse B. & N. Y. R. Co.* 7 Lans. 67; *Huntingdon & B. T. R. & Coal Co.* v. *Decker*, 84 Pa. 419; *Galveston, H. & S. A. R. Co.* v. *Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301.

A railroad company which employs a conductor who, on account of his drunkenness, is unfit for his position, knowing his unfitness, is chargeable with the consequences of its negligence, even to one employed in the same general service. *Huntingdon & B. T. R. & Coal Co.* v. *Decker*, 84 Pa. 419, 82 Pa. 119.

[23]*Zumwalt* v. *Chicago & A. R. Co.* 35 Mo. App. 661; *Stevens* v. *San Francisco & N. P. R. Co.* 100 Cal. 554, 35 Pac. 165; *Illinois C. R. Co.* v. *Jewell*, 46 Ill. 99, 92 Am. Dec. 240; *Chicago & A. R. Co.* v. *Sullivan*, 63 Ill. 293; *Gilman* v. *Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210; *Hilts* v. *Chicago & G. T. R. Co.* 55 Mich. 440, 21 N. W. 878; *Lyons* v. *New York C. & H. R. R. Co.* 39 Hun. 385; *Pennsylvania R. Co.* v. *Brooks*, 57 Pa. 343, 98 Am. Dec. 229.

A master who is chargeable with knowledge of the intemperate habits of a drunken superintendent, who allows dangerous machinery to be operated by an intoxicated workman whom he orders to do an act which must necessarily cause danger to another workman, who is thereby injured, is guilty of a breach of duty toward the latter both at common law and under the employers' liability act, which will support an action for the injury. *McPhee* v. *Scully*, 163 Mass. 216, 39 N. E. 1007; *Kean* v. *Detroit Copper & Brass Rolling Mills*, 66 Mich. 284, 33 N. W. 395.

[24]*Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Baltimore & O. R. Co.* v. *Henthorne*, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634.

In *Chapman* v. *Erie R. Co.* 55 N. Y. 579, however, in which an engineer was killed in a collison through the negligence of the telegraph operator and

promise of correction or change, he cannot recover.[25] The question of negligence in such case is one of fact for the jury;[26] as is also the question whether remaining in the master's employ after he had promised to discharge a drunken coemployee was contributory negligence.[27]

269. Effect as to contributory negligence, generally.— Intoxication does not excuse the omission to use the same care and prudence which are required of a sober man under the same circumstances, to protect himself from injury.[28] And if one's intoxication contributes to his injury as a proximate cause, it is a complete bar to an action for damages sustained thereby.[29] The question, in an action for personal injury from alleged negligence, is whether or not the injury was caused by negligence of the defendant or the contributory negligence of the plaintiff; and not whether the plaintiff was at the time

train dispatcher, competent when employed but given to intoxication thereafter, it was held that good character and qualifications once possessed would be presumed to continue.

[25]*Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

But evidence in an action for an injury to a brakeman, alleged to have been caused by the intemperate habits of the engineer, that the brakeman knew nothing of the intemperate habits, and that he had been in the employ of the company less than two months, and had made but one trip with the engineer, and did not see him often, is sufficient to support a finding that he had no knowledge of such engineer's intemperate habits. And in such case an instruction that if the plaintiff had equal means of knowledge with the defendant in ascertaining the alleged incompetency of the engineer, he cannot recover, is erroneous, the engineer having been in the employ of the company for five or six years. *Williams* v. *Missouri P. R. Co.* 109 Mo. 485, 18 S. W. 1098.

[26]*Campbell & Z. Co.* v. *Roediger*, 78 Md. 601, 28 Atl. 901; *Brickner* v. *New York C. R. Co.* 2 Lans. 515.

[27]*Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

[28]*Louisville & N. R. Co.* v. *Johnson*, 92 Ala. 204, 25 Am. St. Rep. 35, 9 So. 269, 104 Ala. 241, 53 Am. St. Rep. 39, 16 So. 75, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; *Welty* v. *Indianapolis & V. R. Co.* 105 Ind. 55, 4 N. E. 410; *Price* v. *Philadelphia, W. & B. R. Co.* 84 Md. 506, 36 L. R. A. 213, 36 Atl. 263; *Bageard* v. *Consolidated Traction Co.* 64 N. J. L. 316, 49 L. R. A. 425, 81 Am. St. Rep. 498, 45 Atl. 620; *Missouri P. R. Co.* v. *Evans*, 71 Tex. 361, 1 L. R. A. 476, 9 S. W. 325; *Fisher* v. *West Virginia & P. R. Co.* 42 W. Va. 183, 33 L. R. A. 69, 24 S. E. 570; *McDonald* v. *Chicago, M. & St. P. R. Co.* 75 Wis. 121, 43 N. W. 744.

[29]*Fisher* v. *West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758, 19 S. E. 578; *Lynch* v. *New York*, 47 Hun, 524; *Bradley* v. *Second Ave. R. Co.* 8 Daly, 289; *Kenney* v. *Rhinelander*, 28 App. Div. 246, 50 N. Y. Supp. 1088; *Strand* v. *Chicago & W. M. R. Co.* 67 Mich. 380, 34 N. W. 712; *Ronker* v. *St. John*, 21 Ohio C. C. 39; *Walsh* v. *Porterfield*, 87 Pa. 376; *Louisville & N. R. Co.* v. *Cummins*, 23 Ky. L. Rep. 681, 63 S. W. 594.

And if a person drinks under such circumstances that a reasonably prudent man could foresee that he was putting himself in such a condition that an injury would probably happen, it will bar a recovery for the injury received. *Davis* v. *Oregon & C. R. Co.* 8 Or. 172; *Chicago City R. Co.* v. *Lewis*, 5 Ill. App. 242; *Illinois C. R. Co.* v. *Cragin*, 71 Ill. 177.

And contributory negligence is chargeable to a minor who takes chloroform when so intoxicated as to be unable to exercise any reasonable degree of caution or prudence, where he is old enough to earn as a clerk in a grocery store a reasonable and substantial compensation. *Meyer* v. *King*, 72 Miss. 1, 35 L. R. A. 474, 16 So. 245

intoxicated.[30] But no greater degree of care is required to be exercised by an intoxicated man than by a sober one, and if his conduct was characterized by a proper degree of care and prudence, it is immaterial whether he was drunk or sober.[31] And the mere fact of the intoxication of a person injured is not evidence of negligence *per se* which will prevent a recovery for the injury.[32] Nor is the condition of the plaintiff in an action for a personal injury, with reference to intoxication, of any importance when his own negligence did not contribute to the injury complained of.[33] It must have been the substantial cause of the injury,[34] though it is not necessary that a person should be so drunk as to be imbecile before it can be taken into account by a jury in determining the question of his contributory negligence.[35] Selling or giving liquor to another, however, is not

[30] *Denver Tramway Co.* v. *Reid*, 4 Colo. App. 53, 35 Pac. 269. And see *Buesching* v. *St. Louis Gaslight Co.* 6 Mo. App. 85; *Brand* v. *Schenectady & T. R. Co.* 8 Barb. 368.

[31] *Chicago & N. W. R. Co.* v. *Drake*, 33 Ill. App. 114; *Ward* v. *Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Central R. & Bkg. Co.* v. *Phinazee*, 93 Ga. 488, 21 S. E. 66.

[32] *Newton* v. *Central Vermont R. Co.* 80 Hun, 491, 30 N. Y. Supp. 488; *Tompkins* v. *Oswego*, 40 N. Y. S. R. 4, 15 N. Y. Supp. 371; *Lynch* v. *New York*, 47 Hun, 524; *Ditchett* v. *Spuyten Duyvil & P. M. R. Co.* 5 Hun, 165. Reversed on other grounds, 67 N. Y. 425; *Baltimore & O. R. Co.* v. *Boteler*, 38 Md. 568; *Holmes* v. *Oregon & C. R. Co.* 6 Sawy. 291, 5 Fed. 523; *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

The fact that a guest in a hotel was intoxicated, and that his door was unlocked, does not relieve the landlord from liability for the acts of his servants in stealing the property of his guest. *Cunningham* v. *Bucky*, 42 W. Va. 671, 35 L. R. A. 850, 57 Am. St. Rep. 876, 26 S. E. 442.

An innkeeper's liability for the baggage of his guest is increased rather than diminished by the fact that the guest got too drunk at his bar to care for it himself. *Rubenstein* v. *Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806, 19 N. W. 954.

And an innkeeper in whose inn a customer becomes drunk and unconscious, who expels such customer late at night, by reason of which he dies from exposure and cold, cannot escape liability on account of the customer's prior negligence in getting drunk. *Weymire* v. *Wolfe*, 52 Iowa, 533, 3 N. W. 541. And see *McHugh* v. *Schlosser*, 159 Pa. 480, 23 L. R. A. 574, 39 Am. St. Rep. 699, 28 Atl. 291.

[33] *Houston & T. C. R. Co.* v. *Reason*, 61 Tex. 613; *Stuart* v. *Machias Port*, 48 Me. 477; *Alger* v. *Lowell*, 3 Allen, 402; *Central R. & Bkg. Co.* v. *Phinazee*, 93 Ga. 488, 21 S. E. 66; *Maguire* v. *Middlesex R. Co.* 115 Mass 239; *Meyer* v. *Pacific R. Co.* 40 Mo. 151. And see *Baltimore & O. R. Co.* v. *State*, 81 Md. 371, 32 Atl. 201; *Louisville & N. R. Co.* v. *Cummins*, 23 Ky. L. Rep. 681, 63 S. W. 594; *Texas & P. R. Co.* v. *Edmond* (Tex. Civ. App.) 29 S. W. 518; *Ridley* v. *Lamb*, 10 U. C. Q. B. 354.

[34] *Davis* v. *Oregon & C. R. Co.* 8 Or. 172; *Meyer* v. *Pacific R. Co.* 40 Mo. 151; *Ward* v. *Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Seymer* v. *Lake*, 66 Wis. 651, 29 N. W. 554. And see *McCue* v. *Klein*, 60 Tex. 168, 48 Am. Rep. 260.

And the intoxication should be found before considering its effect. *Shelly* v. *Brunswick Traction Co.* 65 N. J. L. 639, 48 Atl. 562.

[35] *Fitzgerald* v. *Weston*, 52 Wis. 354, 9 N. W. 13. But see *Seymer* v. *Lake*, 66 Wis. 651, 29 N. W. 554.

A person is not liable, however, on the ground of injuring one in danger, for death following his selling chloroform to an intoxicated person, who is not shown to have been absolutely without mind to the knowledge of the offender. *Meyer* v. *King*, 72 Miss. 1, 35 L. R. A. 474, 16 So. 245.

contributory negligence which will relieve the latter from liability for a wilful injury done by him to the former.[36] Nor is the purchasing and drinking liquor contributory negligence which will defeat an action under a civil damage act.[37]

270. With relation to trespassers upon, and persons crossing, railroads.— Reasonable care and diligence are all that are required to be exercised by a railroad company toward one who goes upon its tracks at a place other than a crossing, in such an intoxicated condition as not to be able to take care of himself or to heed warnings of approaching trains.[38] And one who voluntarily goes upon a railway track while in such a condition, and is killed, is guilty of contributory negligence which will prevent a recovery,[39] unless the servants of the railway company were guilty of gross negligence or wilful neglect of duty.[40] Nor can one who, while incapable of protecting himself,

[36]*Cassady* v. *Magher*, 85 Ind. 228.

But a licensed liquor seller who furnished another with intoxicating liquor, in violation of law, upon which the latter became intoxicated, when the dealer put him in his vehicle, drawn by a gentle horse, which the intoxicated man had borrowed, which ran away and was killed by reason of the driver's intoxication, is liable to the owner of the horse for its value. *Dunlap* v. *Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

[37]*Weymire* v. *Wolfe*, 52 Iowa, 533, 3 N. W. 541.

[38]*Price* v. *Philadelphia, W. & B. R. Co.* 84 Md. 506, 36 L. R. A. 213, 36 Atl. 263; *Columbus & W. R. Co.* v. *Wood*, 86 Ala. 164, 5 So. 463; *Memphis & C. R. Co.* v. *Womack*, 84 Ala. 149, 4 So. 618. And see *Houston & T. C. R. Co.* v. *Smith*, 52 Tex. 178; *Virginia Midland R. Co.* v. *Boswell*, 82 Va. 932, 7 S. E. 383.

And the facts that a person injured by being run over by a street car was intoxicated at the time, and that he was negligent because of such intoxication, afford no excuse for such negligence, and do not prevent it from being a bar to a recovery of damages for the injuries received. *Weeks* v. *New Orleans & C. R. Co.* 32 La. Ann. 615.

[39]*Southwestern R. Co.* v. *Hankerson*, 61 Ga. 114; *Memphis & C. R. Co.* v. *Womack*, 84 Ala. 149, 4 So. 618; *St. Louis, I. M. & S. R. Co.* v. *Wilkerson*, 46 Ark. 513; *Little Rock & Ft. S. R. Co.* v. *Pankhurst*, 36 Ark. 371; *Little Rock, M. R. & T. R. Co.* v. *Haynes*, 47 Ark. 497, 1 S. W. 774; *Illinois C. R. Co.* v. *Hutchinson*, 47 Ill. 408; *O'Keefe* v. *Chicago, R. I. & P. R. Co.* 32 Iowa, 467; *Price* v. *Philadelphia, W. & B. R. Co.* 84 Md. 506, 36 L. R. A. 213, 36 Atl. 263; *Whalen* v. *St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Button* v. *Hudson River R. Co.* 18 N. Y. 248; *Smith* v. *Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923; *Herring* v. *Wilmington & R. R. Co.* 32 N. C. (10 Ired. L.) 402, 51 Am. Dec. 395; *Denman* v. *St. Paul & D. R. Co.* 26 Minn. 357, 4 N. W. 605; *Norfolk & W. R. Co.* v. *Harman*, 83 Va. 553, 8 S. E. 251.

[40]*Illinois C. R. Co.* v. *Hutchinson*,, 47 Ill. 408; *Indianapolis & St. L. R. Co.* v. *Galbreath*, 63 Ill. 436; *O'Keefe* v. *Chicago, R. I. & P. R. Co.* 32 Iowa, 467; *Kean* v. *Baltimore & O. R. Co.* 61 Md. 154; *Yarnall* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 575; *Houston & T. C. R. Co.* v. *Sympkins*, 54 Tex. 615, 38 Am. Rep. 632.

A railway engineer in charge of an engine, who sees an apparently intoxicated person upon the track before him, has no right to presume that he will get out of the way, but should take means to stop his train in time to prevent a collision. *Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274.

But the intoxication of a person killed while driving along a railroad track does not excuse his negligence in failing to get off the track, though his getting on the track in the first place was due to the negligence of the railroad company. *McDonald* v. *Chicago, M. & St. P. R. Co.* 75 Wis. 121, 43 N. W. 744.

from voluntary intoxication, enters a train of cars from which he is forbidden, without the knowledge or consent of the conductor, hold the railroad to any duty beyond ordinary care to protect him from injury.[41] The mere fact, however, that a person is guilty of negligence in going on a railway track when so intoxicated that a warning whistle would not arouse him, will not relieve the railroad company from liability for injury if it could have been prevented by due diligence.[42] Likewise, a person unable to take care of himself, from intoxication, who recklessly and negligently attempts to cross a railroad track in front of an advancing train, or under other circumstances of danger, and is injured, though at a public crossing, cannot hold the company liable, in the absence of negligence on its part.[43] And the intoxication of the person injured is to be taken into consideration in an action for injury, on the question of contributory negligence, where it was the cause of his attempt to cross the tracks.[44] But the intoxication of a person injured at a railway crossing is not material, where he was not negligent.[45] And slight intoxication raises no inference of want of ordinary care and prudence upon the part of a person crossing a railway track, though the circumstances and the degree of the intoxication may be considered upon the question of due care.[46]

[41] *Missouri P. R. Co.* v. *Evans*, 71 Tex. 361, 1 L. R. A. 476, 9 S. W. 325.

[42] *Fulp* v. *Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74.

If employees of a railroad company, in charge of a train, see a man upon its tracks at a distance ahead sufficient to enable him to get out of the way, they have a right to presume that he will do so, and go on without checking the speed of the train until they see he is not likely to do so, when it becomes their duty to give extra alarm, and, as a last resort, to check its speed and stop the train, if possible, in time to avoid disaster; but where the man seen is known to be, or appears to be, grossly intoxicated, or otherwise insensible to danger or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he may not or will not, and use proper care to avoid injuring him; and, failing in this, the company will be responsible in damages, if, by the use of care, after they became aware of his negligence, they could have avoided injuring him. *St. Louis, I. M. & S. R. Co.* v. *Wilkerson*, 46 Ark. 513.

[43] *Chicago, R. I. & P. R. Co.* v. *Bell*, 70 Ill. 102; *Toledo, P. & W. R. Co.* v. *Riley*, 47 Ill. 514; *Indianapolis & St. L. R. Co.* v. *Galbreath*, 63 Ill. 436; *Weeks* v. *New Orleans & C. R. Co.* 32 La. Ann. 615; *Marquette, H. & O. R. Co.* v. *Hanford*, 39 Mich. 537; *Brand* v. *Schenectady & T. R. Co.* 8 Barb. 368.

But an instruction, in an action against a railroad company for killing a person upon a railroad bridge, that if the deceased went there in an intoxicated condition about schedule time for a train to pass, this would constitute gross negligence, is erroneous as calculated to mislead the jury, where it appears that the train causing the injury was a special, running out of schedule time and faster than the regular train usually ran. *East Tennessee & W. N. C. R. Co.* v. *Winters*, 85 Tenn. 240, 1 S. W. 790.

[44] *Hankinson* v. *Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206. And see *Butcher* v. *West Virginia & P. R. Co.* 37 W. Va. 180, 18 L. R. A. 519, 16 S. E. 457.

[45] *Ward* v. *Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771.

[46] *Baltimore & O. R. Co.* v. *State*, 81 Md. 371, 32 Atl. 201.

An intoxicated person who walks out upon a railroad trestle to a position of

271. With relation to passengers and carriers.—An intoxicated man has the right to ride upon railway trains so long as he behaves in an orderly manner, and his intoxication does not absolve the carrier from its duty to observe due care for his safety, or relieve it from liability for injury to him by negligence, unless his intoxication directly contributed to it;[47] the question depending upon the ability of the passenger to act with proper care and judgment.[48] But a passenger cannot recover for an injury to which his intoxication contributed,[49] though it is the duty of the carrier, upon notice that a passenger is so intoxicated as to be heedless of danger, and is exposing himself thereto, to use ordinary precautions for his safety, such as calling his attention to the danger, and forbidding such exposure; and it is responsible for an injury resulting from a neglect of such duty.[50] It is not its duty, however, to place a guard over a passenger to prevent him from injuring himself or placing himself in a position of danger, and it is not liable, in the absence of evidence that its agents or servants knew of the perilous position and condition of the passenger.[51] So a carrier has the power, and is under the duty, to expel or to refuse to receive as a passenger anyone who is drunk, disorderly, or riotous, or who is in such a condition from intoxication as to endanger or interfere with the comfort of other passengers, and is

great peril, and is there killed by a train, cannot be held to have been free from contributory negligence. *Anderson* v. *Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 203, 58 N. W. 79.

[47]*Milliman* v. *New York C. & H. R. R. Co.* 66 N. Y. 642; *Putnam* v. *Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Illinois C. R. Co.* v. *Sheehan*, 29 Ill. App. 90; *Pittsburgh, C. & St. L. R. Co.* v. *Vandyne*, 51 Ind. 576, 26 Am. Rep. 68; *Maguire* v. *Middlesex R. Co.* 115 Mass. 239; *Kingston* v. *Ft. Wayne & E. R. Co.* 112 Mich. 40, 40 L. R. A. 131, 70 N. W. 315, 74 N. W. 230; *Meyer* v. *Pacific R. Co.* 40 Mo. 151.

The intoxication of a passenger upon a railway train, who was injured by the company's negligence, should not be regarded as disqualifying him to avoid the consequences thereof, if the circumstances were such that a prudent man could not have avoided them by the exercise of ordinary diligence. *Central R. & Bkg. Co.* v. *Phinazee*, 93 Ga. 488, 21 So. 68.

And intoxication is not necessarily evidence of contributory negligence where the intoxicated party, who was a passenger upon a boat which landed at a pontoon upon a dark night, there being no light upon the boat except one lantern in the hands of a deck hand, fell into the river through a space between the pontoon and the boat not over two feet wide and was drowned, the space being due to the fact that the boat had not landed in its usual position. *Holmes* v. *Oregon & C. R. Co.* 6 Sawy. 262, 5 Fed. 523.

[48]*Milliman* v. *New York C. & H. R. R. Co.* 4 Hun, 409, 6 Thomp. & C. 585, Affirmed in 66 N. Y. 642.

[49]*Strand* v. *Chicago & W. M. R. Co.* 67 Mich. 389, 34 N. W. 712; *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 Pa. 512, 91 Am. Dec. 224. And see *Rozwadosfskie* v. *International & G. N. R. Co.* 1 Tex. Civ. App. 487, 20 S. W. 872; *Norfolk & W. R. Co.* v. *Ferguson*, 79 Va. 241.

[50]*Fisher* v. *West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758, 19 S. E. 578; *St. Louis, A. & T. H. R. Co.* v. *Carr*, 47 Ill. App. 353. And see *Cincinnati, I. St. L. & C. R. Co.* v. *Cooper*, 120 Ind. 469, 6 L. R. A. 241, 16 Am. St. Rep. 334, 22 N. E. 340.

[51]*St. Louis, A. & T. H. R. Co.* v. *Carr*, 47 Ill. App. 353.

liable for any injury caused by passengers received in that condition.[52] And a carrier is not bound to wait until some act of violence or other act of misconduct is actually committed before expelling an intoxicated passenger: it is sufficient if he is in such a condition as to make it reasonably certain that he will become offensive.[53] But the intoxication and misbehavior of a passenger, which will authorize his expulsion will not justify expulsion without the exercise of due care for his safety, having reference to time, place, condition, and surroundings,[54] though a railroad company is not liable for an injury

[52]*Edgerly* v. *Union Street R. Co.* 67 N. H. 312, 36 Atl. 558; *Vinton* v. *Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; *Murphy* v. *Union R. Co.* 118 Mass. 228; *Pittsburg & C. R. Co.* v. *Pillow*, 76 Pa. 510, 18 Am. Rep. 424; *Putnam* v. *Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Graham* v. *Manhattan R. Co.* 149 N. Y. 336, 43 N. E. 917; *Railway Co.* v. *Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *King* v. *Ohio & M. R. Co.* 22 Fed. 413.

But where a drunken person got upon a passenger train, and used profane and obscene language to the conductor, and behaved in a disorderly manner, and drew his pistol when the conductor attempted to put him off the train, thus inducing the conductor to arm himself in order to expel him, after which he continued his profanity and insulting language, upon which shots were exchanged, and the drunken person was injured, the railroad company is not liable therefor, though the conductor might not have been fully excusable for shooting *Peavy* v. *Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70.

[53]*Edgerly* v. *Union Street R. Co.* 67 N. H. 312, 36 Atl. 558; *Sullivan* v. *Old Colony R. Co.* 148 Mass. 119, 1 L. R. A. 513, 18 N. E. 678; *Johnson* v. *Louisville & N. R. Co.* 104 Ala. 242, 53 Am. St. Rep. 39, 16 So. 75.

A passenger honestly supposed by the conductor of a street car to be drunk, who repeatedly disobeys the request of the conductor to behave himself, and whose conduct is annoying to other passengers, may be ejected from the car without rendering the company liable therefor, though such conduct was caused by sickness, and not by intoxication, especially where he made no explanation or complaint of sickness. *Lemont* v. *Washington & G. R. Co.* 1 Mackey, 180, 47 Am. Rep. 238. And see *Briggs* v. *Minneapolis Street R. Co.* 52 Minn. 36, 53 N. W. 1019.

But it cannot be presumed that because a man was drunk and offensive to others, as well by his demeanor as in his appearance, that he was a dangerous man, and that his presence in a street car imperiled the safety of others, so as to warrant his expulsion. *Putnam* v. *Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190.

And mere intoxication upon the part of a person ejected from a railway train which did not take away consciousness and the power to understand the danger to which he was exposed, or deprive him of the physical capacity to take care of himself and avoid danger, does not relieve him from the responsibility of exercising due care after being put off, in order to recover for an injury subsequently received. *Johnson* v. *Louisville & N. R. Co.* 104 Ala. 242, 53 Am. St. Rep. 39, 16 So. 75.

[54]*Louisville & N. R. Co.* v. *Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; *Johnson* v. *Louisville & N. R. Co.* 104 Ala. 242, 53 Am. St. Rep. 39, 16 So. 75; *Roseman* v. *Carolina C. R. Co.* 112 N. C. 709, 19 L. R. A. 327, 34 Am. St. Rep. 524, 16 S. E. 766; *Meyer* v. *Pacific R. Co.* 40 Mo. 151; *Louisville, C. & L. R. Co.* v. *Sullivan*, 81 Ky. 624, 50 Am. Rep. 186. And see *Johnson* v. *Chicago, R. I. & P. R. Co.* 58 Iowa, 348, 12 N. W. 329; *Conolly* v. *Crescent City R. Co.* 41 La. Ann. 57, 3 L. R. A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526.

Where a person ejected from a railway train is incapacitated to take care of himself, and so continues until he perishes, his ejection from the train must be regarded as the proximate cause of his death, whether he was incapacitated by intoxication or by being stunned by

occurring from subsequent incapacity to a person ejected from its trains at a time when he was able to take care of himself.[55] And no liability is incurred by the ejection of a trespasser by a conductor who was not informed of his intoxication and the subsequent peril attending his ejection.[56]

272. With relation to injuries on highways, streets, etc. — Being abroad in a public way in a state of intoxication is not negligence as a matter of law, but a circumstance from which a jury may find the existence of negligence as a fact.[57] The question in such case is

the fall from the car. *Gill* v. *Rochester & P. R. Co.* 37 Hun, 109.

But the death of a person struck and killed by a street car cannot be presumed to be the natural and proximate result of the expulsion of such person from another car, where he was intoxicated at the time, but not so drunk as to be deprived of intelligence or unable to walk, and there was no reason to suppose that he was not able to care for himself, and there was nothing to show that he was left in a dangerous place. *Edgerly* v. *Union Street R. Co.* 67 N. H. 312, 36 Atl. 558.

So, in *Haley* v. *Chicago & N. W. R. Co.* 21 Iowa, 15, it was held that a railroad company was not liable for the death of a man, caused by a subsequent train, where he was put off of a train at a flag station where there were only three houses, and left alone on a dark night, although he was in such a condition from intoxication that he seemed to know nothing; the death having happened six hours later; since it did not appear that the expulsion was the proximate cause of his death.

[55]*Johnson* v. *Louisville & N. R. Co.* 104 Ala. 242, 53 Am. St. Rep. 39, 16 So. 75; *Ham* v. *Delaware & H. Canal Co.* 142 Pa. 617, 21 Atl. 1012; *Roseman* v. *Carolina C. R. Co.* 112 N. C. 709, 19 L. R. A. 327, 34 Am. St. Rep. 524, 16 S. E. 766; *Weeks* v. *New Orleans & C. R. Co.* 32 La. Ann. 615; *Missouri P. R. Co.* v. *Evans*, 71 Tex. 361, 1 L. R. A. 476, 9 S. W. 325. And see *McClelland* v. *Louisville, N. A. & C. R. Co.* 94 Ind. 276; *Louisville & N. R. Co.* v. *Logan*, 88 Ky. 232, 3 L. R. A. 80, 21 Am. St. Rep. 332, 10 S. W. 655.

Where a passenger upon a railroad train arrives at his destination and leaves the train and returns and lies down in such proximity to the railway track as to endanger his life from moving trains, and is injured, he cannot claim immunity from the rule of contributory negligence because he was drunk, unless such negligence or want of care upon the part of the servants of the railroad company appears as would render it liable, notwithstanding his own negligence. *Rozwadosfskie* v. *International & G. N. R. Co.* 1 Tex. Civ. App. 487, 20 S. W. 872.

So, where a passenger having delirium tremens was turned over by the carrier to the overseer of the poor at a depot, the duty of the carrier is fully performed. *Atchison, T. & S. F. R. Co.* v. *Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877.

[56]*Louisville & N. R. Co.* v. *Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; *Gill* v. *Rochester & P. R. Co.* 37 Hun, 109.

And a conductor is not bound to act upon the volunteered opinion of a passenger as to the physical or mental state of a drunken man who has been expelled from the train, where he has no reasonable ground to believe that the man was unable to find a place where he would be safe. *Roseman* v. *Carolina C. R. Co.* 112 N. C. 709, 19 L. R. A. 327, 34 Am. St. Rep. 524, 16 S. E. 766.

But evidence that a passenger in a railway train refused in a nonsensical way to pay his fare, and used rude and obscene language to the conductor, such as no one but a crazy or drunken man would employ, at which the latter did not become angry, tends to show in an action against the railroad company for the death of such person, alleged to have been caused by his ejection from the train, that the conductor had knowledge of his intoxicated condition. *Louisville & N. R. Co.* v. *Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51.

[57]*Cramer* v. *Burlington*, 42 Iowa, 315; *Stuart* v. *Machias Port*, 48 Me. 477; *Thorp* v. *Brookfield*, 36 Conn. 320; *Burns* v. *Elba*, 32 Wis. 605; *Ridley* v. *Lamb*, 10 U. C. Q. B. 354.

whether or not the intoxicated person was disqualified to exercise ordinary care.[58] And the question as to what constitutes ordinary care is one for the determination of the jury.[59] But one who receives an injury on a highway while so intoxicated as to be unable to manage himself with prudence cannot be said to be in the use of ordinary care; and if the absence of ordinary care contributed to his injury, he cannot recover.[60] So, negligence will not be imputed to a person injured by reason of negligent driving, while voluntarily riding in a conveyance having an intoxicated driver, over whom he had no control.[61] But where the drunkenness of a person injured on account of existing defects in a sidewalk in any way contributes to his injury, he cannot recover therefor.[62]

273. Application of last clear chance doctrine.— The rule that he who has the last clear chance, notwithstanding the negligence of the adverse party, is deemed solely responsible for injuries resulting from his failure to exercise reasonable care, has been applied to cases of contributory negligence through intoxication.[63] Under this doctrine, where the negligence of the defendant in an action for a personal injury, which contributed directly to the injury, occurred after the danger in which the injured party had placed himself by his own negligence was, or by the exercise of reasonable care might have been, discovered in time to have averted the injury, he is liable, however gross the negligence of the injured party may have been in placing himself in such a position of danger.[64] And the failure of a railway

[58] *O'Hagan* v. *Dillon*, 10 Jones & S. 458.

[59] *Stuart* v. *Machias Port*, 48 Me. 477.

[60] *Cassedy* v. *Stockbridge*, 21 Va. 391.

And intoxication is a material question tending to show want of ordinary care. *Aurora* v. *Hillman*, 90 Ill. 61.

And one who is injured while intoxicated, in an attempt to drive over a washout extending over the roadway, cannot recover of the company, where, had he been sober, he would have seen it and escaped injury; since in such case voluntary intoxication is negligence. *Woods* v. *Tipton County*, 128 Ind. 298, 27 N. E. 611.

[61] *Brannen* v. *Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

But one who travels by night along a country road in a wagon, knowing the driver to be intoxicated and unfit to drive, is guilty of contributory negligence, and cannot recover damages from the township for injuries sustained by the overturning of the wagon and his precipitation down an unfenced bank. *Hershey* v. *Mill Creek Twp. Road* (Pa.) 8 Cent. Rep. 252, 9 Atl. 452.

And a city is not liable for an injury to a woman caused by her being thrown from a wagon driven over a defective crosswalk, where the husband, who was driving, was drunk and drove too fast, the crosswalk not being so out of repair as to render it unsafe to careful and sober people. *Rock Island* v. *Vanlandschoot*, 78 Ill. 485.

[62] *Healy* v. *New York*, 3 Hun, 708.

[63] See *Pickett* v. *Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; *Lloyd* v. *Albemarle & R. R. Co.* 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805; *Werner* v. *Citizens' R. Co.* 81 Mo. 368.

[64] *Werner* v. *Citizens' R. Co.* 81 Mo. 368; *Lloyd* v. *Albemarle & R. R. Co.*

engineer to maintain a reasonable and vigilant lookout along the track renders the railway company liable for killing a human being upon the track, apparently helpless from intoxication, where he could have seen him by the exercise of ordinary care.[65] Even under this rule, however, the negligence of the intoxicated person will be deemed the proximate cause of the injury, unless it can be reasonably inferred that the engineer saw, or could, by the exercise of ordinary care, have seen, the other's perilous condition.[66]

274. Question for jury.— Whether the intoxication of a person injured was such as to have contributed to the injury is a question of fact for the jury;[67] and so is the question whether the removal of

118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805.

Failure of a street car driver to stop a car in the night, when he could see an object on the track as large as a sack of oats, and which he thought resembled one, or a bundle of hay, is such negligence as will render the street car company liable for running over the object, which proved to be a man who had lain or fallen there in a state of intoxication. *Werner* v. *Citizens' R. Co.* 81 Mo. 368.

[65] *Pickett* v. *Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Werner* v. *Citizens' R. Co.* 81 Mo. 368.

And the evidence of a railway engineer whose train ran over and killed a man lying upon the track, alleged to have been drunk, that he could not have seen him in time to stop the train before reaching him, does not authorize the court, in an action for the killing, to take from the jury the question as to whether he was negligent or not in not stopping the train. *Fulp* v. *Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74.

Though a person lying insensible on a railroad track is drunk, his negligence is not deemed concurrent, where the railroad company's servants, by the exercise of ordinary care, could have seen him in time to have prevented the injury. *Lloyd* v. *Albemarle & R. R. Co.* 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805. And see *Yarnall* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 575; *Fulp* v. *Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74.

[66] *Norwood* v. *Raleigh & G. R. Co.* 111 N. C. 236, 16 S. E. 4.

It is incumbent upon the plaintiff, under this rule, in an action for the death of a man killed while lying unconscious from intoxication upon a railroad track, to avoid the effect of such act, to show that when the engineer could first have seen him he was not only on the track, but in such a condition that he could not possibly escape if the train continued on. *Ibid.*

[67] *Houston & T. C. R. Co.* v. *Sympkins,* 54 Tex. 615, 38 Am. Rep. 632; *Cramer* v. *Burlington,* 42 Iowa, 315; *Stuart* v. *Machias Port,* 48 Me. 477; *Baltimore & O. R. Co.* v. *Botcler,* 38 Md. 568; *Healey* v. *New York,* 6 Thomp. & C. 92; *Newton* v. *Central Vermont R. Co.* 80 Hun, 491, 30 N. Y. Supp. 488; *Tompkins* v. *Oswego,* 40 N. Y. S. R. 4, 15 N. Y. Supp. 371; *Ditchett* v. *Spuyten Duyvil & P. M. R. Co.* 5 Hun, 165; *O'Hagan* v. *Dillon,* 10 Jones & S. 456; *Burns* v. *Elba,* 32 Wis. 605; *Maw* v. *King Twp.* 8 Ont. App. Rep. 248.

And a verdict of a jury in an action for damages for negligence, upon the question of contributory negligence and drunkenness of the plaintiff, is conclusive upon appeal, where the evidence was conflicting, and the question was properly submitted to the jury, under proper instructions. *Salina* v. *Trosper,* 27 Kan. 544; *Union P. R. Co.* v. *Diehl,* 33 Kan. 422, 6 Pac. 566; *Southwestern R. Co.* v. *Hankerson,* 72 Ga. 182.

And the jury, in an action for causing death, in which drunkenness is alleged as showing contributory negligence, should consider the nature of the drunkenness in determining whether or not it was sufficient to rebut the presumptions arising from the love of life and natural instinct for self-preservation possessed by all persons. *Illinois C. R. Co.* v. *Cragin,* 71 Ill. 177.

a passenger from one car to another by trainmen, while the train was in motion, was negligent or wrongful, in view of his intoxicated condition.[68] And the extent of the intoxication of a passenger, and the conductor's knowledge of his condition, and the safety of the place at which he is ejected, are also questions for the jury.[69] Likewise the question whether a railway engineer might have discovered a person lying drunk and helpless upon the track, and might have saved his life without putting his passengers in jeopardy, is one for the jury;[70] and so is the question whether proper care was exercised in expelling a drunken and disorderly passenger from a street car;[71] as is also the question as to the negligence of a master in knowingly employing a drunken servant;[72] and that as to the negligence of a servant in remaining in a master's employment after discovering a coemployee's habitual drunkenness.[73] The question as to the legal effect of the intoxication, however, is for the court.[74]

275. Sufficiency of evidence to establish negligence.— Where the evidence of negligence in an action therefor is evenly balanced, the fact of the drunkenness of one of the parties might turn the scale, since a man partially bereft of his faculties would be less careful than if sober.[75] And evidence of the infliction of an injury, together with proof of intoxication and reckless actions upon the part of the person

[68] *Marquette* v. *Chicago & N. W. R. Co.* 33 Iowa, 563; *Guy* v. *New York, O. & W. R. Co.* 30 Hun, 399.

[69] *Louisville & N. R. Co.* v. *Johnson*, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; *Johnson* v. *Louisville & N. R. Co.* 104 Ala. 241, 53 Am. St. Rep. 39, 16 So. 75.

[70] *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Clark* v. *Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43.

[71] *Murphy* v. *Union R. Co.* 118 Mass. 228.

[72] *Gilman* v. *Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *Michigan C. R. Co.* v. *Gilbert*, 46 Mich. 176, 9 N. W. 243.

[73] *Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Williams* v. *Missouri P. R. Co.* 109 Mo. 485, 18 S. W. 1098.

[74] *Schuenke* v. *Pine River*, 84 Wis. 669, 54 N. W. 1007.

[75] *Wynn* v. *Allard*, 5 Watts & S. 525. But the testimony of a witness that he had seen an engineer occasionally drink a glass of beer, and that he thought he saw him drink one on the night of the accident in question, does not tend to show the engineer's intoxication at the time of the collision causing injury, so as to hold the railroad company responsible therefor. *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

And a verdict for the plaintiff in an action for a personal injury against a railroad company, based upon the defendant's negligence, is not justified by evidence of a witness who lived near the railroad track that the accident occurred about ten o'clock at night, and that he was in his room when he heard the train passing, and heard the scream of a man, and the wheels jumping on the rails, and that he got out within five minutes, and found the person run over seriously injured, and that he did not hear the ringing of any bell, and that the locomotive was headed south with one or two cars ahead of it, where there was evidence from which it could be inferred that the person injured was intoxicated, and brought the injury upon himself. *Church* v. *Northern P. R. Co.* 31 Fed. 529.

inflicting it, is sufficient to sustain a recovery.[76] And evidence of habitual drunkenness is sufficient to warrant an inference of unfitness to be entrusted with responsible duties requiring care in their performance.[77] So, intoxication in any degree is proper to be considered in an action for damages for an injury, in determining the question of contributory negligence;[78] though intoxication alone does not establish contributory negligence, and only becomes evidence of it by reason of the fact that the intoxication contributed to the injury.[79] But contributory negligence may be shown by evidence of intoxication, together with negligent acts.[80] And the accident itself happening under circumstances under which it would not have happened to persons

[76] *Daly* v. *Hinz*, 113 Cal. 366, 45 Pac. 693; *Williams* v. *Missouri P. R. Co.* 109 Mo. 485, 18 S. W. 1098.

[77] *Williams* v. *Missouri P. R. Co.* 109 Mo. 485, 18 S. W. 1098.

But intoxication at the time of an injury cannot be inferred from proof of mere intemperate habits. *Hampson* v. *Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

[78] *Thorp* v. *Brookfield*, 36 Conn. 320; *Alger* v. *Lowell*, 3 Allen, 402; *Stuart* v. *Machias Port*, 48 Me. 477; *Lynch* v. *New York*, 47 Hun, 524; *Hankinson* v. *Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206; *Houston & T. C. R. Co.* v. *Waller*, 56 Tex. 331; *Fitzgerald* v. *Weston*, 52 Wis. 354, 9 N. W. 13; *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124; *Holmes* v. *Oregon & C. R. Co.* 6 Sawy. 290, 5 Fed. 523. And see *Cramer* v. *Burlington*, 42 Iowa, 315.

And it should appear from the preponderance of the whole testimony that the person injured was not intoxicated at the time of the injury. *Cramer* v. *Burlington*, 42 Iowa, 315.

[79] *Lynch* v. *New York*, 47 Hun, 524; *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124. And see *Holmes* v. *Oregon & C. R. Co.* 6 Sawy. 290, 5 Fed. 523.

While intoxication of a person injured at the time of the injury is a circumstance to go to the jury on the question of contributory negligence, it is not conclusive, and does not change the burden of proof unless the intoxication was of such a degree as to render him imbecile. *Seymer* v. *Lake*, 66 Wis. 651, 29 N. W. 554. And see *Ford* v. *Umatilla County*, 15 Or. 315, 16 Pac. 33, to nearly the same effect.

And the mere fact that the plaintiff in an action for damages for falling into an excavation had indulged in intoxicating liquors sufficiently to make the fact perceptible from his breath does not show intoxication which disqualifies him from the exercise of ordinary care, and constitutes contributory negligence upon his part. *O'Hagan* v. *Dillon*, 10 Jones & S. 458.

Nor does the fact that a person injured from a defective sidewalk was just returning from a saloon where he got his dinner bucket filled with ale for his sick wife, and he himself had drunk a glass of beer with a fellow workman who had drunk several. *Aurora* v. *Hillman*, 90 Ill. 61.

And evidence that a person contracting for the transportation of supplies to his land smelled whiskey on the captain of the ship on the morning preceding the injury thereto, and that of two witnesses that on one occasion he was drunk on a visit to that plantation, but not when on duty, is not sufficient to show that the disaster occurred with the knowledge of the owner within the meaning of U. S. Rev. Stat. § 4283 (U. S. Comp. Stat. 1901, p. 2943), providing for the limitation of liability of the owner to the value of his interest in the vessel and her freight if the loss was occasioned or occurred without his privity or knowledge, where all the witnesses spoke as to the captain's general sobriety, and the owner claimed that he had never known him to be drunk, and that liquor was forbidden on his boats, except, possibly, a small flask in bad weather. *The Anna*, 47 Fed. 525.

[80] See *Holland* v. *West End Street R. Co.* 155 Mass. 387, 29 N. E. 622; *Des*

exercising ordinary care, together with intoxication, is sufficient.[81] But contributory negligence which will justify taking the case from the jury is not established upon evidence of intoxication, where the testimony on that point was conflicting.[82]

elms v. *Baltimore & O. R. Co.* 149 Pa. 432, 24 Atl. 283; *Monk* v. *Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Bradley* v. *Second Ave. R. Co.* 8 Daly, 289.

And evidence that a person run over by a railroad train while attempting to cross the tracks was intoxicated entitles the defendant, in an action for the injury, to an instruction that if the person injured was guilty of negligence, and such negligence contributed to the injury, she is not entitled to recover. *Brand* v. *Schenectady & T. R. Co.* 8 Barb. 368.

[81] *McCracken* v. *Markesan*, 76 Wis. 499, 45 N. W. 323; *Meyer* v. *King*, 72 Miss. 1, 35 L. R. A. 474, 16 So. 245.

One who crosses a stream upon a foot bridge which is defective, and is injured by falling from the bridge, will be denied a recovery upon the ground of contributory negligence, where it appears that he was very much intoxicated, and was warned that the bridge was not safe, and there was another bridge which was safe within a few feet of that from which the accident happened. *Wood* v. *Andes*, 11 Hun, 543.

[82] *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

CHAPTER XII.

OFFICES AND PLACES OF TRUST.

I. Lunacy.
276. Mental incapacity as a disqualification.
II. Drunkenness.
277. Drunkenness as a ground of incapacity.

I. Lunacy.

276. Mental incapacity as a disqualification.— Persons who are actually insane or idiotic would probably be deemed ineligible to hold public office, even in the absence of statutory provisions on the subject;[1] and they are made ineligible by statutory enactment in most of the states. But such provisions do not exclude persons whose minds are merely enfeebled by age or disease.[2] And a person who labors under hallucinations or delusions is not excluded, where they do not relate to political matters, and do not go to the extent of incapacitating him to transact ordinary business.[3] And the fact that an administrator was sent to an insane asylum does not create an absolute vacancy in the administratorship, so as to warrant one who had renounced his right in the former's favor to retract the renunciation.[4]

II. Drunkenness.

277. Drunkenness as a ground of incapacity.— The test as to habitual drunkenness, which will warrant the removal of a public officer, is whether he was habitually intemperate whenever the opportunity was offered.[5] Particular instances of drunkenness and of improper

[1] *Sinks* v. *Reese*, 19 Ohio St. 306, 2 Am. Rep. 397.

The insanity of a sheriff, officially ascertained, suspends him from office, and terminates the agency of his deputies, and gives his sureties the same rights they would have if he were dead. *Somers* v. *Burke County*, 123 N. C. 583, 68 Am. St. Rep. 834, 31 S. E. 873.

[2] *Sinks* v. *Reese*, 19 Ohio St. 306, 2 Am. Rep. 397.

[3] *Clark* v. *Robinson*, 88 Ill. 498.

[4] *Moore* v. *Moore*, 68 Cal. 281, 9 Pac. 164.

Where an officer is declared a lunatic by a court of competent jurisdiction, and the county court declares his office vacant for that reason, the order declaring the vacancy will not be declared invalid at his instance upon being discharged from the asylum as cured, upon the ground that it was made without notice, since, the judgment declaring him a lunatic being valid, no notice was required. *Bowen* v. *Long*, 19 Ky. L. Rep. 1881, 44 S. W. 647.

[5] *Trigg* v. *State*, 49 Tex. 645. And see *Re Peters*, 10 Kulp. 93.

and unlawful acts are immaterial and out of place on a charge of habitual drunkenness, in a proceeding for the removal of an officer on that ground, though they might be used as evidence on the question of habitual drunkenness.[6] Nor will habits of intemperance disqualify a person otherwise entitled thereto, from receiving letters of administration, unless they are such as to make him an habitual drunkard.[7] And a person found by inquisition to be an habitual drunkard is not thereby disqualified to perform the office of executor or administrator.[8] Habitual drunkenness, however, is a sufficient cause for the removal of an administrator, under a statute providing therefor, even in the absence of a showing that it rendered him incapable of discharging his duties.[9] And fixed habits of intemperance constitute a sufficient ground for the removal of a guardian of an insane person.[10] Whether one otherwise entitled to administration is incompetent by reason of drunkenness and improvidence is a question of fact for the trial court, where the evidence is conflicting.[11]

[6] *Trigg* v. *State*, 49 Tex. 645.

The intoxication of a public officer, when not occurring while in the discharge of an official duty, is not a ground for removal from office. *State* v. *Welsh*, 109 Iowa, 19, 79 N. W. 369.

And getting drunk four times in a year, each time in a different month of the year, does not constitute such habitual drunkenness as will justify the removal of the drinker from office. *Trigg* v. *State*, 49 Tex. 645.

But the voluntary intoxication of a sheriff while engaged in the performance of his official duties is such wilful misconduct on his part as to justify his removal from office, especially where it results in his allowing a prisoner committed to his charge to escape and remain at liberty for some time. *State* v. *Welsh*, 109 Iowa, 19, 79 N. W. 369.

[7] *Elmer* v. *Kechele*, 1 Redf. 472.

The appointment of a person as administrator will not be disturbed under a statute providing that no person is competent to serve as administrator who, when appointed, is adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, upon evidence that he drank to a considerable extent at times, where it appears that for several years he had conducted a large business with such care, foresight, and attention as to acquire the reputation of being a conservative, successful, and clear-headed business man, and that other business men sought his counsel, and that he had attended to important business matters for others, and that his use of intoxicating liquors was generally temperate. *Root* v. *Davis*, 10 Mont. 228, 25 Pac. 105.

But evidence that a person named in a will as an executor had used intoxicating liquors, and at times became intoxicated, and that he was under their influence a great part of the time, having occasional sprees ending in delirium tremens, and that he had become insolvent, is sufficient to warrant the surrogate in refusing to issue letters testamentary to him, and in removing him from the office of trustee, on the ground of incompetency by reason of improvidence and habitual drunkenness, though during the pendency of the proceeding his indulgence had been less excessive than before. *Re Cady*, 36 Hun, 122.

[8] *Sill* v. *M'Knight*, 7 Watts & S. 245.

[9] *Gurley* v. *Butler*, 83 Ind. 501.

[10] *Kettletas* v. *Gardner*, 1 Paige, 488.

[11] *Re Connors*, 110 Cal. 408, 42 Pac. 906.

CHAPTER XIII.

SETTLEMENT OR DOMICIL.

278. Capacity as affecting power to choose.

278. Capacity as affecting power to choose.— Insanity need not amount to complete madness to render a party unable to choose a settlement or domicil; in such case the jury is to consider whether the mind of the party was diseased to such an extent as to deprive him of volition, free will, and the power of choice, so as to take away his control over his mind and actions.[1] And a pauper is presumed to have sufficient intelligence to exercise a choice with regard to his residence, until the contrary is conclusively shown.[2] One who has sufficient mental capacity to form an intention and to make a choice as to his place of abode, and goes to live in the place of his choice without compulsion, and lives there for the period prescribed by law, without assistance from any town, acquires a settlement in that place,[3] though proceedings for the appointment of a guardian were then pending.[4] And where the lunacy of a person is merely temporary, and not permanent, his maintenance is chargeable to the parish of his selection.[5] A person without sufficient capacity to marry cannot obtain a settlement by marriage.[6]

[1] *Townsend* v. *Pepperell*, 99 Mass. 40.

A child whose mental capacity is such that she is incapable of exercising any choice or intention in regard to her residence is not emancipated upon attaining her majority, where she continues to reside in her father's family, and would take, by derivation, a settlement subsequently acquired by him. *Topsham* v. *Chelsea*, 60 Vt. 219, 13 Atl. 861.

[2] *Topsham* v. *Chelsea*, 60 Vt. 219, 13 Atl. 861.

[3] *Westmore* v. *Sheffield*, 56 Vt. 239; *Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741.

A residence in a town for the requisite period will give a woman a legal settlement though she was weak of intellect, but capable of doing the coarser work about a kitchen, and of knitting and sewing, and was handy at taking care of small children, and could read and attend church and behave with propriety, though she was not capable of taking care of herself and making contracts, and providing herself with a place to live. *Ludlow* v. *Landgrove*, 42 Vt. 137.

[4] *Talbot* v. *Chamberlain*, 149 Mass. 57, 3 L. R. A. 254, 20 N. E. 305.

[5] *Reg.* v. *Manchester*, 2 Jur. N. S. 1205; *Hunslet* v. *Dewsberry Union*, 2 Jur. N. S. 1207, note.

Incipient insanity does not incapacitate one from gaining a settlement. *Buckland* v. *Charlemont*, 3 Pick. 173.

[6] *Winslow* v. *Troy*, 97 Me. 130, 53 Atl. 1008.

And a marriage by a female pauper with a man so void of understanding as to be incapable of making a valid contract will not change the place of her settlement from that of her nativity. *Middleborough* v. *Rochester*, 12 Mass. 363.

CHAPTER XIV.

THE STATUTE OF LIMITATIONS.

I. Lunacy.
279. Degree of incapacity which will prevent running.
II. Drunkenness.
280. Effect of incapacity to prevent running.

I. Lunacy.

279. Degree of incapacity which will prevent running.—The mental incapacity which will prevent the running of the statute of limitations must be such as to render the party unable to understand or ascertain his rights, and that his rights have been trespassed upon, and that such trespass will eventually destroy them.[1] And in case of fraud it must be such as to prevent him from realizing the nature and consequences of the fraudulent act, and preclude him from taking the necessary steps required of him to remedy it.[2] Old age, causing such imbecility as to render the party incapable of transacting business, is sufficient to prevent the statute of limitations from running against him.[3] But where one has ascertained the facts which con-

[1] *Warlick* v. *Plonk*, 103 N. C. 81, 9 S. E. 190; *Oliver* v. *Berry*, 53 Me. 206, 87 Am. Dec. 547; *Clark* v. *Trail*, 1 Met. (Ky.) 35; *Clarke* v. *Irwin*, 63 Neb. 539, 88 N. W. 783.

Sufficient mental ability to know what one is doing, and the nature of the act done, is not the test of insanity which will affect the running of the statute of limitations. *Burnham* v. *Mitchell*, 34 Wis. 117.

The mental incapacity which will prevent the statute of limitations from running against a settlement of a claim must be such as to render the party unable to understand that the relation of debtor and creditor existed between himself and the other party, and the amount he was to receive in satisfaction of the indebtedness, and to have a rational idea as to all the circumstances of the case, and as to the propriety of the settlement. *Ibid.*

[2] *Wright* v. *Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605. And see *Allore* v. *Jewell*, 94 U. S. 506, 24 L. ed. 260; *Crowther* v. *Rowlandson*, 27 Cal. 376.

And to prove that fraud was concealed within the meaning of a statute providing that the cause of action therefor shall accrue at the time of its discovery, it is sufficient to show that the person defrauded was such an imbecile or in such a condition of mind that it was scarcely possible that he could have discovered it, though it would have been an unconcealed act if the condition of his mind had not been that of actual lunacy. *Manby* v. *Bewicke*, 3 Kay & J. 342.

[3] *Porter* v. *Porter*, 3 Humph. 586.

So, being cross, cranky, freakish, and peculiar occasionally, either in private or in public, does not constitute insanity within the meaning of a statutory provision that an action may be brought within two years after the removal of disability. *Calumet Electric Street R. Co.* v. *Mabie*, 66 Ill. App. 235.

It has been held that the word "insane," as used in the statute of limita-

stitute a fraud, and knows of its existence, the statute begins to run, irrespective of the degree of intelligence possessed by him, though he may not have enough courage and independence to resist hostile influences, and assert his rights.[4] And the disability which will affect the running of the statute must be an existing one at the time the cause of action accrues.[5] To render insanity a disability it is not necessary that it should have been judicially determined.[6] And it may consist of insane delusion as well as permanent insanity.[7]

II. Drunkenness.

280. Effect of incapacity to prevent running.—The incompetency from intoxication or otherwise which will exonerate one from the consequences of his own laches, and exempt him from the operation of the statute of limitations, must be an incapacity preventing him from realizing the nature and consequences of any fraud that may have been practised upon him, and from understanding his rights, and precluding him from taking the necessary steps to right the wrong inflicted upon him.[8] Mere temporary excitement is not suffi-

tions, is equivalent to the term *non compos mentis*, or unsound and deranged mind, as used in the statute of wills; and if a person is so insane as to be incapable of making a will he should be considered insane within the meaning and intent of the statute of limitations. *Burnham* v. *Mitchell*, 34 Wis. 117.

[4] *Piper* v. *Hoard*, 107 N. Y. 67, 1 Am. St. Rep. 785, 13 N. E. 632. And see *Warlick* v. *Plonk*, 103 N. C. 81, 9 S. E. 190.

Legal liabilities may be enforced against idiots and lunatics; and therefore, the fact that they are not in all respects *sui juris* is no reason for extending the time allowed by statute for commencing actions against them. *Sanford* v. *Sanford*, 62 N. Y. 553.

And testimony of witnesses that a person was addled, but sometimes had pretty good sense, will not warrant a court in announcing its conclusion, in the presence of a jury, that he was insane, and that the statute of limitations would not run against him. *Asbury* v. *Fair*, 111 N. C. 251, 16 S. E. 167.

[5] *Griswold* v. *Butler*, 3 Conn. 227; *Clark* v. *Trail*, 1 Met. (Ky.) 35; *Jones* v. *Perkins*, 5 B. Mon. 222; *Sharp* v. *Stephens' Committee*, 21 Ky. L. Rep. 687, 52 S. W. 979; *McCutcheon* v. *Currier*, 94 Me. 362, 47 Atl. 923; *Allis* v. *Moore*, 2 Allen, 306; *Piper* v. *Hoard*, 107 N. Y. 67, 1 Am. St. Rep. 785, 13 N. E. 632; *Asbury* v. *Fair*, 111 N. C. 251, 16 S. E. 467; *Adamson* v. *Smith*, 2 Mill, Const. 269, 12 Am. Dec. 665; *Lincoln* v. *Norton*, 36 Vt. 679; *Oliver* v. *Pullam*, 24 Fed. 127; *Doe ex dem. Griggs* v. *Shane*, 4 T. R. 306; *Cotterell* v. *Dutton*, 4 Taunt. 826, 14 Revised Rep. 675.

Insanity which did not develop until after the expiration of six months from the time of an accident alleged to have caused it does not extend the period of limitation applicable to actions for personal injuries, under a statutory provision for such extension where the person entitled to bring the action is insane at the time the cause of action accrues. *Calumet Electric Street R. Co.* v. *Mabie*, 66 Ill. App. 235.

But the statute of limitations will not run against a party who was beaten by another to such an extent as to become deranged, so as to bar an action for the beating. *Sasser* v. *Davis*, 27 Tex. 656.

[6] *Lantis* v. *Davidson*, 60 Kan. 389, 56 Pac. 745. And see *Hawley* v. *Griffin* (Iowa) 92 N. W. 113.

[7] See *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

[8] *Wright* v. *Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605.

The mere fact that a man spent all

cient, unless the party is deprived of his reason and understanding.[9] A drunkard is not an incompetent like an idiot or lunatic; he is simply incompetent upon proof that his understanding was clouded, or his reason dethroned, by actual intoxication at the time.[10] So far as legal capacity is concerned, however, it is immaterial, on the question of the running of the statute, from what cause such a state of mind arose, whether by the act of Providence or by the party's own imprudence.[11]

the money he could procure in gratifying an inordinate taste for liquor does not constitute a sufficient incompetency to relieve him from the consequences of his laches in not proceeding for relief within ten years after a deed was fraudulently obtained from him. *Ibid.*

[9]*Bliss* v. *Connecticut & P. Rivers R. Co.* 24 Vt. 424.

[10]*Wright* v. *Fisher,* 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605.

[11]*Bliss* v. *Connecticut & P. Rivers R. Co.* 24 Vt. 424.

And certiorari will lie to review an award of commissioners in assessing damages for land taken in the construction of a railroad at a time when the owner was voluntarily intoxicated, though an appeal was not taken within the time limited by law. *Ibid.*

A direction by a person judicially found to be an habitual drunkard, to a holder of a note against him, to send it to a designated person, who would pay it, does not constitute an acknowledgment of an existing debt more than twenty years old, which will take it out of the statute of limitations. *Hannum's Appeal,* 9 Pa. 471.

CHAPTER XV.

ACTIONS.

281. Competency to maintain.

281. Competency to maintain.—No question of competency of a defendant arises when an action against him results in his favor. The question as to his competency to defend himself when judgment is rendered against him is elsewhere treated;[1] and when a guardian or committee has been appointed for him, such guardian or committee can enforce his rights under the direction of the court; but when no such guardian or committee has been appointed, and his rights are infringed, there is a question as to his competency to pursue the remedy prescribed by law, though it has been but slightly considered by the courts. The rule governing it, however, seems to be furnished by a recent Georgia case,[2] holding that whether one absolutely *non compos mentis* can or cannot, in his own name, bring and maintain an action, one who, though very weak in mind, has enough capacity to understand the nature of a particular cause of action, and will enough to desire to bring suit thereon, may do so without a next friend or guardian.

[1] *Post*, chapter XVI., JUDGMENTS.

[2] *Calhoun* v. *Mosly*, 114 Ga. 641, 40 S. E. 714.

The facts that a grantor was very old and feeble, and that his mind was affected by old age, that he had not sufficient mental capacity to transact business or make valid contracts, and that his mind had been so affected for years, do not prevent him from bringing suit to set aside a deed made by him, without a next friend or guardian, if he had enough mental capacity to understand the nature of his cause of action, and sufficient will to desire to bring suit thereon. *Ibid.*

But a woman who is an imbecile and incompetent to testify cannot institute and prosecute a proceeding in bastardy. *State ex rel. Yilek* v. *Jehlik*, 66 Kan. 301, 61 L. R. A. 265, 71 Pac. 572.

CHAPTER XVI.

JUDGMENTS.

282. Effect of incapacity upon, generally.
283. Effect as to purchasers.
284. Degree of insanity which will affect.
285. When and how relieved against.

282. Effect of incapacity upon, generally.—A judgment against a party is neither void nor voidable nor impeachable collaterally, where jurisdiction was obtained, merely because the person against whom it was rendered was insane.[1] Judgments at law and decrees in equity may be properly entered against persons who are *non compos mentis,* when they are properly represented.[2] And they are as binding upon

[1]*Walker* v. *Clay,* 21 Ala. 807; *Sacramento Sav. Bank* v. *Spencer,* 53 Cal. 737; *Dunn* v. *Dunn,* 114 Cal. 210, 46 Pac. 5; *Newell* v. *Smith,* 23 Ga. 170; *Foster* v. *Jones,* 23 Ga. 168; *Noel* v. *Modern Woodmen,* 61 Ill. App. 597; *Maloney* v. *Dewey,* 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848; *Speck* v. *Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213; *Boyer* v. *Berryman,* 123 Ind. 451, 24 N. E. 249; *Dickerson* v. *Davis,* 111 Ind. 433, 12 N. E. 145; *Woods* v. *Brown,* 93 Ind. 164, 47 Am. Rep. 369; *Allison* v. *Taylor,* 6 Dana, 87, 32 Am. Dec. 68; *King* v. *Robinson,* 33 Me. 114, 54 Am. Dec. 614; *Stigers* v. *Brent,* 50 Md. 214, 33 Am. Rep. 317; *Heard* v. *Sack,* 81 Mo. 610; *Crow* v. *Meyersieck,* 88 Mo. 411; *Lamprey* v. *Nudd,* 29 N. H. 299; *Weber* v. *Weitling,* 18 N. J. Eq. 441; *Crippen* v. *Culver,* 13 Barb. 428; *Sternbergn* v. *Schooleraft,* 2 Barb. 153; *Robertson* v. *Lain,* 19 Wend. 649; *Brittain* v. *Mull,* 99 N. C. 483, 6 S. E. 382; *Johnson* v. *Pomeroy,* 31 Ohio St. 247; *Henry* v. *Brothers,* 48 Pa. 70; *Wood* v. *Bayard,* 63 Pa. 320; *Re Eckstein,* 1 *Clark* (Pa.) 224, 1 Pars. Sel. Cas. 59; *Denni* v. *Elliott,* 60 Tex. 337; *Ewing* v. *Wilson,* 63 Tex. 88; *Wynne* v. *Newman,* 75 Va. 816; *Pollock* v. *Horn,* 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885; *Watt* v. *Brookover,* 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007; *Withrow* v. *Smithson,* 37 W. Va. 757, 19 L. R. A. 762, 17 S. E. 316; *White* v. *Hinton,* 3 Wyo. 753, 17 L. R. A. 66, 30 Pac. 953; *Bramhall* v. *United States,* 6 Ct. Cl. 238; *Beverley's Case,* 4 Coke, 123; *Mansfield's Case,* 12 Coke, 124.

A judgment obtained against a lunatic is merely irregular, and not void, though obtained by one who had knowledge of the insanity, without interposition of a guardian. *Johnson* v. *Pomeroy,* 31 Ohio St. 247; *McAlister* v. *Lancaster County Bank,* 15 Neb. 295, 18 N. W. 57.

But the making of a deed to bar an entail is a matter *in pais,* and does not stand on the same footing as the entering of judgments in a court of record, and evidence is admissible to show that the grantor was *non compos mentis,* or that, being of a weak mind, he was imposed upon, for the purpose of avoiding such deed. *Wood* v. *Bayard,* 63 Pa. 320.

[2]*King* v. *Robinson,* 33 Me. 114, 54 Am. Dec. 614; *Ex parte Leighton,* 14 Mass. 207; *Foster* v. *Jones,* 23 Ga. 168; *McNees* v. *Thompson,* 5 Bush, 686.

Judgment in a suit against a lunatic is properly rendered against the lunatic himself, and not against his guardian. *Walker* v. *Clay,* 21 Ala. 797.

Where no guardian has been appointed for an adult *non compos,* suit for necessaries must be prosecuted against him, and his estate must pay

them and their property, where jurisdiction was obtained, as similar judgments would be upon a sane person.[3] And subsequent insanity of a defendant will not render a judgment against him void in such case.[4] Such judgment is, nevertheless, a lien upon land.[5] And the property of a lunatic is not exempt from execution issued upon a judgment rendered subsequent to the establishment of his sanity.[6] Nor does the insanity of a defendant, either present or subsequent, affect the right to enter a judgment against him upon a power of attorney to confess judgment, a power thus conferred not being rev-

any judgment that may be recovered. *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67.

And the fact that a guardian failed to obtain leave from a court of equity to institute a suit against his lunatic debtor renders the judgment obtained neither void nor voidable; and a party acting under it is not a trespasser. *Crippen* v. *Culver*, 13 Barb. 428.

[3]*Bensieck* v. *Cook*, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642; *King* v. *Robinson*, 33 Me. 114, 54 Am. Dec. 614. And see *Lamprey* v. *Nudd*, 29 N. H. 299.

And a judgment against a lunatic cannot be set aside upon the ground of absence of jurisdiction of the person of the defendant, because at the time he and his property were in charge of a committee, duly appointed by the court of chancery. *Sternbergh* v. *Schoolcraft*, 2 Barb. 153.

But before a lunatic can be personally affected by a judgment upon a contract made by him, it is necessary that process should be prayed for and issued against him, and served upon him; and such a judgment is invalid when process was prayed for and issued against, and service was made upon, his guardian only. *Scott* v. *Winningham*, 79 Ga. 492, 4 S. E. 390.

[4]*Weber* v. *Weitling*, 18 N. J. Eq. 441; *Crippen* v. *Culver*, 13 Barb. 428; *Robertson* v. *Lain*, 19 Wend. 649; *Fleming* v. *Seeligson*, 57 Tex. 524. And see *Weaver* v. *Brenner*, 145 Pa. 299, 21 Atl. 1010.

And an action brought by a guardian against a debtor, pending which the debtor is adjudged an habitual drunkard and a committee is appointed for his estate by proceedings previously commenced in another court, will not be dismissed; but proceedings therein will be stayed until the reformation of the defendant, and the discharge of his committee, if such event should occur, so as to permit the plaintiff to retain the advantage obtained. *Niblo* v. *Harrison*, 9 Bosw. 668.

And a judgment rendered against a person who is subsequently found to be of unsound mind may be revived by action against the judgment debtor and his committee. *McNees* v. *Thompson*, 5 Bush, 686.

But judgment will not be permitted to be entered upon a warrant of attorney to secure a retransfer, upon demand, of stock loaned, after which the person giving the warrant becomes and continues to be insane, and was so when the formal demand was made upon him, as such a demand must be made of a person capable of understanding it. *Capper* v. *Dando*, 4 Nev. & M. 335, 2 Ad. & El. 458, 1 H. & W. 11, 4 L. J. K. B. N. S. 97.

[5]*Withrow* v. *Smithson*, 37 W. Va. 757, 19 L. R. A. 762, 17 S. E. 316.

But the general rule that judgments of a court of general jurisdiction are not subject to collateral attack does not apply to an action for divorce, brought against a wife who had been taken by her husband to another state and confined in an asylum therein, and sued by him while thus absent, in which judgment was obtained upon constructive service, from which there was no appeal or means by which it might be modified or vacated. *Newcomb* v. *Newcomb*, 13 Bush, 544, 26 Am. Rep. 222.

[6]*Pollock* v. *Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885; *Ex parte Leighton*, 14 Mass. 207. *Contra*, *Buckler* v. *Reese*, 100 Ky. 336, 53 S. W. 492.

And knowledge on the part of a sheriff having an execution in his hands, that proceedings had been instituted to have the execution debtor interdicted, does not warrant him in staying a sale

ocable.[7] The rule is different, however, after inquisition, when the statute vests the effects of the lunatic absolutely in the committee.[8]

283. Effect as to purchasers.— Title to land sold passes upon a judgment and execution and sale thereunder, though the judgment debtor was insane at the time of its rendition.[9] A sheriff's deed in such case is not void, but voidable only.[10] And in a proper case the purchaser would be protected.[11] Public policy forbids that a judgment

of the property seized; parties desiring to stop the sale must enjoin it. *Rau* v. *Katz*, 26 La. Ann. 463.

So, at common law a defendant cannot be discharged from arrest or imprisonment under body execution issued on a demand in a civil suit, on the ground that he was insane at the time of the arrest, or became so afterwards; and under a statute authorizing the discharge of such a person when sent to an insane asylum, he may, on being restored to sanity, be again arrested by his guardian. *Bush* v. *Pettibone*, 4 N. Y. 300.

It has been held, however, that a judgment creditor, under a judgment rendered against an insane person, will not be allowed to attach either the person or the estate of the judgment debtor, but will be obliged to apply to the committee or to a court of chancery for the payment of his debt; and, as a general rule, will then be required to establish the justice of his demand. *Robertson* v. *Lain*, 19 Wend. 650; *Brasher* v. *Cortlandt*, 2 Johns. Ch. 400; *Niblo* v. *Harrison*, 9 Bosw. 668; *Re Hopper*, 5 Paige, 490; *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Eq. Cas. 59; *Wright's Appeal*, 8 Pa. 57; *McNees* v. *Thompson*, 5 Bush, 686.

And that an attachment issued on a judgment will be dissolved where the defendant had been reported as insane, without lucid intervals, by inquisition covering the date of the judgment. *Harmstead* v. *Kingsley*, 3 W. N. C. 64.

[7] *Spencer* v. *Reynolds*, 9 Pa. Co. Ct. 249; *Hageman* v. *Salisberry*, 74 Pa. 280; *Person* v. *Warren*, 14 Barb. 488; *Piggot* v. *Killick*, 4 Dowl. P. C. 287, 1 H. & W. 518.

But a bond and warrant of attorney executed by a person subsequently found by inquisition to have been at the time of unsound mind and incapable of governing himself or managing his affairs, and a judgment entered thereon by confession, may be set aside upon terms, in the discretion of the court; but they are not absolutely void, and will not be set aside unconditionally, where it appears that, for several years prior thereto, the alleged lunatic had been permitted to carry on business. *Person* v. *Warren*, 14 Barb. 488. And see *Crawford* v. *Thomson*, 161 Ill. 161, 43 N. E. 617.

And the committee of a lunatic is not estopped, by a judgment rendered upon a note containing a warrant of attorney to confess judgment and a waiver of inquisition, from denying the validity of the title of a purchaser thereunder, where the waiver of the inquisition was not contained in the warrant, or made part of it, and was the act of the defendant himself when he was incapable of executing a valid contract, and the purchaser was aware of his incapacity. *Hope* v. *Everhart*, 70 Pa. 231.

If a waiver of inquisition as to exemption is a part of a judgment rendered upon a note containing a warrant of attorney to confess judgment, however, the defendant, though a lunatic, is bound by it, and his committee cannot question its validity in a subsequent action; but if it was not a part of the judgment, the defendant is not bound, and the committee are not estopped from denying the validity of a purchaser's title. *Ibid.*

[8] See *ante*, § 150.

[9] *Tomlinson* v. *Devore*, 1 Gill, 348; *Hageman* v. *Salisberry*, 74 Pa. 280.

A judgment in partition is not invalidated so as to affect the title of a purchaser thereunder, by the fact that one of the parties in interest was insane and resided in a foreign country, and that a tutor had been appointed, who appointed an attorney in fact to represent him in the state, since the tutor may exercise his office by agent. *Vick* v. *Volz*, 47 La. Ann. 42, 16 So. 568.

[10] *Thomas* v. *Hunsucker*, 108 N. C. 720, 13 S. E. 221.

[11] *Foster* v. *Jones*, 23 Ga. 168.

A title derived from a purchase under a judgment against one who was *non compos mentis* cannot be attacked in an action of trespass to try title, until

shall be questioned on account of the insanity of the judgment debtor, as against an innocent purchaser who has acquired rights under it.[12] And he will be held to have acquired title thereunder, in the absence of anything to indicate fraud or an attempt to take advantage of the situation.[13] A sale of land of a lunatic on execution issued on a confessed judgment is properly vacated and set aside, however, where the judgment creditor became the purchaser, and knew the debtor was insane and unfit to transact ordinary business when he secured the confession.[14]

284. Degree of insanity which will affect.— Unsoundness of mind amounting to incapacity to judge or understand business is a good cause for opening a default and setting aside a judgment rendered thereon.[15] And the court will not proceed to render judgment against a man or his estate where it is certain that he has no capacity to care for himself or to employ someone else to do it for him.[16] But mere eccentricity or extravagant and unreasonable notions upon the part of the judgment debtor will not affect the validity of a judg-

such judgment is reversed or set aside by some direct proceeding instituted for that purpose. *Ewing* v. *Wilson,* 63 Tex. 88.

[12]*Dunn* v. *Dunn,* 114 Cal. 210, 46 Pac. 5; *Crawford* v. *Thomson,* 161 Ill. 161, 43 N. E. 617; *Heard* v. *Sack,* 81 Mo. 610.

[13]*Rau* v. *Katz,* 26 La. Ann. 463.

[14]*Crawford* v. *Thomson,* 161 Ill. 161, 43 N. E. 617.

But knowledge upon the part of a purchaser under a judgment entered upon a note containing a warrant to confess judgment, and waiver of inquisition, of facts showing that the judgment debtor was insane and incapable of executing a valid waiver, must be clearly established by evidence before his title is declared void. *Hope* v. *Everhart,* 70 Pa. 231.

[15]*McClain* v. *Davis,* 77 Ind. 419; *Garretson* v. *Hubbard,* 110 Iowa, 7, 81 N. W. 174; *Litchfield's Appeal,* 28 Conn. 127, 73 Am. Dec. 662; *Speck* v. *Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213; *Wynne* v. *Newman,* 75 Va. 816.

An elderly woman having but little knowledge of the world or of business, who could neither read nor write, should be relieved from a judgment against her upon default in foreclosure, where she did not understand the summons when it was read to her or know what it meant, or that she had any interest in the matter, when she had a good and valid defense. *Adams* v. *Citizens' State Bank,* 70 Ind. 89.

[16]*Leach* v. *Marsh,* 47 Me. 548, 78 Am. Dec. 503; *Litchfield's Appeal,* 28 Conn. 127, 73 Am. Dec. 662.

Melancholy under which a person labors will excuse inattention to his affairs, and authorize relief against judgments obtained against him during such a state of mind, though he may not be so absolutely insane as to avoid his contracts. *Tabb* v. *Gist,* 6 Call (Va.) 279.

And a man who was eccentric, erratic, and peculiar in his behavior, and who entertained a fixed idea that there was no power to tax his property, and that his title could not be lost, pursuant to which he made no effort to pay taxes, is so incapacitated as to warrant the setting aside of a judgment for taxes and tax deeds of his property, and the giving of permission to his heirs to redeem it. *Hawley* v. *Griffin* (Iowa) 92 N. W. 113.

And a proceeding for the condemnation of land will not be sustained where it appears that the owner was of unsound mind, and not competent to elect whether the condemnation should be for twenty years or in fee, under a statute authorizing such election, where such election was not made by his committee. *Sullivan* v. *Wilson,* 101 Ky. 427, 41 S. W. 260.

ment against him;[17] nor will feeble health, though the mind is affected by it;[18] nor will delusions and hallucinations,[19] or partial insanity with respect to particular matters;[20] though the rule is different where the partial derangement relates to the subject-matter of the judgment.[21] The test is capacity to understand and comprehend the fact and result of the legal proceedings.[22] And to annul a judgment upon the ground of insanity, the evidence should be as conclusive as is required to justify a decree of interdiction.[23] And to affect the proceedings or judgment, it must have existed during the continuance of the trial.[24]

285. When and how relieved against.— A judgment or decree rendered against a lunatic may be opened within the time limited by law, to admit a valid defense.[25] And a writ of error or an appeal is the proper remedy where the record of a judgment shows that the judgment debtor was insane at the time it was rendered.[26] And the fact that a person against whom a suit was commenced was in-

[17] *Covas* v. *Bertoulin*, 44 La. Ann. 683, 11 So. 143.

[18] *Wynne* v. *Newman*, 75 Va. 816.

[19] *Covas* v. *Bertoulin*, 44 La. Ann. 683, 11 So. 143.

[20] *Speck* v. *Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213.

[21] *Horner* v. *Marshall*, 5 Munf. 466.

A man, though one of intelligence on general subjects, who was wholly irrational and uncontrollable as to business transactions connected with the right of the civil government to impose taxes, and the obligation of the citizen to submit thereto, deeming it sinful to pay tribute to temporal powers, is entitled to protection against a judgment for taxes assessed against him. *Heard* v. *Sack*, 81 Mo. 610.

[22] *Spurlock* v. *Noe*, 19 Ky. L. Rep. 1321, 39 L. R. A. 775, 43 S. W. 231.

The test of mental incapacity which will warrant setting aside a judgment for taxes is whether the tax debtor had a sufficiently sound mind to understand, in a reasonable manner, the nature and effect of his conduct with reference to the matter. *Hawley* v. *Griffin* (Iowa) 92 N. W. 113.

[23] *Covas* v. *Bertoulin*, 44 La. Ann. 683, 11 So. 143.

A judgment against an insane person, and a sale of real estate in satisfaction thereof, will not be set aside long afterwards, on the ground of his insanity, where he was going at large and attending to his own affairs without objection up to the time of the sale, and upon appointment of a committee for him, two years later, no steps were taken to set aside the judgment, although he had no other property. *Spurlock* v. *Noe*, 19 Ky. L. Rep. 1321, 39 L. R. A. 775, 43 S. W. 231.

And permitting one's property to be sold under a judgment for taxes, where they are high, and the taxes, with penalties and interest, nearly equal the market value of such lands, does not establish insanity upon the part of a person not having the means with which to pay them. *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

[24] *Butters* v. *Comyns*, 81 Ill. App. 418.

[25] *White* v. *Hinton*, 3 Wyo. 753, 17 L. R. A. 66, 30 Pac. 953; *Dickerson* v. *Davis*, 111 Ind. 433, 12 N. E. 145; *Glass* v. *Hilberg*, 1 Pa. Dist. R. 621; *Ash* v. *Conyers*, 2 Miles (Pa.) 94; *Townsend* v. *Price*, 19 Wash. 415, 53 Pac. 668.

The fact that an insane person's guardian redeemed his land from an execution sale does not affect the right of the administrator of the insane person to have a default set aside and judgment opened; such redemption having been made to save the property of the ward. *Dickerson* v. *Davis*, 111 Ind. 433, 12 N. E. 145.

[26] *Allison* v. *Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Lamprey* v. *Nudd*, 29 N. H. 299; *Re Hopper*, 5 Paige, 491.

An appropriate remedy where judgment had been rendered against an insane person of whom the court acquired jurisdiction but failed to appoint a

sane, and that he so continued until judgment was rendered, is good cause for the reversal of the judgment,[27] or for a summary application for relief in the court in which it was obtained.[28] Where there is no remedy at law, and the judgment was improperly recovered for claims not justly due, a bill in equity will lie for relief against it or to restrain the proceeding.[29] In relieving from a judgment against an insane person, however, equity will require justice to be done by

guardian *ad litem* when the general guardian failed to appear is by proceedings in error and not by original action to vacate the judgment. *McAlister* v. *Lancaster County Bank*, 15 Neb. 295, 18 N. W. 57.

But a writ of error on a scire facias to revive a judgment brings up only the proceedings in the scire facias, where the record of the first judgment was not before the court, except so far as it was exhibited in replication to the plea of *nul tiel* record. *Henry* v. *Brothers*, 43 Pa. 70.

[27]*Lamprey* v. *Nudd*, 29 N. H. 299; *Leach* v. *Marsh*, 47 Me. 548, 74 Am. Dec. 503; *Demelt* v. *Leonard*, 19 How. Pr. 142.

Judgments confessed by an insane person, and a sale under execution thereon to the person in whose favor the confession was made, are properly set aside; but will be allowed to stand where the sale was made to a third party having no knowledge of the invalidity of the judgment or of the insanity of the judgment debtor. *Crawford* v. *Thomson*, 161 Ill. 161, 43 N. E. 617.

[28]*Demelt* v. *Leonard*, 19 How. Pr. 142; *Adler* v. *State*, 35 Ark. 517, 37 Am. Rep. 48; *Allison* v. *Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Heard* v. *Sack*, 81 Mo. 610.

A judgment against an insane person may be set aside under a statute providing for relief from a judgment taken through mistake or inadvertence, though there had been no judicial determination of insanity. *Judd* v. *Gray*, 156 Ind. 278, 59 N. E. 849.

But a writ of error *coram nobis* or a motion in lieu thereof is not a proper process to reverse a judgment against a person who was insane at the time of its rendition where there was no suggestion of his insanity in the record of the judgment; the remedy in such case is by action in equity. *Withrow* v. *Smithson*, 37 W. Va. 757, 19 L. R. A. 762, 17 S. E. 316.

And the plaintiff in an action foreclosing a mortgage executed by a husband and wife, in which the wife appeared and answered in her own right in behalf of her insane husband, who takes issue on such answer and voluntarily goes to trial thereon without objection, cannot raise such objection by motion in arrest of judgment. *Yount* v. *Turnpaugh*, 33 Ind. 46.

Audita querela will lie to set aside a judgment rendered upon a writ issued by a justice of the peace against one who was insane and under guardianship at the time, since such justice has no jurisdiction, and in such a case cannot confer it. *Miller* v. *Potter*, 54 Vt. 267.

[29]*Demelt* v. *Leonard*, 19 How. Pr. 142; *Re Hopper*, 5 Paige, 491; *Sternbergh* v. *Schoolcraft*, 2 Barb. 153; *Crippen* v. *Culver*, 13 Barb. 428; *Robertson* v. *Lain*, 19 Wend. 650; *Clarke* v. *Dunham*, 4 Denio, 262; *Maloney* v. *Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848; *Dickerson* v. *Davis*, 111 Ind. 433, 12 N. E. 145; *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Cas. 59; *Pollock* v. *Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885. But see *Stigers* v. *Brent*, 50 Md. 214, 33 Am. Rep. 317.

Unless a judgment against a lunatic is obtained by the appointment of a committee for him, it is within the power of the chancellor to restrain the enforcement of the claim against him. *Re Delahunty*, 28 Abb. N. C. 245, 18 N. Y. Supp. 395.

And an action will lie to set aside a tax deed made under a judgment for unpaid taxes, though it was regular on the face of the record, where, at the time of the accruing of the taxes, as well as at the time of the service upon the owner and the rendition of judgment and making of the sale, he was of unsound mind and incapable of transacting business. *Heard* v. *Sack*, 81 Mo. 610.

So, it is a sufficient ground in equity for a perpetual injunction against a judgment for slander that, at the time of speaking the defamatory words, and when judgment was rendered, the defendant was insane or deranged on the subject to which such words related. *Horner* v. *Marshall*, 5 Munf. 466.

way of payment of whatever is due.[30] And it is necessary to show such fraud or unfairness that, in equity and good conscience, the judgment should not stand.[31] Nor will relief be granted unless it appears that the defendant was not represented,[32] and that he was insane at the time of the judgment or decree.[33] It is optional with the court, in a proceeding to avoid a judgment, whether it will submit issues to the jury or not; and it may or may not adopt the finding of the jury.[34]

And the constitutional provision that insane persons shall not be barred of their rights of property by adverse possession of less than seven years from and after the removal of the disability does not apply to an action to have a judgment vacated because of the insanity of the judgment debtor. *Fleming* v. *Seeligson*, 57 Tex. 534.

A judgment and subsequent proceedings thereon will not be set aside in a court of law for irregularity, on the ground that a judgment debtor had been found by inquisition to be a lunatic or an habitual drunkard; the committee should apply to a court of chancery for relief. *Clarke* v. *Dunham*, 4 Denio, 262.

A court of chancery has no power, however, to annul a judgment, and set aside a verdict of a jury, and order a new trial, in an action at law, on the ground that the judgment debtor was insane; it may act on the parties, but not directly on the judgment, nor on the court which rendered it. *Wynne* v. *Newman*, 75 Va. 816.

And an action cannot be maintained by the guardian of a lunatic for relief against a judgment rendered against a former guardian of the lunatic, through excusable neglect, where the ward was not a necessary party to the action in which it was rendered. *Jones* v. *Crowell*, 143 Ind. 218, 42 N. E. 612.

[30]*Litchfield's Appeal*, 28 Conn. 127, 73 Am. Dec. 662; *Loomis* v. *Spencer*, 2 Paige, 153.

One who sues a lunatic for a debt, and obtains judgment at law, must give up his advantage, and pay his own costs, before a court of chancery will interfere for his relief. *Re Heller*, 3 Paige, 199.

The fact that a holder of a note made by an insane person was an endorsee for value, without notice, does not affect the maker's right to relief under a statute providing for relief against mistake or inadvertence. *Dickerson* v. *Davis*, 111 Ind. 433, 12 N. E. 145.

[31]*Johnson* v. *Pomeroy*, 31 Ohio St. 247; *Jones* v. *Crowell*, 143 Ind. 218, 42 N. E. 612; *Woods* v. *Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Hawley* v. *Griffin* (Iowa) 97 N. W. 96; *Crippen* v. *Culver*, 13 Barb. 428; *Bramhill's Case*, 6 Ct. Cl. 238. See also *L'Amoureux* v. *Crosby*, 2 Paige, 422, 22 Am. Dec. 655.

The rule that in a foreclosure suit the chancellor will decree a sale of the whole premises when the defendants stand by and do not suggest that the mortgaged premises greatly exceed in value the amount of the mortgage debt does not apply where any of the defendants were *non compos mentis*, since in such case all the protection will be extended them of which a sane adult could avail himself. *Eslava* v. *Lepretre*, 21 Ala. 504, 56 Am. Dec. 266.

[32]*Henderson* v. *Mitchell*, Bail. Eq. 113, 21 Am. Dec. 526; *Jones* v. *Crowell*, 143 Ind. 218, 42 N. E. 612; *Finzer* v. *Nevin*, 13 Ky. L. Rep. 773, 18 S. W. 367.

[33]*Brown* v. *Rentfro*, 57 Tex. 327.

[34]*Heard* v. *Sack*, 81 Mo. 610.

Under Ky. Civil Code, § 520, providing that in a proceeding to vacate or modify a judgment, proceedings shall be the same as those in the action in which the judgment was rendered, the plaintiff in an action to vacate a judgment rendered in an equity action is entitled to a jury trial on the question of the soundness of his mind at the date of the particular transaction involved. *Small* v. *Reeves*, 104 Ky. 289, 46 S. W. 726. Reversing 37 S. W. 682.

One who proceeds with the enforcement of a judgment against an insane person with knowledge of proceedings instituted by the defendant to be relieved therefrom, takes the chance that, if the judgment is reversed or set aside, he will be compelled to restore his adversary to the situation he was in before the erroneous judgment was rendered. *Dickerson* v. *Davis*, 111 Ind. 433, 12 N. E. 145.

CHAPTER XVII.

BANKRUPTCY.

286 What incapacity affects.

286. What incapacity affects.— A person who is so insane as to be wholly incapable of managing his affairs cannot, while in that condition, commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian.[1] But a lunatic may be adjudged a bankrupt under the direction of his committee, acting with the consent of the court in lunacy.[2]

[1] *Re Marvin*, 1 Dill. 178, Fed. Cas. No. 9,178.

Creditors may, unless restrained by statute, raise the objection that their debtor was *non compos mentis*, for the purpose of avoiding his assignment for the benefit of creditors. *Riley* v. *Carter*, 76 Md. 581, 19 L. R. A. 489, 35 Am. St. Rep. 443, 25 Atl. 667.

[2] *Re Farnham* [1895] 2 Ch. 799, 64 L. J. Ch. N. S. 717, 12 Reports, 554, 73 L. T. N. S. 231, 3 Manson, 109.

The jurisdiction of a court in lunacy over the property of a person found to be a lunatic cannot be ousted by a subsequent adjudication in bankruptcy, without the consent of the court; and the trustee in bankruptcy can take the property only subject to the jurisdiction in lunacy, which cannot be devested by a voluntary settlement so as to enable the trustee to stand in the place of the beneficiary, such a settlement being void for all purposes. *Ibid.*

CHAPTER XVIII.

JURORS.

287. Insanity as affecting capacity.

287. **Insanity as affecting capacity.**—Insanity of a juror is a good cause for discharging the jury in a criminal case, though it be without the consent of the prisoner or his counsel; and such discharge rests in the discretion of the court, and cannot form the subject of a plea in bar to a further trial.[1] And one whose mind is so weak that he cannot be made to understand the obligations of an oath, or feel religious scruples, is not competent to be a juror.[2] But mental defects which will disqualify a juror must amount to such imbecility or to such gross ignorance as practically to disqualify him from performing his duties as such;[3] and when alleged as a ground for a new trial it must be proved by clear and full evidence.[4] And the existence of an abstract opinion on the part of an individual as to the propriety or impropriety of the defense of insanity in a criminal prosecution does not disqualify him for being a juror.[5]

[1] *United States* v. *Haskell*, 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

The fact that a constitutional provision makes colored persons qualified jurors has no effect upon mental defects as a ground for disqualification, the same imbecility or defect of mental incapacity disqualifying a colored person as a white person. *Caldwell* v. *State*, 41 Tex. 86.

[2] *Caldwell* v. *State*, 41 Tex. 86.

[3] *Caldwell* v. *State*, 41 Tex. 86.

[4] *State* v. *Scott*, 8 N. C. (1 Hawks) 24.

Where it does not appear that previous insanity of a person chosen as a juror was of a permanent character, its continuance is not presumed. *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41.

[5] *People* v. *Carpenter*, 102 N. Y. 245, 6 N. E. 584, Affirmed in 38 Hun, 490; *Butler* v. *State*, 97 Ind. 378; *Hall* v. *Com.* (Pa.) 11 Cent. Rep. 183, 12 Atl. 163.

And the same rule applies to a mistaken view of the law applicable to the defense of insanity, where a willingness and an ability to yield readily to the law as it exists appears, and there is no prejudice against a genuine defense. *Butler* v. *State*, 97 Ind. 378.

But a juror, in a prosecution for a crime of great enormity in which insanity is alleged, who does not think a man who commits such an offense can be of sound mind, is disqualified, where, to change his opinion, evidence would be required, since the law presumes sanity. *Com* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

And that a juror considered the fact of suicide as conclusive evidence of insanity is a good cause for a challenge in an action upon an insurance policy where the assured died by his own hand. *Hiatt* v. *Mutual L. Ins. Co.* 2 Dill. 572, note.

CHAPTER XIX.

WITNESSES.

I. Lunacy.
288. General rules as to effect.
289. Presumption and burden of proof as to.
290. Method of determining capacity.
291. Proof as to incompetency.
292. Habeas corpus may bring witness.
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II. Drunkenness.
295. Effect on competency, generally.

I. Lunacy.

288. General rules as to effect.— The rule was laid down generally, in some of the earlier cases, that persons who were *non compos mentis,* or deranged in mind, were incompetent witnesses;[1] and so were persons laboring under a temporary privation of memory and understanding;[2] and persons in whose minds a delusion existed.[3] The modern rule which is now prevalent, however, is that a person is competent as a witness, where, at the time he is offered to be sworn, he possesses such understanding as enables him to retain in memory, and give a correct account of, the events of which he had been a witness,[4] and to appreciate the sanctity and binding force of the obliga-

[1] *Livingston* v. *Kiersted,* 10 Johns. 362; *Phebe* v. *Prince,* Walk. (Miss.) 131; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Hartford* v. *Palmer,* 16 Johns. 143.

[2] *Hartford* v. *Palmer,* 16 Johns. 143.

[3] *Armstrong* v. *Timmons,* 3 Harr. (Del.) 343.

There is no exception to the statutory rule in Texas that persons who are insane when they are offered as witnesses, or who were so when the events happened of which they are called to testify, are totally incompetent as witnesses. *Lopez* v. *State,* 30 Tex. App. 487, 28 Am. St. Rep. 935, 17 S. W. 1058.

[4] *Walker* v. *State,* 97 Ala. 85, 12 So. 83; *Clements* v. *McGinn* (Cal.) 33 Pac. 920; *Tucker* v. *Shaw,* 158 Ill. 326, 41 N. E. 314; *Cannady* v. *Lynch,* 27 Minn. 435, 8 N. W. 164; *Com.* v. *Reynolds,* cited in 10 Allen, 64; *Guthrie* v. *Shaffer,* 7 Okla. 459, 54 Pac. 698; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Hiett* v. *Shull,* 36 W. Va. 563, 15 S. E. 146; *Pittsburgh & W. R. Co.* v. *Thompson,* 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; *District of Columbia* v. *Armes,* 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Reg.* v. *Hill,* 2 Den. C. C. 254, 5 Cox C. C. 259, 5 Eng. L. & Eq. 547, 15 Jur. 470, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222; *Fennell* v. *Tait,* 1 Cromp. M. & R. 584, 5 Tyrw. 218; *Spittle* v. *Walton,* L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405; *Allen* v. *State,* 60 Ala. 19. And see *State* v. *Brown,* 2 Marv. (Del.) 380, 36 Atl. 458.

The reason for not admitting the tes-

tion of an oath;[5] and he is not competent if he is unable to understand such obligation, whatever may have been the character of his incapacity.[6] Under this doctrine the testimony of a witness who is insane or laboring under a delusion is to be received with proper caution, and considered in connection with his incapacity, rather than to be rejected or struck out.[7] And it is not an objection either to the

timony of persons *non compos mentis* is that their malady involves such an impairment of the faculties that facts are not correctly impressed on their minds, or not retained in their memory, or that they do not understand their responsibility as witnesses; and if such reasons for the exclusion of the witness do not exist, he should be permitted to testify. *Worthington* v. *Mencer*, 96 Ala. 310, 17 L. R. A. 407, 11 So. 72.

And an allegation in a complaint that the plaintiff was at one time insane does not render him incompetent to testify as a witness in an action. *Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 147. And see *Holcomb* v. *Holcomb*, 28 Conn. 177.

But a man seventy-eight years of age, with but little knowledge of passing events and a feeble memory of past transactions, who did not know while on the stand what place he was in, where he stayed the night before, or where he came from that morning, and could not remember that he had ever lived in a different place, though he had done so for the past four years, is not competent as a witness, and his testimony is worthless for the purpose of showing a transfer to him to have been fraudulently made. *Woodhull* v. *Whittle*, 63 Mich. 575, 30 N. W. 368.

[5]*Walker* v. *State*, 97 Ala. 85, 12 So. 83; *Clements* v. *McGinn* (Cal.) 33 Pac. 920; *Holcomb* v. *Holcomb*, 28 Conn. 177; *Com.* v. *Reynolds*, cited in 10 Allen, 64; *Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Hiett* v. *Shull*, 36 W. Va. 563, 15 S. E. 146; *District of Columbia* v. *Armes*, 107 U. S. 519, 27 L. ed. 518, 2 Sup. Ct. Rep. 840; *Reg.* v. *Hill*, 2 Den. C. C. 254, 5 Cox C. C. 259, 5 Eng. L. & Eq. 547, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470.

Where a witness understands that perjury is punishable by law, it is sufficient to qualify him, though he has no conception of the religious obligation of an oath. *Snyder* v. *Nations*, 5 Blackf. 295.

And a statement by a witness that she did not know the consequences or how she would be punished in case she testified falsely does not show incapacity as a witness, where it appeared to the court from her manner on the stand and her answers that she had as much intelligence as ordinary persons of her class. *State* v. *Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277, 14 So. 181.

[6]*Livingston* v. *Kiersted*, 10 Johns. 362; *McKelton* v. *State*, 88 Ala. 181, 7 So. 38; *Armstrong* v. *Timmons*, 3 Harr. (Del.) 343; *State* v. *Meyers*, 46 Neb. 152, 37 L. R. A. 423, 64 N. W. 697. And see *Fuller* v. *Fuller*, 17 Cal. 605; *Kilburn* v. *Mullen*, 22 Iowa, 498; *Phebe* v. *Prince*, Walk. (Miss.) 131; *Hartford* v. *Palmer*, 16 Johns. 143; *Gebhart* v. *Shindle*, 15 Serg. & R. 235.

Mental deficiencies of an adult witness which would exempt him from accountability for his own conduct proximately contributing to his personal injury would also render him an incompetent witness of the occurrences in which the injury was received. *Worthington* v. *Mencer*, 96 Ala. 310, 17 L. R. A. 407, 11 So. 72.

[7]*People* v. *Harper*, 1 Edm. Sel. Cas. 180; *Sarbach* v. *Jones*, 20 Kan. 499; *McCutchen* v. *Pigue*, 4 Heisk. 565; *Reg.* v. *Hill*, 2 Den. C. C. 254, 5 Cox. C. C. 259, 5 Eng. L. & Eq. 547, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470. And see *Clark* v. *Lopez*, 75 Miss. 932, 23 So. 648, 957.

In weighing the testimony of a person who was of unsound mind at the time of the occurrence of the facts in question, the distinction recognized by law between knowledge of a fact and belief in the existence of a fact, and between an event which is objective and demonstrable and an incident which may be merely personal and subjective, is of special importance. *People ex rel. Norton* v. *New York Hospital*, 3 Abb. N. C. 229.

And a person upon whom a criminal assault was made, who cannot talk, but can make signs, and has understanding

competency or credibility of a witness that he is subject to fits of derangement, if he was sane at the time his testimony was offered.[8] Nor is it an objection that he was insane shortly before and shortly after that time.[9] Statutes disqualifying insane witnesses include only such persons as are so unsound in mind as to render them incompetent at common law.[10]

289. Presumption and burden of proof as to.—Every person tendered as a witness is presumed to be sane and competent to testify until the contrary is shown.[11] And the burden rests with the party asserting the contrary to show not only the insanity of the witness, but that it was of such a nature and extent as to incapacitate him to give testimony.[12] And he may support his objection either by examination of the witness,[13] or by the testimony of other witnesses.[14] Where the general insanity of the witness has been proved, however, the presumption is that it continues, and it rests with the party offering him to show that he has been so far restored to sanity as to make him competent as a witness.[15] The ancient presumption that a person born deaf and dumb is an idiot is an idea which no longer exists, at least in the United States.[16]

290. Method of determining capacity.— The question whether a person offered as a witness is insane at the time goes to the compe-

enough to take care of herself, and to communicate her wants, and observe things occurring about her, and render services to others, may be sworn as a witness and examined through the medium of a person who can understand her, who is sworn to interpret her testimony to the court and jury. *People* v. *McGee*, 1 Denio, 19.

[8]*Campbell* v. *State*, 23 Ala. 44; *Evans* v. *Hettich*, 7 Wheat. 453, 5 L. ed. 496; *State* v. *Kelley*, 57 N. H. 549; *Lewis* v. *Eagle Ins. Co.* 10 Gray, 508.

A defendant in a prosecution for homicide is himself competent to testify that he could not resist the impulse to kill the man killed by him. *Abbott* v. *Com.* 23 Ky. L. Rep. 226, 62 S. W. 715.

[9]*Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711.

[10]*Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164.

The suspicion that might be engendered by the failure of a party to produce an aged witness whose mental capacity was alleged to be such that his evidence would be entirely worthless cannot be regarded as evidence tending to show fraud or to overturn the evidence of other facts. *Woodhull* v. *Whittle*, 63 Mich. 565, 30 N. W. 368.

[11]*State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Armstrong* v. *Timmons*, 3 Harr. (Del.) 342. And see *State* v. *De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Gainesville* v. *Caldwell*, 81 Ga. 76, 7 S. E. 99; *Robinson* v. *Dana*, 16 Vt. 474.

[12]*State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *State* v. *Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277, 14 So. 181; *State* v. *Halloway*, 8 Blackf. 45; *Harrod* v. *Harrod*, 1 Kay & J. 9, 18 Jur. 853.

[13]*Reg.* v. *Hill*, 5 Cox C. C. 259, 5 Eng. L. & Eq. 547, 2 Den. C. C. 254, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470.

[14]*Livingston* v. *Kiersted*, 10 Johns. 362; *District of Columbia* v. *Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840. But see *Bell* v. *Rinner*, 16 Ohio St. 45.

[15]*Armstrong* v. *Timmons*, 3 Harr. (Del.) 342.

[16]*Christmas* v. *Mitchell*, 38 N. C. (3 Ired. Eq.) 541; *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41.

tency of the witness, and is a preliminary one, to be decided by the court;[17] and its decision will not be disturbed on appeal, where no abuse of discretion appears.[18] And where the court is evenly divided as to the competency of a witness alleged to be insane, his testimony will be admitted.[19] It is not the duty of the trial court to examine a witness as to mental unsoundness, however, merely because one of the parties alleges it, unless it sees some indication of unfitness to testify.[20] And the rule that insanity affects the competency of a witness, and that the question of competency must be determined when the witness is called, and before he is sworn, is relaxed where the incompetency first appears from the testimony of the witness himself, and, perhaps, in some cases where the fact is shown *aliunde*.[21] And where the witness is not so deficient as to require his exclusion by the court, it is for the jury to decide what amount of credit shall be given to his testimony.[22] The condition of mind of

[17]*Clements* v. *McGinn* (Cal.) 33 Pac. 920; *Holcomb* v. *Holcomb*, 28 Conn. 177; *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Dickson* v. *Waldron*, 135 Ind. 507, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Carpenter* v. *Dame*, 10 Ind. 125; *Com.* v. *Reynolds*, cited in 10 Allen, 64; *People ex rel. Norton* v. *New York Hospital*, 3 Abb. N. C. 229; *Guthrie* v. *Shaffer*, 7 Okla. 459, 54 Pac. 698; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *State* v. *Michael*, 37 W. Va. 565, 19 L. R. A. 605, 16 S. E. 803; *District of Columbia* v. *Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840. And see *Kendall* v. *May*, 10 Allen, 59.

[18]*Dickson* v. *Waldron*, 135 Ind. 507, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Mills* v. *Cook* (Tex. Civ. App.) 57 S. W. 81.

The court on appeal will presume that the judge in the court below was not influenced on the question of the admission of evidence of a witness alleged to be insane by such evidence as he ought not to have considered. *Campbell* v. *State*, 23 Ala. 44.

But the decision of the court in a preliminary examination as to the sufficiency of the mental capacity of a witness to render him competent is not conclusive in subsequent stages of the trial, and the court may stop the examination when satisfied of the incapacity of the witness, and direct the jury to disregard his evidence. *Queen* v. *Whitehead*, L. R. 1 C. C. 33.

[19]*State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

[20]*Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164.

But the exclusion of testimony to prove that a witness offered by the state in a criminal prosecution was deranged is erroneous. *Livingston* v. *Kiersted*, 10 Johns. 362.

[21]*Pease* v. *Burrowes*, 86 Me. 153, 29 Atl. 1053.

In *Robinson* v. *Dana*, 16 Vt. 474, it was held that whether a witness is incompetent because of unsoundness of mind is a fact to be proved by evidence of others, and not by the examination of the witness alone, and that a refusal to permit a preliminary examination is not error.

[22]*District of Columbia* v. *Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Worthington* v. *Mencer*, 96 Ala. 310, 17 L. R. A. 407, 11 So. 72; *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Dickson* v. *Waldron*, 135 Ind. 507, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Sarbach* v. *Jones*, 20 Kan. 499; *Com.* v. *Reynolds*, cited in 10 Allen, 64; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711.

In *Carpenter* v. *State*, 10 Ind. 125, the question whether, if the court should hold a witness alleged to be insane to be competent, and he should testify, the opposite party might be permitted to prove actual incompetency or weakness of the faculties, to affect his credibility, though it did not exist in a sufficient de-

a witness claimed to be insane, if incapable of appreciating the truth, must go to the question of credibility, and be submitted to the jury.[23] And the question as to the sanity or insanity of a witness at the time of the transaction about which he is called upon to testify, when he is sane at the time of the trial, affects his credibility, and not his competency, and is one for the jury.[24] And the force of such testimony rests wholly upon corroborating circumstances.[25] An officer who takes a deposition does not take the place of the court, and has no right to decide upon a question of competency of an alleged insane witness making it.[26]

291. Proof as to incompetency.— The insanity of a witness at the time of a transaction concerning which he is called upon to testify is to be proved in the same manner as insanity in any other case.[27] And evidence of previous and subsequent insanity may be given for that purpose.[28] And a witness's credibility may be attacked by

gree to exclude him as a witness, was raised but not decided, but it was stated that the rule that it might be done would seem to be inferable from the statute.

[23]*Pease* v. *Burrowes*, 86 Me. 153, 29 Atl. 1053; *Walker* v. *State*, 97 Ala. 85, 12 So. 83; *State* v. *Moats*, 108 Iowa, 13, 78 N. W. 701.

Cross-examination of a witness, the incredibility of whose story rests on inference that her mind imagines fanciful occurrences with relation to the subject-matter of her direct examination as real, is competent for the consideration of the jury on the question of the weight to be given her direct evidence, though it includes other matters which would be inadmissible if considered independently, but it will not be evidence of the facts thus stated. *Pease* v. *Burrowes*, 86 Me. 153, 29 Atl. 1053.

[24]*Holcomb* v. *Holcomb*, 28 Conn. 177; *Guthrie* v. *Shaffer*, 7 Okla. 459, 54 Pac. 698. And see *Gainesville* v. *Caldwell*, 81 Ga. 76, 7 S. E. 99.

The court, in a criminal prosecution, should, upon special request, instruct the jury as to the sanity or insanity of a witness whose testimony is attacked on that ground, though the testimony as to his insanity is very slight, so that the jury may consider it in weighing his credibility. *Territory* v. *Padilla*, 8 N. M. 510, 46 Pac. 346.

But refusal to permit the mental capacity of a witness to be impeached rests within the wise discretion of the court, where his deposition had been taken at a previous indecisive trial, and was used again in the trial resulting in the judgment appealed from, and no objection was raised to it, and the witness was in another state, and evidence to sustain his mental capacity could not be produced during the progress of the trial. *Carpenter* v. *Dame*, 10 Ind. 125.

[25]*People ex rel. Norton* v. *New York Hospital*, 3 Abb. N. C. 229.

[26]*Carpenter* v. *Dame*, 10 Ind. 125.

It is the duty of an officer taking a deposition of a witness, though alleged to be insane, to take down all the testimony, and forward it to the court in which it is intended to be used, and all objections are to be raised, weighed, and decided in that court. *Carpenter* v. *Dame*, 10 Ind. 125.

[27]*Holcomb* v. *Holcomb*, 28 Conn. 177; *Guthrie* v. *Shaffer*, 7 Okla. 459, 54 Pac. 698.

[28]*Holcomb* v. *Holcomb*, 28 Conn. 177; *State* v. *Kelley*, 57 N. H. 549; *Hoard* v. *State*, 15 Lea, 318; *Fairchild* v. *Bascomb*, 35 Vt. 398.

But evidence of prior temporary delusions or mental aberrations of ancestors and relatives is not sufficient, without more, to go to the jury on the question of the unsoundness of mind, when insanity is merely a collateral issue, as where an attempt is made to impeach the competency or credibility of a witness by proving that he was insane. *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63.

evidence that his mind and memory had become impaired by disease,[29] or by evidence of stupid conduct and irrational talk.[30] So, evidence that a witness who had been examined was of imbecile mind and memory is admissible to affect his credibility, though it was not offered as an objection to his competency.[31] And opinions of medical men are entitled to peculiar weight on the question of the competency of a witness alleged to be insane, where they had good opportunity to observe.[32] And an inquisition of lunacy against a witness is prima facie, though not conclusive, evidence of his incompetency to testify, though his evidence was offered against one not a party to the proceeding in lunacy.[33] A statute providing that persons of unsound mind cannot be witnesses refers to a mind that is insane in fact, in contradistinction to one that had been judicially declared unsound.[34] And a witness who had been declared insane, and placed under guardianship, is competent, after recovery, to testify respecting facts which occurred during the time he was under guardianship.[35] And

[29] *Alleman* v. *Stepp*, 52 Iowa, 626, 35 Am. Rep. 288, 3 N. W. 636; *Fairchild* v. *Bascomb*, 35 Vt. 398. And see *Carpenter* v. *Dame*, 10 Ind. 129.

[30] *Territory* v. *Padilla*, 8 N. M. 510, 46 Pac. 346.

[31] *Rivara* v. *Ghio*, 3 E. D. Smith, 264. And see *Livingston* v. *Kiersted*, 10 Johns. 362.

So, an alleged lunatic, called as a witness, may examine and cross-examine witnesses called on either side, to determine the question of his competency. Reg. v. Hill, 2 Den. C. C. 254, 5 Cox C. C. 259, 5 Eng. L. & Eq. 547, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470.

[32] *Armstrong* v. *Timmons*, 3 Harr. (Del.) 342.

Where there is a direct conflict in the testimony of two witnesses, and one of them is aged, and has had an attack of paralysis, an expert witness may be asked if paralysis does not have a tendency to impair the mind of aged persons. *Lord* v. *Beard*, 79 N. C. 5.

And where the testimony of a witness is assailed by the opposite party on the ground of her mental incapacity, by calling witnesses to detail the facts and express opinions thereon, the witnesses of such party may be asked questions on cross-examination, the object of which is to draw from them an opinion as to the competency of such witness. *Bricker* v. *Lightner*, 40 Pa. 199.

[33] *Hoyt* v. *Adee*, 3 Lans. 173; *Kendall* v. *May*, 10 Allen, 59; *Pittsburgh & W. R. Co.* v. *Thompson*, 27 C. C. A. 333; 54 U. S. App. 222, 82 Fed. 720. And see *Spittle* v. *Walton*, L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405.

It is a question for the jury, under proper instructions, whether a witness was competent to testify, where, after being examined on interrogatories, he was found to be a lunatic and confined in a lunatic asylum, and evidence had been given by other witnesses pro and con on the question of his sanity. *Gainesville* v. *Caldwell*, 81 Ga. 76, 7 S. E. 99.

Where a petition or affidavit is sworn to by a person who had been found by inquisition to be a lunatic, the officer before whom it is sworn should state in the jurat that he has sworn the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind and capable of understanding the nature and contents of the instrument. *Re Christie*, 5 Paige, 242.

[34] *Clements* v. *McGinn* (Cal.) 33 Pac. 920.

[35] *Sarbach* v. *Jones*, 20 Kan. 499. And see *Tucker* v. *Shaw*, 158 Ill. 326, 41 N. E. 914.

But one who has been adjudged insane, and is under guardianship, and whose condition is not improved, is held not to be a competent witness, in *Hull* v. *Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270.

a lunatic under confinement in an asylum may be a witness, if the judge considers him competent in point of understanding, and he is aware of the nature and consequences of an oath.[36] But an affidavit of a person suffering from mental delusion, made while confined in an asylum, cannot be received in evidence unless his mental capacity is first ascertained by a proper preliminary inquiry.[37]

292. Habeas corpus may bring witness.—A *habeas corpus ad testificandum* may be issued to bring into court a witness from an insane asylum,[38] upon affidavit that he is not dangerous, and is in a fit state to be brought into court.[39] An order for the examination of a party before trial will not be granted, however, when he is alleged to be partially insane; in such case he should be examined on the trial, so that the court may judge of his sanity.[40] The testimony of a deaf and dumb witness may be elicited by any means necessary to the end.[41]

293. Proof in case of subsequent insanity of witness.—An instrument may be established by proof of the handwriting of the attesting witness where he has become insane after its execution.[42] And a book of accounts kept by one who has since become insane may be used in evidence upon being verified, when material to the issue.[43]

[36]*Reg.* v. *Hill*, 5 Eng. L. & Eq. 547, 2 Den. C. C. 254, 5 Cox C. C. 259, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470; *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Tucker* v. *Shaw*, 158 Ill. 326, 41 N. E. 914. And see *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *Kendall* v. *May*, 10 Allen, 59; *Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164.

A record of justices, finding a person to be insane and a proper person to be admitted to the insane hospital for the curable insane, is not evidence to prove that the same person was insane nine years afterwards, when she appeared as a witness in a case. *Breedlove* v. *Bundy*, 96 Ind. 319.

[37]*Spittle* v. *Walton*, L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405; *Hand* v. *Burrows*, 23 Hun, 330; *State* v. *Smith*, 26 Wash. 354, 67 Pac. 70.

Discharge of a witness from an asylum is prima facie evidence of restoration to sound mind, or of improper commitment, where, under the statutes, the only grounds for discharge are recovery or improper commitment. *Clements* v. *McGinn* (Cal.) 33 Pac. 920.

[38]*Spittle* v. *Walton*, L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405; *Fennell* v. *Tait*, 1 Cromp. M. & R. 584, 5 Tyrw. 218.

A commission may issue to take the testimony of a person committed to a lunatic asylum in another state, but the return must be submitted to the presiding justice upon the trial in which the evidence is intended for use, and the court must institute an investigation as to the competency of the witness. *Hand* v. *Burrows*, 23 Hun, 330; *Carpenter* v. *Dame*, 10 Ind. 125.

[39]*Fennell* v. *Tait*, 1 Cromp. M. & R. 584, 5 Tyrw. 218.

[40]*Mason* v. *Libbey*, 2 Abb. N. C. 137.

[41]*State* v. *Howard*, 118 Mo. 127, 24 S. W. 41.

[42]*Currie* v. *Child*, 3 Campb. 283; *Bernett* v. *Taylor*, 9 Ves. Jr. 381.

[43]*Holbrook* v. *Gay*, 6 Cush. 215.

The temporary insanity of a person whose book of accounts is material evidence in an action should only operate as a postponement of the trial until sufficient time has elapsed for his restoration; but when no such restoration can be reasonably anticipated, the book should be admitted upon proof of his handwriting and verification by the oath of his guardian, and the effect of

Likewise the reasons for admitting the testimony of deceased witnesses, taken on a former trial, apply with equal force in the case of witnesses mentally dead or incapacitated by insanity or loss of mind.[44] And the testimony of a witness, formerly taken in the same case, may be read in evidence upon a subsequent trial, upon a showing that he has become incompetent.[45] And depositions taken at a former trial may be read in evidence, where the witness has become insane or lost his memory of the past.[46] Failure of a witness to recollect particular facts, however, will not justify proving his testimony on a former trial, where such forgetfulness does not amount to mental imbecility.[47] And evidence of a witness who is merely shown to have run away cannot be given under a statute authorizing the use of the testimony of witnesses who have become insane.[48]

294. Effect of insanity of adverse party.—A decree upon an inquisition establishing the fact of insanity of a party to an action is not

his insanity is one for the exercise of the sound discretion of the presiding judge. *Ibid.*

[44]*Whitaker* v. *Marsh*, 62 N. H. 477; *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95.

Where a witness, sane at the time of testifying, afterwards becomes temporarily insane, and the case again comes up for trial, the court will direct an adjournment, in a proper case, to await recovery. *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711.

If a witness is actually insane at the time of the trial of an indictment, however, his deposition, taken before the committing magistrate, is receivable in evidence the same as if he were dead, although the insanity may be only temporary; but if it appears that he is not insane, but merely suffering from depression of spirits in consequence of the injury, which affected his intellect, from which he will probably eventually recover, his deposition, taken before the committing magistrate, is not receivable. *Reg.* v. *Marshall*, Car. & M. 147.

[45]*Emig* v. *Dichl*, 76 Pa. 359; *Rothrock* v. *Gallaher*, 91 Pa. 108; *Howard* v. *Patrick*, 38 Mich. 795.

[46]*Gainesville* v. *Caldwell*, 81 Ga. 76, 7 S. E. 99; *Murley* v. *Templeman*, cited in Shelford on Lunatics, 495; *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

A deposition previously made may be admitted in evidence where the witness had become insane at the time of the trial, though it was not taken *de bene esse*. *Reg.* v. *Marshall*, Car. & M. 147. And see *Jones* v. *Jones*, 1 Cox C. C. 184; *Murley* v. *Templeman*, cited in Shelford on Lunatics, 495.

When a deposition of a witness alleged to be incompetent is offered in evidence, it is within the discretion of the court to refuse to permit it to be impeached on that ground, where the evidence to sustain mental capacity would have to be sought in another state, and it could not be produced in season for use in the trial in progress. *Carpenter* v. *Dame*, 10 Ind. 125.

And secondary evidence of what a witness testified to on a preliminary investigation before a committing magistrate may be given on the trial of the accused for the same offense, when his testimony was not reduced to writing, and he has since become insane, and the precise words of the witness need not be given. *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95.

In *Drayton* v. *Wells*, 1 Nott & M'C. 409, 9 Am. Dec. 718, however, it was held that the testimony of a witness who had been examined on a former trial between the same parties, where the point in issue was the same, may be given in evidence on a second trial by persons who heard it, only when the witness is dead, insane, beyond the jurisdiction, or where the court is satisfied that he has been kept away by the contrivance of the opposite party.

[47]*Stein* v. *Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55.

[48]*State* v. *King*, 86 N. C. 606.

necessary, under statutes prohibiting the other party to an action from testifying therein where the adverse party is insane, in order to exclude the sane party's testimony as to transactions concerning which the other party, if sane, could have contradicted him.[49] And an error in the admission of testimony which is not competent, because offered against an insane party, is not corrected by permitting the insane defendant to testify.[50] But though a party to a case is insane, yet, if he is competent to testify, the other party may be permitted to testify in his own favor.[51]

II. Drunkenness.

295. Effect on competency, generally.—The question whether an intoxicated witness is competent rests in the sound discretion of the trial court.[52] And it is not error to refuse to administer the oath to a person tendered as a witness, who is so drunk as not to understand its obligation, where opportunity is offered to recall him when he becomes sober.[53] But when a witness is sworn, the question whether he is drunk or not, and whether his evidence is material or not, is one of fact for the jury.[54] And evidence that a witness was drunk

[49] *Bailey* v. *Harvey*, 60 N. H. 152.

A party to an action, seventy years old, who had paralysis, and was of weak mental capacity and memory, and could not tell how old he was, or understand an inquiry whether he recollected giving a designated note, and was unable to move or dress himself alone, and did not seem to understand anything about his business, is not insane, within the meaning of Mass. Gen. Stat. chap. 131, § 14, providing that, where one of the original parties to an action is shown to be insane, the other party shall not be permitted to testify in his own favor. *Doud* v. *Hall*, 8 Allen, 410.

But the fact that a plaintiff in an action for a personal injury alleged that his mind had been impaired by reason of his injuries, and that evidence in support of that allegation had been received, does not prevent him from being called upon to testify as a witness; whether he was in fact competent to testify is a question to be decided by the court, resting within its sound discretion, and it is for the jury to give such credit to the testimony offered as it is entitled to receive. *Dickson* v. *Waldron*, 135 Ind. 507, 24 L. R. A. 483, 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1.

[50] *Huling* v. *Huling*, 32 Ill. App. 519.

[51] *Kendall* v. *May*, 10 Allen, 59.

[52] *Gould* v. *Crawford*, 2 Pa. St. 89.

[53] *State* v. *Underwood*, 28 N. C. (6 Ired. L.) 96.

The testimony of a person accused of crime committed when he was so drunk as to be unconscious and irresponsible, as to what took place while he was in that condition, is of little or no value on a prosecution for the crime. *Territory* v. *Franklin*, 2 N. M. 307.

And the exclusion of a witness from the court room and from testifying in a criminal case because he was intoxicated is not reversible error, where it does not appear that any objection was made to the exclusion, or that the court was informed of the importance of his testimony, and an adjournment asked until he became competent to testify. *Fox* v. *Territory*, 2 Wash. Terr. 297, 5 Pac. 603.

[54] *State* v. *McNinch*, 12 S. C. 89.

Neither the fact that a witness was discharged from the police force for alleged drunkenness, nor that he was unjustly accused thereof, can legally affect his credibility as a witness. *Barker* v. *Savage*, 1 Sweeny, 288.

at the time of the transaction concerning which he attempts to testify is admissible to discredit him,[55] and as tending to show that his faculties for observation were either gone or impaired.[56] But the verdict of a jury should not be interfered with because based in part upon the testimony of a witness who was drunk, when it was also supported by other evidence.[57] And intoxication not reaching the degree of stupefaction at the time of the happening of the events concerning which the witness is called upon to testify, though it impairs credibility, does not destroy it; and his testimony is entitled to belief when corroborated.[58] The general character of a witness for drunkenness, however, is not admissible in evidence to affect his credibility.[59] And a finding that a person was an habitual drunkard furnishes no objection to his competency as a witness.[60]

[55] *Fleming* v. *State*, 5 Humph. 564.

[56] *Mace* v. *Reed*, 89 Wis. 440, 62 N. W. 186; *Sisson* v. *Conger*, 1 Thomp. & C. 564.

Where a witness testifies that he did not know that certain conversations took place at a specified time and place, which were supposed to relate to the testimony he was expected to give, he may be asked whether or not he was drunk at the time, for the purpose of impeaching him. *Strang* v. *People*, 24 Mich. 1.

[57] *Mercer* v. *State*, 17 Ga. 146.

So, a party cannot stand by and permit a witness to be examined, and cross-examine him himself, and permit his evidence to go to the jury, and then, for the first time, after verdict, object that he was intoxicated. *Dickinson* v. *Buskie*, 59 Wis. 136, 17 N. W. 685.

[58] *State* v. *Castello*, 62 Iowa, 404, 17 N. W. 605. And see *Meyers* v. *State*, 37 Tex. Crim. Rep. 208, 39 S. W. 111.

So, an opium consumer is not incompetent as a witness, though the testimony of such a person is unreliable, and the jury should be carefully cautioned as to the credence to be given it. *State* v. *White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

And proof that a witness was in the habit of using laudanum is not sufficient to discredit or weaken his testimony unless it also establishes either that his mind is impaired generally thereby, or that he was under the influence of the opiate at the time of giving testimony. *McDowell* v. *Preston*, 26 Ga. 528.

And a person so stupefied by drugs that he did not know what was done to him is not an incompetent witness within the provisions of a statute declaring persons incompetent who were insane when the events happened of which they were called to testify. *Pones* v. *State*, 43 Tex. Crim. Rep. 201, 63 S. W. 1021.

And a statute providing that persons who are intoxicated at the time of their production for examination as witnesses are not competent to testify is intended to exclude persons only when intoxicated to a degree which would exclude them at common law. *Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164.

[59] *Brindle* v. *M'Ilvaine*, 10 Serg. & R. 282; *Thayer* v. *Boyle*, 30 Me. 475.

[60] *Gebhart* v. *Shindle*, 15 Serg. & R. 235.

CHAPTER XX.

EVIDENCE.

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I. Presumption and burden and measure of proof.

a. With reference to lunacy.

296. **Presumption of sanity.**— It is a universal rule that everyone is presumed to be sane and of sound mind until the contrary appears.[1] It applies to criminal prosecutions, in which every person is presumed to possess a sufficient degree of reason to be responsible for his criminal acts.[2] And sufficient capacity to contract, of parties

[1] This is supported by numerous cases, among which are: *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Brown* v. *State*, 40 Fla. 459, 25 So. 63; *Humphreys* v. *State*, 45 Ga. 190; *Menkins* v. *Lightner*, 18 Ill. 282; *Argo* v. *Coffin*, 142 Ill. 368, 32 N. E. 679; *Rush* v. *Megee*, 36 Ind. 69; *Wallis* v. *Luhring*, 134 Ind. 447, 34 N. E. 231; *Dinkelspiel* v. *Central Kentucky Asylum*, 24 Ky. L. Rep. 2240, 73 S. W. 771; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Ricketts* v. *Jolliff*, 62 Miss. 440; *Jackson* v. *Hardin*, 83 Mo. 175; *Perkins* v. *Perkins*, 39 N. H. 163; *State ex rel. Board of Health* v. *Lederer*, 52 N. J. Eq. 675, 29 Atl. 444; *Jackson ex dem. Cadwell* v. *King*, 4 Cow. 207, 15 Am. Dec. 354; *Odom* v. *Riddick*, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609; *Re Shelleig*, 11 Ohio S. & C. P. Dec. 81; *Pennypacker* v. *Pennypacker* (Pa.) 7 Cent. Rep. 532, 8 Atl. 634; *Miller* v. *Rutledge*, 82 Va. 863, 1 S. E. 202; *Hiett* v. *Shull*, 36 W. Va. 563, 15 S. E. 146; *Long* v. *Long*, 4 Ir. Ch. Rep. 106; *Groom* v. *Thomas*, 2 Haag. Eccl. Rep. 433.

[2] A great number of cases also support this rule, among which are: *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *McKenzie* v. *State*, 26 Ark. 334; *People* v. *McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *State* v. *Draper*, Houst. Crim. Rep. (Del.) 291; *State* v. *Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *Danforth* v. *State*, 75 Ga. 614, 58 Am. Rep. 480; *People* v. *Walter*, 1 Idaho, 386; *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Moore* v. *Com.* 92 Ky. 630, 18 S. W. 833; *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271; *State* v. *Lawrence*, 57 Me. 574; *Com.* v. *Heath*, 11 Gray, 303; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Newcomb* v. *State*, 37 Miss. 383; *State* v. *McCoy*, 34 Mo. 536, 86 Am. Dec. 121; *State* v. *Palmer*, 161 Mo 152, 61 S. W. 651; *State* v. *Hartley*, 22 Nev. 342, 28 L. R. A. 33, 40 Pac. 372; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *State* v. *Hill*, 65 N. J. L. 626, 47 Atl. 814; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379; *State* v. *Starling*, 51 N. C. (6 Jones L.) 366; *Loeffner* v. *State*, 10 Ohio St. 598; *State* v. *Tyler*, 7 Ohio N. P. 443, 5 Ohio S. & C. P. Dec. 588; *Maas* v. *Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Barner*, 199 Pa. 335, 49 Atl. 60; *King* v. *State*, 91 Tenn. 617, 20 S. W. 169; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *Hurst* v. *State*, 40 Tex. Crim. Rep. 378, 46 S. W. 635, 50 S. W. 719; *People* v. *Dillon*, 8 Utah, 92, 30 Pac. 150; *Guiteau's Case*, 10 Fed. 161; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130.

A criminal act does not of itself raise a presumption of insanity. *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292.

And the presumption of sanity and responsibility for criminal acts applies though the accused was born deaf and dumb, and had never received special religious or moral instruction. *State* v. *Draper*, Houst. Crim. Rep. (Del.) 291.

to a contract, regularly made, is also presumed.[3] And a grantor in a deed is presumed to be sane and competent at the time of its execution.[4] And old age or physical infirmity raises no presumption of incapacity to make a deed or contract.[5] Likewise, a testator is presumed to have been possessed of a sound and disposing mind at the time of making his will.[6] But the presumption in the case of wills

And an instruction in a criminal prosecution that every man is supposed to be sane and responsible for his criminal acts until the contrary is shown, together with one as to the burden of proof, is not objectionable as making the presumption of sanity, and the burden of proving insanity, too prominent. *Massengale* v. *State*, 24 Tex. App. 181, 5 S. W. 650, 6 S. W. 35.

The presumption that every one is sane until the contrary is made to appear, however, does not apply in case of a person accused of crime, who pleads guilty; in such case his sanity must be made plainly to appear. *Sanders* v. *State*, 18 Tex. App. 372.

[3]*Killian* v. *Badgett*, 27 Ark. 166; *State* v. *Geddis*, 42 Iowa, 268; *Fay* v. *Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Dorchester* v. *Dorchester*, 18 N. Y. S. R. 402, 3 N. Y. Supp. 238, Reversed on other grounds in 121 N. Y. 156, 23 N. E. 1043; *Tuite* v. *Hart*, 71 App. Div. 619, 75 N. Y. Supp. 1098; *Hall* v. *Mutual L. Ins. Co.* 19 Ky. L. Rep. 1240, 43 S. W. 194.

[4]*Killian* v. *Badgett*, 27 Ark. 166; *Doe ex dem. Guest* v. *Beeson*, 2 Houst. (Del.) 246; *English* v. *Porter*, 109 Ill. 285; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Dearmond* v. *Dearmond*, 12 Ind. 455; *Achey* v. *Stephens*, 8 Ind. 411; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Anderson* v. *Cranmer*, 11 W. Va. 562; *Snodgrass* v. *Knight*, 43 W. Va. 294, 27 S. E. 233; *Delaplain* v. *Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; *Farnsworth* v. *Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Eakin* v. *Hawkins*, 48 W. Va. 364, 37 S. E. 622; *Eakin* v. *Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Hoge* v. *Fisher*, 1 Pet. C. C. 163, Fed. Cas. No. 6,585.

Where a purchaser finds a regular chain of title, formal in all its parts, upon the registration books, executed by grantors of full age, he has a right to rely upon the presumption of sanity, and will be protected if he purchases without notice of insanity, for a fair consideration. *Odom* v. *Riddick*, 104 N. C. 515, 7 L. R. A. 118, 17 Am. St. Rep. 686, 10 S. E. 609.

And evidence of the sanity of a grantor is not admissible in an action brought to set aside his deed, where no evidence as to his insanity had been given. *Dearmond* v. *Dearmond*, 12 Ind. 455.

But a bargain between a person of unsound mind and another standing in a fiduciary or confidential relation to him, is presumed to be against justice, and necessitates proof of knowledge and fairness. *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Haydock* v. *Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385

[5]*Williams* v. *Haid*, 118 N. C. 481, 24 S. E. 217; *Cowee* v. *Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Lewis* v. *Pead*, 1 Ves. Jr. 19.

But a finding of incompetency on an inquisition of lunacy overreaching the time of the execution of a deed affords a presumption, in an action to set it aside, that the grantor was insane; and if there is evidence of unsoundness of mind after the time of the commencement of the unsoundness as stated in the inquisition, an issue may be directed to inquire whether he was of unsound mind at the time of the execution of the deed. *Frank* v. *Mainwaring*, 2 Beav. 115.

[6]This rule is also supported by a great number of cases, among which are: *O'Donnell* v. *Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Wilbur* v. *Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Herbert* v. *Berrier*, 81 Ind. 1; *Boone* v. *Ritchie*, 21 Ky. L. Rep. 864, 53 S. W. 518; *Brown* v. *Ward*, 53 Md. 393, 36 Am. Rep. 422; *Richardson* v. *Bly*, 181 Mass. 97, 63 N. E. 3; *Payne* v. *Banks*, 32 Miss. 292; *Jackson* v. *Hardin*, 83 Mo. 175; *Pettes* v. *Bingham*, 10 N. H. 515; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Delafield* v. *Parish*, 25 N. Y. 9; *Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905; *Mayo* v. *Jones*,

is not usually so strong as in the case of deeds and contracts;[7] though it extends through life, no matter to what age the testator lives.[8] So, everyone is presumed to have capacity to contract marriage.[9] And a pauper is presumed to have sufficient intelligence to exercise a choice with regard to her residence until the contrary appears.[10] And sanity is presumed on habeas corpus for discharge from an asylum.[11]

So, no presumption of insanity arises in an action upon an insurance policy, from the mere fact of the death of the insured, caused by his own physical act.[12] The presumption of sanity is not one of law, however, but one of fact, or, at least, a mixed presumption of

78 N. C. 402; *Grabill* v. *Barr*, 5 Pa. 441, 47 Am. Dec. 418; *Messner* v. *Elliott*, 184 Pa. 41, 39 Atl. 46; *Lee* v. *Lee*, 4 M'Cord L. 183, 17 Am. Dec. 722; *Denny* v. *Pinney*, 60 Vt. 524, 12 Atl. 108; *Burton* v. *Scott*, 3 Rand. (Va.) 399; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Brown* v. *Bruce*, 19 U. C. Q. B. 35.

So, a testator sane at the time of making his will is presumed to be still sane at a subsequent time, when he makes alterations in the will. *Hawkins* v. *Grimes*, 13 B. Mon. 257.

And no presumption of insanity arises from a disposition in a will different from what a jury would make or from what the law would make in case of intestacy. *Henry* v. *Hall*, 106 Ala. 84, 54 Am. St. Rep. 22, 17 So. 187.

[7]*Beaubien* v. *Cicotte*, 8 Mich. 9. And see *Turner* v. *Turner*, 1 Litt. (Ky.) 102.

And refusal to instruct the jury in a will contest that every one is presumed to be sane until the contrary is proved is not error, where they were told that they should find in favor of the will on the question of testamentary capacity unless it appeared that the testator was so unsound in mind at the time as to be incapable of managing his affairs. *Elliott* v. *Welby*, 13 Mo. App. 19.

[8]*Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666.

No presumption of incompetency to make a will or gift arises from the mere fact of advanced age and increasing physical disease which had weakened the testator's or donor's mind, and which, within three months afterwards, resulted in his death. *Williams* v. *Haid*, 118 N. C. 481, 24 S. E. 217; *Re Wheeler*, 5 Misc. 279, 25 N. Y. Supp. 313.

[9]*Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439.

One who is competent to make a contract is presumed to have sufficient mental capacity to enter into the contract of marriage. *Powell* v. *Powell*, 27 Miss. 783.

And a marriage ceremony performed while the husband was upon his death bed and helpless, surrounded by the woman he married and her friends, when he was apparently oblivious not only of his former wife, but of his children also, affords no presumption against the validity of the previous marriage. *Christy* v. *Clarke*, 45 Barb. 529.

A person asserting the validity of a marriage entered into by one who had previously been adjudged a lunatic, however, has the burden of proving a lucid interval or a ratification. *Goodheart* v. *Ransley*, 28 Ohio L. J. 227.

[10]*Topsham* v. *Chelsea*, 60 Vt. 219, 13 Atl. 861.

[11]*Com. ex rel. Helmbold* v. *Kirkbride*, 11 Phila. 427.

And the discharge of a person from an insane asylum to which he had been transferred from the penitentiary creates a presumption in favor of his recovery. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

And the facts that a woman is in her one hundredth year, and that her sight is very much impaired, and that she is somewhat deaf, do not raise a presumption against her soundness of mind, upon the execution of a commission of lunacy. *Re Collins*, 18 N. J. Eq. 253.

[12]*Coffey* v. *Home L. Ins. Co.* 44 How. Pr. 481; *Duffield* v. *Robeson*, 2 Harr.

law and fact;[13] and whatever force it has is given it, not because of its intrinsic weight as an item of proof, but by reason of its operation in some degree in rendering the circumstances adduced to prove sanity more persuasive;[14] and where, upon the whole evidence, it is doubtful whether the person in question was sane or insane, the presumption in favor of sanity may operate to decide the question.[15] The doctrine that a person born deaf and dumb is presumed to be an idiot has been abandoned, and the question of such person's capacity or responsibility now rests upon his actual mental capacity.[16]

297. Burden of proof generally in miscellaneous matters.—In accordance with the general rule that all persons are presumed to be sane until the contrary is made to appear, it is also a general rule that the burden of proof to establish insanity or unsoundness of mind rests with him who alleges it.[17] And he who seeks to avoid a contract upon the ground of incapacity must establish such incapacity,[18] the rule being the same whether the insanity was general, or partial, or

(Del.) 375; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

A condition in a life insurance policy, making it void in case the insured should die by his own hand, is in the nature of a penalty or forfeiture. *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41.

[13]*Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

[14]*McGinnis* v. *Kempsey*, 27 Mich. 363.

The jury is not absolutely controlled, in a criminal prosecution, by the presumption of sanity. *Davis* v. *United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353.

[15]*Hawkins* v. *Grimes*, 13 B. Mon. 257, and see *Myatt* v. *Walker*, 44 Ill. 485; *Lilly* v. *Waggoner*, 27 Ill. 395; *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578.

[16]*Barnett* v. *Barnett*, 54 N. C. (1 Jones Eq.) 221; *Brower* v. *Fisher*, 4 Johns. Ch. 441. And see *State* v. *Draper*, Houst. Crim. Rep. (Del.) 291; *King* v. *Steel*, 1 Leach C. L. 451.

At common law a person who was deaf and dumb from birth was presumed to be *non compos mentis;* but the rule was different where he became so from accident. *Yong* v. *Sant*, 1 Dyer, 56a.

[17]*Worthington* v. *Mencer*, 96 Ala. 310, 17 L. R. A. 407, 11 So. 72; *Reeve* v. *Bonwill*, 5 Del. Ch. 1; *Frazer* v. *Frazer*, 2 Del. Ch. 260; *Argo* v. *Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679; *Menkins* v. *Lightner*, 18 Ill. 282; *Guild* v. *Hull*, 127 Ill. 523, 20 N. E. 665; *McCormick* v. *McCormick*, 109 Iowa, 700, 81 N. W. 172; *Ricketts* v. *Jolliff*, 62 Miss. 440; *Jackson ex dem. Cadwell* v. *King*, 4 Cow. 207, 15 Am. Dec. 354; *Delafield* v. *Parish*, 25 N. Y. 9; *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Ean* v. *Snyder*, 46 Barb. 239; *Cincinnati Street R. Co.* v. *Wright*, 54 Ohio St. 181, 32 L. R. A. 340, 43 N. E. 688; *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Pennypacker* v. *Pennypacker* (Pa.) 7 Cent. Rep. 532, 8 Atl. 634; *Burton* v. *Scott*, 3 Rand. (Va.) 399; *Hall* v. *Unger*, 2 Abb. U. S. 507, Fed. Cas. No. 5,949; *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441. And see *Smith* v. *McClure*, 146 Ind. 123, 44 N. E. 1004.

[18]*White* v. *Farley*, 81 Ala. 563, 8 So. 215; *Fay* v. *Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *State* v. *Geddis*, 42 Iowa, 268; *Hall* v. *Mutual L. Ins. Co.* 19 Ky. L. Rep. 1240, 43 S. W. 194; *Day* v. *Seeley*, 17 Vt. 542; *Hiett* v. *Shull*, 36 W. Va. 563, 15 S. E. 146; *Menkins* v. *Lightner*, 18 Ill. 282; *Tuite* v. *Hart*, 71 App. Div. 619, 75 N. Y. Supp. 1098.

This rule applies to releases. *Swayze* v. *Swayze*, 37 N. J. Eq. 180; *Chicago West Div. R. Co.* v. *Mills*, 91 Ill. 39. And to assignments. *Dorchester* v. *Dorchester*, 18 N. Y. S. R. 402, 3 N. Y. Supp. 238, Reversed on other grounds in 121 N. Y. 156, 23 N. E. 1043.

temporary.[19] And the burden of showing incompetency to make a deed devolves upon the party alleging its invalidity,[20] unless a previous condition of insanity has been established.[21] Likewise, insanity must be established by the conservator of an alleged insane person, who brings an action to set aside a conveyance made by his ward.[22] But one who deals with a man known to be of weak intellect has the burden of showing that no undue advantage was taken of his weakness, and that the dealings were had deliberately, and with knowledge of all the circumstances connected with them.[23] And the burden

[19]*Wray* v. *Wray*, 32 Ind. 126; *Chicago West Div. R. Co.* v. *Mills*, 91 Ill. 39.

[20]*Harrison* v. *Harrison*, 126 Ala. 323, 28 So. 586; *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689; *Doe ex dem. Guest* v. *Beeson*, 2 Houst. (Del.) 246; *Chancellor* v. *Donnell*, 95 Ala. 342, 10 So. 910; *Dicken* v. *Johnson*, 7 Ga. 484; *Guild* v. *Warne*, 149 Ill. 105, 36 N. E. 635; *Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *English* v. *Porter*, 109 Ill. 285; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Achey* v. *Stephens*, 8 Ind. 411; *Paulus* v. *Reed* (Iowa) 96 N. W. 757; *Howe* v. *Howe*, 99 Mass. 88; *Gibbons* v. *Dunn*, 46 Mich. 146, 9 N. W. 140; *Brown* v. *Brown*, 39 Mich. 792; *Hoey* v. *Hoey*, 53 App. Div. 208, 65 N. Y. Supp. 778; *Ballew* v. *Clark*, 24 N. C. (2 Ired. L.) 23; *Cropp* v. *Cropp*, 88 Va. 753, 14 S. E. 529; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Anderson* v. *Cranmer*, 11 W. Va. 562; *Jones* v. *Rice*, 99 Wis. 429, 75 N. W. 64; *Hoge* v. *Fisher*, 1 Pet. C. C. 163, Fed. Cas. No. 6,585; *Greenslade* v. *Dare*, 20 Beav. 284, 24 L. J. Ch. N. S. 490, 1 Jur. N. S. 294, 3 Week. Rep. 220.

So, the burden of proof of incompetency of a mortgagor rests with the party bringing an action to set aside the mortgage on that ground. *Gates* v. *Cornett*, 72 Mich. 435, 40 N. W. 740.

And the burden of proving insanity or undue influence rests with the party alleging it, on an issue as to whether a deed was procured by undue influence or while the grantor was insane. *Howe* v. *Howe*, 99 Mass. 88.

And an instruction in an action to set aside a deed, to the effect that if the grantor was a person of weak mind it would be sufficient to avoid it unless the defendant could show that, notwithstanding such weakness, he had sufficient capacity to understand the nature of his act, is erroneous as improperly shifting the burden of proof. *Somers* v. *Pumphrey*, 24 Ind. 231.

[21]*Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383. And see *Cropp* v. *Cropp*, 88 Va. 753, 14 S. E. 529.

The presumption of business capacity at the time a deed was made is not changed by the fact that on that day an application to the probate court was made for the appointment of a guardian for the grantor, and that one was subsequently appointed. *Doty* v. *Hubbard*, 55 Vt. 278.

[22]*Pickerell* v. *Morss*, 97 Ill. 220; *Re Shelleig*, 11 Ohio S. & C. P. Dec. 81.

[23]*Gates* v. *Cornett*, 72 Mich. 435, 40 N. W. 740; *Wartemberg* v. *Spiegel*, 31 Mich. 402; *Duncombe* v. *Richards*, 46 Mich. 166, 9 N. W. 149; *Crawford* v. *Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870; *Van Pelt* v. *Van Pelt*, 30 Barb. 134; *Miskey's Appeal*, 107 Pa. 611; *Clark* v. *Malpas*, 31 Beav. 80, 4 De G. F. & J. 401, 8 Jur. N. S. 734, 10 Week. Rep. 676; *Lins* v. *Lenhardt*, 127 Mo. 271, 29 S. W. 1025; *Jones* v. *Thompson*, 5 Del. Ch. 374. And see *Weir* v. *Fitzgerald*, 2 Bradf. 42; *Mowry* v. *Silber*, 2 Bradf. 133; *Hyer* v. *Little*, 20 N. J. Eq. 443; *Morton* v. *Morton* (N. J. Eq.) 7 Cent. Rep. 134; 8 Atl. 807; *Ellis* v. *Mathews*, 19 Tex. 390, 70 Am. Dec. 353; *Fishburne* v. *Ferguson*, 84 Va. 87, 4 S. E. 575; *Smith* v. *Smith*, 60 Wis. 329, 19 N. W. 47; *Jacox* v. *Jacox*, 40 Mich. 473, 29 Am. Rep. 547.

And an instrument evidencing a sale, in the handwriting of the purchaser, which bears the marks of illiteracy, coupled with evidence of an excessive price, is of great weight as tending to show fraud, though no imputation is cast upon his capacity. *Cockell* v. *Taylor*, 15 Beav. 115, 21 L. J. Ch. N. S. 545.

And where one who has the burden of proof of the fairness of a transfer made to him by an old uncle within a few days of his death is evasive in his testimony, the burden is increased, and

also rests with a grantee taking a conveyance from a person of unsound mind, to show that he accepted it in ignorance of such unsoundness.[24] So, the burden of proof in an action to set aside a gift upon the ground of mental weakness of the donor rests with the complainant.[25] And a party seeking to impeach the validity of a marriage on the ground of incapacity of a party to understand its nature must prove it.[26] And capacity rendering suicide an avoidance of insurance must be proved by the one alleging it.[27]

298. Burden of proof in criminal cases.—While there is some conflict of opinion as to the burden of proof in criminal cases, a large number of them proceed upon the theory that the plea of insanity is an affirmative defense, and hold that it devolves upon the accused to prove that he was insane and incapable of rational acts, to such an extent as to render him criminally irresponsible at the time of the act in question,[28] or that he had not the moral power to resist the

it is no excuse that he was afraid of being entrapped by counsel. *Duncombe* v. *Richards*, 46 Mich. 166, 9 N. W. 149.

But the burden of proving affirmatively that no deception was practised or undue influence used is not imposed upon a party to a contract by the fact that the other party was old and his grandfather and employer. *Cowee* v. *Cornell*, 75 N. Y. 91, 31 Am. Rep. 428.

[24]*Hull* v. *Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270.

A man executing a deed *in extremis* cannot be supposed to have a mind adequate to the business in hand, and may be deemed to be more easily imposed upon, though there is no direct proof that he was *non compos mentis* or delirious. *Fane* v. *Devonshire*, 6 Bro. P. C. 137.

[25]*Kimball* v. *Cuddy*, 117 Ill. 213, 7 N. E. 589; *Teegarden* v. *Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

[26]*Cannon* v. *Smalley*, L. R. 10 Prob. Div. 96; *Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853, 2 Week. Rep. 612; *Browning* v. *Reane*, 2 Phillim. Eccl. Rep. 69; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439.

[27]*Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676.

So, the burden rests with the plaintiff in an action to vacate a judgment and decree upon the ground that she was of unsound mind and incapable of managing her business at the time the action was commenced and until after judgment, to establish such facts. *Smith* v. *McClure*, 146 Ind. 123, 44 N. E. 1004.

[28]Among other cases supporting this rule are: *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *People* v. *Myers*, 20 Cal. 518; *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State* v. *Danby*, Houst. Crim. Rep. (Del.) 166; *State* v. *Cole*, 2 Penn. (Del.) 344, 45 Atl. 391; *Brown* v. *State*, 40 Fla. 459, 25 So. 63; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *People* v. *Walter*, 1 Idaho, 386; *Sanders* v. *State*, 94 Ind. 147; *State* v. *Robbins*, 109 Iowa, 650, 80 N. W. 1061; *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271; *State* v. *Parks*, 93 Me. 208, 44 Atl. 899; *Com.* v. *Eddy*, 7 Gray, 583; *State* v. *Brown*, 12 Minn. 538, Gil. 448; *State* v. *McCoy*, 34 Mo. 536, 86 Am. Dec. 121; *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Graves* v. *State*, 45 N. J. L. 347, 46 Am. Rep. 778; *State* v. *Hill*, 65 N. J. L. 626, 47 Atl. 814; *Faulkner* v. *Territory*, 6 N. M. 464, 30 Pac. 905; *State* v. *Starling*, 51 N. C. (6 Jones L.) 366; *State* v. *Spivey*, 132 N. C. 989, 43 S. E. 475; *Bergin* v. *State*, 31 Ohio St. 111; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Kilpatrick*, 204 Pa. 218, 53 Atl. 774; *State* v. *McIntosh*, 39 S. C. 97, 17 S. E. 446; *King* v. *State*, 91 Tenn. 617, 20 S. W. 169; *Carter* v. *State*, 39 Tex. Crim. Rep. 345, 46 S. W. 236, 45

impulse to commit the crime,[29] unless such incapacity appears from evidence offered by the prosecution.[30] And where the accused offers no testimony tending to show insanity, the presumption in favor of sanity prevails.[31] So, under this rule the burden also rests with the accused to show his insanity upon an inquiry as to his sanity at the time he is brought up to plead to the indictment or for trial.[32]

Quite a number of authorities of great weight, however, have adopted the theory that sanity is an ingredient in the crime, as essential as the overt act, and that the plea of insanity is merely the denial of one of the essential allegations against the accused, and that the burden of proof rests with the prosecution to show sanity as a part of its case.[33] But even under this rule, in the absence of evidence indi-

S. W. 508; *People* v. *Dillon*, 8 Utah, 92, 30 Pac. 150; *People* v. *Calton*, 5 Utah, 451, 16 Pac. 902; *Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795; *Davis* v. *United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *Kinloch's Case*, 25 How. St. Tr. 981, 997; *Reg.* v. *Layton*, 4 Cox C. C. 149.

This rule seems to have been affirmed in several New York cases. See *People* v. *Pine*, 2 Barb. 566; *People* v. *O'Connell*, 62 How. Pr. 436; *People* v. *Casey*, 2 N. Y. Crim. Rep. 187; *Walker* v. *People*, 1 N. Y. Crim. Rep. 7; *People* v. *Coleman*, 1 N. Y. Crim. Rep. 1; *People* v. *Robinson*, 1 Park. Crim. Rep. 649, Affirmed in 2 Park. Crim. Rep. 235; *Lake* v. *People*, 1 Park. Crim. Rep. 495.

But the contrary rule seems to have obtained, and the apparent inconsistency would seem to be the result of the doctrine that sanity need not be proved unless insanity is asserted. See line of contrary cases cited below, note 33 *et seq.*

So, the burden rests with the defendant in an appellate court, upon appeal from a conviction in a criminal case in which the court below had found that he was not insane, to show that there was sufficient evidence in favor of the defense of insanity. *Hoard* v. *State*, 15 Lea, 318.

[29]*Brown* v. *Com.* 78 Pa. 122; *State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *State* v. *Coleman*, 27 La. Ann. 691.

This rule applies particularly to partial or temporary insanity. *State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249; *Kinloch's Trial*, 25 How. St. Tr. 997.

[30]*State* v. *Denby*, Houst. Crim. Rep. (Del.) 166; *People* v. *Calton*, 5 Utah, 451, 16 Pac. 902.

A statute imposing upon the defendant in a criminal case the burden of proving a plea of insanity does not invade any of his constitutional rights. *Martin* v. *State*, 119 Ala. 1, 25 So. 255.

Though the burden of proving insanity rests with him who alleges it, however, the plea of insanity does not relieve the state, in a criminal prosecution, from proving every fact essential to make out the crime; and the state, therefore, retains the right to open and close. *State* v. *Robbins*, 109 Iowa, 659, 80 N. W. 1061; *State* v. *Felter*, 32 Iowa, 49.

[31]*McKenzie* v. *State*, 26 Ark. 334; *State* v. *Hagt*, 47 Conn. 518, 36 Am. Rep. 89; *Sanders* v. *State*, 94 Ind. 147; *State* v. *Norwood*, 115 N. C. 791, 44 Am. St. Rep. 498, 20 S. E. 712; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Nevling* v. *Com.* 98 Pa. 323; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Com.* v. *Heidler*, 191 Pa. 375, 43 Atl. 211; *United States* v. *Lawrence*, 4 Cranch C. C. 514, Fed. Cas. No. 15,576; *McDougal* v. *State*, 88 Ind. 24; *Reg.* v. *Stokes*, 3 Car. & K. 185; *King* v. *State*, 9 Tex. App. 558.

And no instruction as to insanity need be given in the absence of evidence tending to show it. *Bishop* v. *Com.* 22 Ky. L. Rep. 760, 58 S. W. 817.

[32]*State* v. *O'Grady*, 3 Ohio Legal News, 137; *United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555; *Reg.* v. *Turton*, 6 Cox C. C. 385.

[33]*Montag* v. *People*, 141 Ill. 75, 30 N. E. 337; *Hopps* v. *People*, 31 Ill. 385, 83 Am. Dec. 231; *Russell* v. *State*, 53 Miss. 367; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *Ballard* v. *State*, 19 Neb. 610, 28 N. W. 271; *Wright* v.

cating insanity, both the court and the jury are justified in acting upon the presumption of sanity; and when the evidence establishes the criminal act, and indicates nothing as to the mental capacity of the accused, a conviction is authorized,[34] though whenever the question of sanity is put in issue by facts coming from either side, it devolves upon the prosecution to establish it.[35] And the general rule is that the burden of proof is regarded as remaining with the government throughout the entire case,[36] though the courts of a few of the states regard the burden as a shifting one and hold that where evidence is produced sufficient to raise a reasonable doubt of the defendant's sanity, the presumption of sanity ceases, and the burden shifts

People, 4 Neb. 407; *Moett* v. *People*, 85 N. Y. 373; *Brotherton* v. *People*, 75 N. Y. 159; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379.

[34]*Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *State* v. *Crawford*, 11 Kan. 32; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379; *Brotherton* v. *People*, 75 N. Y. 159; *Walter* v. *People*, 32 N. Y. 147; *Com.* v. *Eddy*, 7 Gray, 583.

But an instruction as to reasonable doubt, making no reference to the defense of insanity, is not objectionable as authorizing a conviction in the absence of proof of the defendant's sanity. *Schwartz* v. *State* (Neb.) 91 N. W. 190.

And an instruction that the defendant is presumed to be sane until he convinces the jury by the evidence that he is insane is not error, where he has been tried upon the theory that the burden rests with the prosecution to maintain his sanity. *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379.

[35]*Montag* v. *People*, 141 Ill. 75, 30 N. E. 337; *Fisher* v. *People*, 23 Ill. 293; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *State* v. *Crawford*, 11 Kan. 32; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *Furst* v. *State*, 31 Neb. 403, 47 N. W. 1116; *Snider* v. *State*, 56 Neb. 309, 76 N. W. 574; *Knights* v. *State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *Com.* v. *Heath*, 11 Gray, 303; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379; *People* v. *Barberi*, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168; *Maas* v. *Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960. And see *Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95; *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *State* v. *Morphy*, 33 Iowa, 270, 11 Am. Rep. 122.

But the evidence need not be sufficient to raise a reasonable doubt of sanity. *Snider* v. *State*, 56 Neb. 309, 76 N. W. 574.

The legal presumption of sanity under this rule is regarded as merely a matter of evidence, standing upon the same ground as the testimony of the witnesses; not shifting the burden of proof in the sense of changing the rule as to the quantity of evidence required, but being merely prima facie proof of sanity, upon which the jury can find a verdict though it cannot be weighed against any measurable amount of evidence. *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State* v. *Jones*, 64 Iowa, 356, 17 N. W. 911, 20 N. W. 470; and see *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *McAllister* v. *Territory*, 1 Wash. Terr. 360.

And an instruction in a criminal prosecution, that to establish the defense of insanity it must be clearly proved, is not error, where the court elsewhere charged the jury that the burden of establishing beyond a reasonable doubt, as one of the elements of guilt, that the accused was not insane, is cast upon the prosecution. *Walker* v. *People*, 88 N. Y. 86, Affirming 26 Hun, 67, 1 N. Y. Crim. Rep. 7.

[36]*Davis* v. *United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *Com.* v. *McKie*, 1 Gray, 61, 61 Am. Dec. 410; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Snider* v. *State*, 56 Neb. 309, 76 N. W. 574; *Knights* v. *State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *McAllister* v. *Territory*, 1 Wash. Terr. 360.

to the prosecution, which is then required to prove sanity as a constituent element of the crime.[37]

299. Conflicting rules as to burden of proof in will cases.—The question of burden of proof in will cases has given rise to a hopeless conflict of authority, in some instances directly contrary rules having been asserted in the same jurisdiction. Upon the one hand, the rule is laid down by a large number of cases that the burden of proof of unsoundness of mind, or testamentary incapacity, rests with those who contest the will.[38] And they have the right to open and close.[39] And the burden of proving an insane delusion which will affect the validity of a testator's will also rests with the party affirming or setting it up.[40] Within this rule express proof of a testator's capacity is not required, in the absence of a contest, as in

[37] *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95; *Bradley* v. *State*, 31 Ind. 492.

But evidence tending to show the insanity of the accused in a criminal prosecution does not shift the burden of proof upon the accused, unless it is sufficient to create a reasonable doubt as to his sanity. *People* v. *Finley*, 38 Mich. 482; *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486.

And proof of insensibility to the consequences of his acts on the part of a person accused of homicide, and of absence of apparent motive, is not such evidence of insanity as will cast the burden upon the state of affirmatively proving sanity. *State* v. *Redemeier*, 8 Mo. App. 1.

[38] Among the cases supporting this rule are: *Murphree* v. *Senn*, 107 Ala. 424, 18 So. 264; *Cotton* v. *Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Re Motz*, 136 Cal. 558, 69 Pac. 294; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Duffield* v. *Robeson*, 2 Harr. (Del.) 375; *Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Teegarden* v. *Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Stephenson* v. *Stephenson*, 62 Iowa, 163, 17 N. W. 456; *Brown* v. *Ward*, 53 Md. 393, 36 Am. Rep. 422; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Re Burns*, 121 N. C. 336, 28 S. E. 519; *Egbert* v. *Egbert*, 78 Pa. 326; *Lee* v. *Lee*, 4 M'Cord, L. 183, 17 Am. Dec. 722; *Bartee* v. *Thompson*, 8 Baxt. 508; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Allen* v. *Griffin*, 69 Wis. 529, 35 N. W. 21; ignoring the contrary opinion of Lyon, J., in *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287; *Cartwright* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90; *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433. But see later English cases, *infra*.

Under this rule the presumption of sanity in a will contest stands until overcome by the weight of the testimony impeaching it. *Newhard* v. *Yundt*, 132 Pa. 324, 19 Atl. 288; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Burton* v. *Scott*, 3 Rand. (Va.) 399.

And the burden of proving the proper execution of a will rests with the defendant in ejectment claiming under it, and for that purpose he must call the subscribing witnesses, making them his own, to testify to the fact of execution and mental capacity of the testator at the time, leaving the other party the benefit of cross-examining the witnesses. *Waters* v. *Waters*, 35 Md. 531.

And an instruction in an action to contest a will, that the plaintiff must prove that the testator was not of sound mind and disposing memory, is erroneous where the statute only requires the party contesting to show that the party was of unsound mind. *Kenworthy* v. *Williams*, 5 Ind. 375.

[39] *Chandler* v. *Ferris*, 1 Harr. (Del.) 454; *Bell* v. *Buckmaster*, 1 Harr. (Del.) 460, note.

[40] *Dew* v. *Clark*, 3 Addams Eccl. Rep. 79; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 28 Week. Rep. 703, 44 J. P. 220, 49 L. J. Prob. N. S. 8; *Allen* v. *Public Administrator*, 1 Bradf. 378; *Keeler* v. *Keeler*, 20 N. Y. S. R. 439, 3 N. Y. Supp. 629; *Re Scott*, 128 Cal. 57, 60

such case the presumption of competency will prevail.[41] And where a will is contested on the ground of insanity, the proponent is only required to prove the fact of formal execution, when the burden of overturning the presumption of sanity is cast upon the contestants.[42] Upon the other hand, however, the contrary rule is laid down by authorities of great weight, that the burden of proof rests with the proponents of a will to show all the facts necessary to make a valid will, including the fact that it was the free act of a man competent under the law to make a will.[43] And they are entitled to open and close the argument before the jury.[44] And the presumption of sanity

Pac. 527; *Hemingway's Estate*, 195 Pa. 291, 78 Am. St. Rep. 815, 45 Atl. 726, Affirming 7 Northampton Co. Rep. 93; *Scarborough* v. *Baskin*, 65 S. C. 558, 44 S. E. 63.

[41]*Herbert* v. *Berrier*, 81 Ind. 1; *Perkins* v. *Perkins*, 39 N. H. 163; *Smith* v. *Smith*, 4 Baxt. 293; *Hawkins* v. *Grimes*, 13 B. Mon. 257; *Bartee* v. *Thompson*, 8 Baxt. 508.

[42]*Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Werstler* v. *Custer*, 46 Pa. 502; *Key* v. *Holloway*, 7 Baxt. 575; *Frear* v. *Williams*, 7 Baxt. 550; *Smith* v. *Smith*, 4 Baxt. 293; *Woodford* v. *Buckner*, 23 Ky. L. Rep. 627, 63 S. W. 617; *Bramel* v. *Bramel*, 101 Ky. 64, 39 S. W. 520.

[43]Among the cases supporting this rule are: *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Evans* v. *Arnold*, 52 Ga. 169; *Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Bramel* v. *Bramel*, 101 Ky. 64, 39 S. W. 520; *Gerrish* v. *Nason*, 22 Me. 438, 39 Am. Dec. 589; *Re Thomson*, 92 Me. 563, 43 Atl. 511; *Crowninshield* v. *Crowninshield*, 2 Gray, 524; *Richardson* v. *Bly*, 181 Mass. 97, 63 N. E. 3; *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Re Layman*, 40 Minn. 371, 42 N. W. 286; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *Tingley* v. *Cowgill*, 48 Mo. 291; *Carl* v. *Gabel*, 120 Mo. 283, 25 S. W. 214; *Murry* v. *Hennessey*, 48 Neb. 608, 67 N. W. 470; *Hardy* v. *Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Delafield* v. *Parish*, 25 N. Y. 9; *Ramsdell* v. *Viele*, 6 Dem. 244, 16 N. Y. S. R. 281, Affirmed in 20 N. Y. S. R. 446, 3 N. Y. Supp. 499, 117 N. Y. 636, 22 N. E. 1130; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Re Van Alstine* (Utah) 72 Pac. 942; *Williams* v. *Robinson*, 42 Vt. 658, 1 Am. Rep. 359; distinguishing and explaining *Dean* v. *Dean*, 27 Vt. 746; *Denny* v. *Pinney*, 60 Vt. 524, 12 Atl. 108; *Riddell* v. *Johnson*, 26 Gratt. 152; *Gray* v. *Rumrill* (Va.) 44 S. E. 697, overruling, though without mentioning, *Burton* v. *Scott*, 3 Rand. (Va.) 399; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Banks* v. *Goodfellow*, 22 L. T. N. S. 813, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 28 Week. Rep. 703, 44 J. P. 220, 49 L. J. Prob. N. S. 8.

Mullins v. *Cottrell*, 41 Miss. 291, and *Payne* v. *Banks*, 32 Miss. 292, seem to announce the opposite rule, but the decision in those cases probably turned upon the question as to the weight and sufficiency of evidence rather than upon that of burden of proof. And *Brown* v. *Torrey*, 24 Barb. 583; *Legg* v. *Myer*, 5 Redf. 628; *Harper* v. *Harper*, 1 Thomp. & C. 351; *Miller* v. *White*, 5 Redf. 320; *Potter* v. *McAlpine*, 3 Dem. 108, are probably open to the same explanation.

And under this rule an averment on the part of the proponents of a will, for the purpose of forming an issue, should include everything necessary to constitute a valid will, including soundness of mind; though where the requirement of soundness rests upon implication only, the presumption of sanity is sufficient to satisfy the implication without averment. *Beaubien* v. *Cicotte*, 8 Mich. 9; and see *Hawkins* v. *Grimes*, 13 B. Mon. 257.

But the burden of proof in a will contest rests with the proponents to show general sanity or testamentary capacity only; and a charge submitting to the jury the question whether the testatrix was entirely free from insanity of any kind is improper. *Wetter* v. *Habersham*, 60 Ga. 194.

[44]*Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Rigg*

does not apply in a will contest, where the statute requires the testator to be of sound mind to make a valid will, such soundness of mind being required to be proved by the proponent.[45]

300. Shifting of the burden resting with the proponent.—Within the doctrine above stated many of the cases hold that the burden of proof resting with the proponent of a will to show sanity continues throughout the trial, and does not shift upon the giving of evidence of insanity.[46] And he must produce sufficient evidence to outweigh that offered by the contestants, so as to satisfy the jury, upon the whole case, that the testator was of sound mind.[47] But when a prima facie case has been established by the proponent, the case stands the same as if the burden of proof throughout rested with the contestants; and they are bound by rules applicable to the party having the affirmative as to the order of their proof.[48] In a number of the states, however, the rule is that while the burden rests with the proponent of a will to show that the testator was of sound mind, when this is done the burden shifts to the contestant, not only to neutralize

v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Brooks* v. *Barrett*, 7 Pick. 94; *Phelps* v. *Hartwell*, 1 Mass. 71; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Hardy* v. *Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Re Van Alstine* (Utah) 72 Pac. 942.

But the question as to who shall go forward is within the discretion of the court; and an error in the exercise of such discretion is not a ground for a new trial. *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100.

[45]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Barnes* v. *Barnes*, 66 Me. 286; *Cilley* v. *Cilley*, 34 Me. 162; *Gerrish* v. *Nason*, 22 Me. 438, 39 Am. Dec. 589; *Crowninshield* v. *Crowninshield*, 2 Gray, 524; *Beaubien* v. *Cicotte*, 8 Mich. 9; *Re Layman*, 40 Minn. 371, 42 N. W. 286; *Martin* v. *Perkins*, 56 Miss. 204; *Beazley* v. *Denson*, 40 Tex. 416; *Nicholas* v. *Kershner*, 20 W. Va. 251; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

In an action by executors to determine the validity of a will under the provisions of N. Y. Code Civ. Proc. § 2653a, however, the burden of establishing incompetency rests with the contestants. *Dobie* v. *Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801.

[46]*Crowninshield* v. *Crowninshield*, 2 Gray, 524; *Barker* v. *Comins*, 110 Mass. 477; *Norton* v. *Paxton*, 110 Mo. 456, 19 S. W. 807; *Baxter* v. *Abbott*, 7 Gray, 71; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *Elliott* v. *Welby*, 13 Mo. App. 19; *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Aikin* v. *Weckerly*, 19 Mich. 482; *Perkins* v. *Perkins*, 39 N. H. 163; *Delafield* v. *Parish*, 25 N. Y. 9; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Riddell* v. *Johnson*, 26 Gratt. 152; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880; *Symes* v. *Green*, 1 Swabey & T. 401, 5 Jur. N. S. 742, 28 L. J. Prob. N. S. 83.

[47]*Aikin* v. *Weckerly*, 19 Mich. 482; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6.

Under this rule the burden of proof does not shift upon evidence of sanity given by the subscribing witnesses. *Crowninshield* v. *Crowninshield*, 2 Gray, 524.

[48]*Kempsey* v. *McGinniss*, 21 Mich. 123; *Re Layman*, 40 Minn. 371, 42 N. W. 286; *Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880. And see *Hodgdon* v. *Crosby*, 1 Wash. Terr. 578; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Hoge* v. *Fisher*, 1 Pet. C. C. 163, Fed. Cas. No. 6,585; *Barber's Appeal*, 63 Conn. 393, 22

the proof of sanity offered, but also the presumption of sanity;[49] and that while the person propounding a will must prove not only its execution and publication, but also the mental capacity of the testator, one who sets up the fact that the testator is *non compos mentis* must prove it.[50]

301. Sufficiency of evidence to satisfy or shift the burden.—In the absence of evidence in a will contest tending to show want of testamentary capacity, slight evidence of capacity is all that is needed to authorize the probate of the will.[51] But there must be some evidence other than the presumption of sanity to satisfy or shift the burden resting with the proponent.[52] Such burden, however, is satisfied by a preponderance of testimony.[53] And a prima facie case is made

L. R. A. 90, 27 Atl. 973; *Jackson* v. *Hardin*, 83 Mo. 175; *Carpenter* v. *Carpenter*, Milward, 159.

[49]*Carpenter* v. *Calvert*, 83 Ill. 62; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Hollenbeck* v. *Cook*, 180 Ill. 65, 54 N. E. 154; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Wilbur* v. *Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Pendlay* v. *Eaton*, 130 Ill. 69, 22 N. E. 853; *Egbers* v. *Egbers*, 177 Ill. 82, 52 N. E. 285; *Holloway* v. *Galloway*, 51 Ill. 160; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Mifflin* v. *Smedley*, 3 Del. Co. Rep. 143; *Bramel* v. *Bramel*, 101 Ky. 64, 39 S. W. 520; *Fee* v. *Taylor*, 83 Ky. 259; *Milton* v. *Hunter*, 13 Bush, 163; *Woodford* v. *Buckner*, 23 Ky. L. Rep. 627, 63 S. W. 617; *Boone* v. *Ritchie*, 21 Ky. L. Rep. 864, 53 S. W. 518; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Jackson* v. *Hardin*, 83 Mo. 175; *Delafield* v. *Parish*, 25 N. Y. 9; *Temple* v. *Temple*, 1 Hen. & M. 476; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433.

Though the burden of proof rests in the first instance upon the party seeking to establish a will to show that the testator was of sound mind at the time of making it, when a prima facie case has been made, the presumption of sanity arises. *Carpenter* v. *Calvert*, 83 Ill. 62; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287.

[50]*Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880; *Egbers* v. *Egbers*, 177 Ill. 82, 52 N. E. 285; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Hollenbeck* v. *Cook*, 180 Ill. 65, 54 N. E. 154; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *King* v. *King*, 19 Ky. L. Rep. 868, 42 S. W. 347; *McFadin* v. *Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Fulbright* v. *Perry County*, 145 Mo. 432, 46 S. W. 955; *Sehr* v. *Lindemann*, 153 Mo. 276, 54 S. W. 537.

[51]*Allen* v. *Griffin*, 69 Wis. 529, 35 N. W. 21. And see *Hawkins* v. *Grimes*, 13 B. Mon. 257; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

[52]*McGinnis* v. *Kempsey*, 27 Mich. 363; *Aikin* v. *Weekerly*, 19 Mich. 482; *Martin* v. *Perkins*, 56 Miss. 204; *Werstler* v. *Custer*, 46 Pa. 502; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880. And see *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Hubbard* v. *Hubbard*, 7 Or. 42; *Re Lyddy*, 24 N. Y. S. R. 607, 5 N. Y. Supp. 636.

In *Re Baldwin*, 13 Wash. 666, 43 Pac. 934, it was held that sufficient proof to make out a prima facie case of the sanity of a testator at the time his will was made is necessary before the admission of the will to probate, as one of the jurisdictional facts.

And an instruction in a will contest that it devolves upon the person seeking to sustain the will to prove that the testator was of competent mind and memory to make it at the time of its publication is erroneous, as excluding altogether the presumption of sanity, and as excluding the right of the proponent to make out his case upon the question of sanity from the whole case before the jury. *Hawkins* v. *Grimes*, 13 B. Mon. 257.

[53]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473.

by testimony in favor of competency by the subscribing witnesses,[54] or by proof of due execution of a will rational in its provisions, and consistent in its details, language, and construction.[55] The fact that a will is unreasonable, however, though competent on the question of mental capacity, imposes no new or special burden upon the party propounding it.[56] And the burden of proof of a disposing mind and memory cannot be satisfied by mere proof that the testator had capacity at some anterior date.[57]

Where the burden of proof of incapacity rests with the contestants,

[54]*O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *Howat* v. *Howat*, 19 Ky. L. Rep. 756, 41 S. W. 771; *Taff* v. *Hosmer*, 14 Mich. 309; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Jackson* v. *Hardin*, 83 Mo. 175; *McFadin* v. *Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Re Forman*, 54 Barb. 274; *Cordrey* v. *Cordrey*, 1 Houst. (Del.) 269; *Bell* v. *Buckmaster*, 1 Harr. (Del.) 460, note; *Werstler* v. *Custer*, 46 Pa. 502.

After favorable testimony on the question of sanity by the attesting witnesses, the testimony of the contestants to defeat a will must so far overcome that of the proponents as to neutralize the effect of the legal presumption of sanity. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

And where the attesting witnesses to a will do not impeach the testator's sanity, or if, being absent or dead, their handwriting is proved, the will will be regarded as established unless proof of insanity is offered by the contestants. *Perkins* v. *Perkins*, 39 N. H. 163.

The introduction in evidence of the various attestations to a will before the clerk of a probate court, however, does not shift the burden of proof from the proponent to the contestant, on the question of testamentary capacity. *Elliott* v. *Welby*, 13 Mo. App. 19.

[55]*Fee* v. *Taylor*, 83 Ky. 259; *Milton* v. *Hunter*, 13 Bush, 163; *Flood* v. *Pragoff*, 79 Ky. 607; *Hawkins* v. *Grimes*, 13 B. Mon. 257; *Anderson* v. *Irwin*, 101 Ill. 411; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Symes* v. *Green*, 1 Swabey & T. 401, 5 Jur. N. S. 742, 28 L. J. Prob. N. S. 83. And see *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

A will made by the testator himself, unaided by others, the provisions and expressions of which are sage and judicious, raises a presumption, even in case of a person habitually insane, that it was made during the existence of a lucid interval, which imposes upon those who attack it the burden of proving insanity at the moment it was made. *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577, 15 So. 297.

And the fact that a testator wrote his will himself is prima facie evidence that he was in his right mind and competent to make a will at the time, which will cast the burden of proof to repel the presumption of sanity upon those who assert the contrary. *Temple* v. *Temple*, 1 Hen. & M. 476.

[56]*Barker* v. *Comins*, 110 Mass. 477.

There is a presumption against an unfinished will materially altering and controlling a former will deliberately made and formally executed, however, so that to establish such a will there must be the fullest proof of capacity, volition, intention, and interruption by the act of God. *Blewitt* v. *Blewitt*, 4 Hagg. Eccl. Rep. 410.

And the burden of proving the capacity of one who, shortly before his death, conveyed all his property to certain members of his family, leaving others unprovided for, rests with the grantees. *Lins* v. *Lenhardt*, 127 Mo. 271, 29 S. W. 1025.

[57]*Holloway* v. *Galloway*, 51 Ill. 159.

And an instruction that unless a grantor had sufficient capacity to clearly comprehend the nature of the business engaged in, and he consented of his own volition, the jury must find for the plaintiff in an action to set aside a deed, is not subject to the objection that it tends to mislead the jury into the belief that the burden was on the defendant, where it appears that the grantor was insane shortly before the execution of the deed. *Fishburne* v. *Ferguson*, 84 Va. 87, 4 S. E. 575.

it can only be shifted by showing prior habitual or fixed insanity, or actual incapacity at the date of the instrument.[58] But it is shifted to the proponents by proof of insanity before and after the date of the will,[59] after which the proponents must show that the will was executed during a lucid interval.[60] And while an inquisition of lunacy is not binding as against third persons, it destroys the presumption in favor of sanity, and casts the burden of establishing it upon the party alleging it.[61] So, the fact that a party procured the execution of a will casts the burden upon him to prove capacity, where incapacity is alleged.[62] And where a will is written or prepared by a party to be benefited by it, he or any other party seeking to establish it must show capacity and freedom of will on the part of the testator.[63] And

[58]*Eastis* v. *Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204; *Cropp* v. *Cropp*, 88 Va. 753, 14 S. E. 529.

Proof of monomania, in a will contest, does not require the other party to show, by a preponderance of the evidence, that it did not enter into the will. *Young* v. *Miller*, 145 Ind. 652, 44 N. E. 757.

Nor is mere proof of delusion sufficient to satisfy the burden of proof of incapacity. *Wait* v. *Westfall* (Ind.) 68 N. E. 271.

Nor is mere weakness. *Re Latour*, 140 Cal. 414, 73 Pac. 1070.

And occasional flightiness or wandering of intellect of a dying testator during his last sickness does not change the presumption of competency to make a will, so that the contrary must be proved before the jury can find the will invalid. *McMasters* v. *Blair*, 29 Pa. 298.

And evidence that a testatrix, a year or so before making her will, had an attack of pneumonia, and acted strangely, and would lock herself in her rooms and refuse to answer calls, and that she hid her keys and forgot where she put them, and wandered about the house in the night, and that her memory was weak, is insufficient to overcome the ordinary presumption in favor of testamentary capacity. *Lennig's Estate*, 4 Pa. Dist. R. 94.

[59]*Ford* v. *Ford*, 7 Humph. 92; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391.

[60]*Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391.

When a will is made upon a death bed shortly before death, and delirium or stupor from drugs is shown, there is no presumption that it was made during a lucid interval, though such intervals are shown to have existed. *Elliott* v. *Welby*, 13 Mo. App. 19.

[61]*Snook* v. *Watts*, 11 Beav. 105, 12 Jur. 444; *Bannatyne* v. *Bannatyne*, 14 Eng. L. & Eq. Rep. 581, 16 Jur. 864, 2 Rob. Eccl. Rep. 472; *Leckey* v. *Cunningham*, 56 Pa. 373; *Glass* v. *Hilberg*, 1 Pa. Dist. R. 621; *Mifflin* v. *Smedley*, 3 Del. Co. Rep. 143; *Lewis* v. *Jones*, 50 Barb. 645; *Re Pendleton*, 1 Connoly, 480, 5 N. Y. Supp. 849; *Re Taylor*, 1 Edm. Sel. Cas. 375; *Harrison* v. *Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Lilly* v. *Waggoner*, 27 Ill. 395; *Breed* v. *Pratt*, 18 Pick. 115; *Stone* v. *Damon*, 12 Mass. 487; *Hamilton* v. *Hamilton*, 10 R. I. 538.

So, the presumption of an intent to revoke a will does not follow an act of destruction or cancelation, where the testator had been impeached as insane. *Re Jones*, 2 Ohio Dec. 409.

But the preliminary action of a clerk of the court in appointing a next friend of a party to an action to conduct it is not such a finding of insanity as will overcome the presumption of sanity, and shift the burden of proof. *Smith* v. *Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

[62]*Currie* v. *Currie*, 24 Can. S. C. 712. And see *Hegney* v. *Head*, 126 Mo. 619, 29 S. W. 587; *Boyd* v. *Boyd*, 66 Pa. 283; *Wilson* v. *Mitchell*, 101 Pa. 495.

[63]*McDaniel* v. *Crosby*, 19 Ark. 544; *Morrison* v. *Smith*, 3 Bradf. 209; *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Harvey* v. *Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Croft* v. *Day*, 1 Curt. Eccl. Rep. 782; *Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 631.

So, where want of mental capacity to

weakness of mind, together with the fact that the will was unequal, or that the party procuring it received a benefit under it, casts the burden upon the beneficiary to rebut the presumption of undue influence, and of affirmatively showing mental capacity.[64] And where capacity is doubtful there must be proof of instructions or of knowledge of contents, and strong proof of intention;[65] though this rule applies with stringency only where the instrument is unofficial, and obtained by those whom it proposes to materially benefit.[66]

302. Burden of proof after probate.—Where a will has been probated and it is subsequently sought to set the probate aside, the same conflicting rules exist with reference to the burden of proof as in case of a contested probate; some of the cases holding, on the one hand, that one who seeks to set aside a will upon an allegation of mental incapacity assumes the affirmative, and has the burden of proof;[67]

make a will is urged as an objection to the probate of a nuncupative will, the party offering such will must prove the existence of capacity by the clearest testimony; and, where it leaves the mind in a state of doubt, it is the duty of the court not to admit the will to probate. *Dorsey* v. *Sheppard*, 12 Gill & J. 192, 37 Am. Dec. 77.

[64]*Wilson* v. *Mitchell*, 101 Pa. 495; *Caldwell* v. *Anderson*, 104 Pa. 199; *Cuthbertson's Appeal*, 97 Pa. 163; *Wilson's Appeal*, 99 Pa. 545; *Phipps* v. *Van Kleeck*, 22 Hun, 544; *Mowry* v. *Silber*, 2 Bradf. 133; *Burger* v. *Hill*, 1 Bradf. 360; *McKnight* v. *Wright*, 12 Rich. L. 232.

But the mere fact that a testatrix's legal adviser who wrote her will was made an executor thereof is not sufficient to cast the burden of proving testamentary capacity upon the proponent, where probate was applied for four years after the testatrix's death. *Linton's Appeal*, 104 Pa. 228.

And the fact that a testratrix whose sanity was questioned was old and somewhat feeble, and that her will gave her legal adviser, who had prepared it, property amounting to one eighth of her whole estate, and gave the residue to him in trust for certain relatives, is not sufficient proof, in a proceeding to contest the will, to shift the burden from the party alleging fraud or undue influence to the beneficiaries, and furnishes insufficient evidence of fraud or undue influence to warrant a submission of the cause to a jury. *Stokes* v. *Miller*, 10 W. N. C. 241.

[65]*Billinghurst* v. *Vickers*, 1 Phillim. Eccl. Rep. 193; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656; *Bartee* v. *Thompson*, 8 Baxt. 508; *Rutland* v. *Gleaves*, 1 Swan, 198; *Renn* v. *Samos*, 33 Tex. 760; *Mitchell* v. *Thomas*, 5 Notes of Cases, 600, 6 Moore P. C. C. 137.

But the rule is different when the testator was merely enfeebled by disease and unable to speak articulately. *Re Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

[66]*Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441; *Cramer* v. *Crumbaugh*, 3 Md. 491.

So, the rule that a presumption against the validity of a will arises where a stranger prepared it and received a large legacy under it does not apply to a case in which the person preparing a will was a near relative, who would have inherited a large portion of the estate had the testator died intestate. *Caldwell* v. *Anderson*, 104 Pa. 199.

The fact that the beneficiaries in a will occupied the house of the testatrix, and were caring for her in her illness, does not make their relation to her a fiduciary one, which will cast upon them the burden of vindicating her will against the imputation that it was procured by fraud or undue influence. *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

[67]*Jenkins* v. *Tobin*, 31 Ark. 306; *Clements* v. *McGinn* (Cal.) 33 Pac. 920; *Moore* v. *Allen*, 5 Ind. 521; *Blough* v. *Parry*, 144 Ind. 463, 40 N. E. 70, 43 N.

and he must first produce his evidence;[68] and he has the right to open and close upon the trial.[69] And where the statute provides that the order of probate shall be prima facie evidence of the due attestation, execution, and validity of a will, the burden of proof with respect to each of these subjects is changed from the propounders to the contestants, where it remains; the court and jury having only to determine the case upon all the evidence.[70] Upon the other hand, however, the rule is well supported that the burden of proof in a proceeding to contest a will after its admission to probate, or upon appeal from an order of probate, rests with those seeking to maintain it, to show that at the time of its execution the testator was of sound mind and memory;[71] and they are entitled to open and close and go forward on the trial.[72] Likewise the burden of proving the proper execution of a will has been held to rest with the defendant in ejectment claiming under it, and for that purpose he must call subscribing witnesses, making them his own, to testify as to the fact of execution and mental capacity, leaving the plaintiff the benefit of cross-examining them.[73] After the will has been put in evidence, however, and proof of testamentary capacity has been made by the subscribing witnesses, the burden of proof no longer rests with the person seeking to maintain the will: it is then the duty of the jury to determine the question of testamentary capacity from the weight of all the evidence introduced.[74]

E. 560; *Turner* v. *Cook*, 36 Ind. 129; *Rich* v. *Bowker*, 25 Kan. 7; *Copeland* v. *Copeland*, 32 Ala. 512; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Boylan* v. *Mecker*, 28 N. J. L. 274; *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Jones* v. *Jones*, 43 N. Y. S. R. 434, 17 N. Y. Supp. 905; *Ivison* v. *Ivison*, 80 App. Div. 599, 80 N. Y. Supp. 1011; *Hagan* v. *Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109; *Thompson* v. *Kyner*, 65 Pa. 368; *Higgins* v. *Nethery*, 30 Wash. 239, 70 Pac. 489.

And proof that a testator suffered from monomania or from general unsoundness of mind does not impose upon the defendant, in an action to set aside a will, the burden of showing that such monomania did not enter into or in any way control the execution of the will, or that the unsoundness was not of a character to affect testamentary capacity; the burden still remains with the plaintiff to show want of testamentary capacity. *Young* v. *Miller*, 145 Ind. 652, 44 N. E. 757.

[68] *Rich* v. *Bowker*, 25 Kan. 7.

[69] *Moore* v. *Allen*, 5 Ind. 521.

[70] *Mears* v. *Mears*, 15 Ohio St. 90.

[71] *Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Jackson* v. *Hardin*, 83 Mo. 175; *Benoist* v. *Murrin*, 58 Mo. 307; *Tingley* v. *Cowgill*, 48 Mo. 291; *Cravens* v. *Faulconer*, 28 Mo. 21; *Jones* v. *Roberts*, 37 Mo. App. 163; *Elliott* v. *Welby*, 13 Mo. App. 19; *Norton* v. *Paxton*, 110 Mo. 456, 19 S. W. 807; *Seebrock* v. *Fedawa*, 30 Neb. 425, 46 N. W. 650.

[72] *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 261, 20 Am. Dec. 100; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329.

[73] *Waters* v. *Waters*, 35 Md. 531.

[74] *Pendlay* v. *Eaton*, 130 Ill. 69, 22 N.

303. Insurance cases; burden of proof in case of suicide. — The rule has been laid down in some of the cases that the burden of proof rests with the plaintiff in an action upon a life insurance policy containing a condition against liability in the case of suicide, to show that the insured was incompetent to understand the moral character of his act; or was urged to its commission by an insane impulse which he could not resist.[75] Within this rule mere proof that the insured was insane at times is not sufficient.[76] But the presumption against intentional suicide is a disputable one, standing for the fact, only, until overcome by a preponderance of evidence.[77] And a large number of the cases have adopted the contrary rule, that the burden rests with the insurer to prove responsibility in case of suicide, and not with the assured to negative it.[78] And it is entitled to open and close.[79]

304. Presumption and burden of proof of continuance as to habitual insanity. — When habitual, chronic, or continuous insanity is once proved to exist, it is presumed to continue until the contrary is shown.[80] And the burden rests with the party asserting it of prov-

E. 853; *Holloway* v. *Galloway*, 51 Ill. 159; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Newhard* v. *Yundt*, 132 Pa. 324, 19 Atl. 288; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

Where, on the trial of an issue in a suit to contest the validity of a will, the parties claiming under it offer the will in evidence and the order of court admitting it to probate, and rest, and the contestants offer their testimony impeaching its validity, the proponents may then interpose general evidence as to sanity of the testator, to sustain the will. *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

[75] *Waters* v. *Connecticut Mut. L. Ins. Co.* 2 Fed. 892; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623.

[76] *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414.

[77] *Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 87 Wis. 328, 58 N. W. 399; *Knickerbocker L. Ins. Co.* v. *Peters*, 42 Md. 414; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

[78] *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 41; *Mutual Ben. L. Ins. Co.* v. *Davicss*, 87 Ky. 541, 9 S. W. 812; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *Stormont* v. *Waterloo Life & Casualty Assur. Co.* 1 Fost. & F. 22.

In making proof necessary to establish the liability of an insurer, where the insured had committed suicide, the person making it is entitled to the benefit of the presumption that a sane man would not commit suicide, and of other rules of law for the guidance of the courts and juries in the investigation and determination of the facts. *Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155.

[79] *Stormont* v. *Waterloo Life & Casualty Assur. Co.* 1 Fost. & F. 22.

The burden of proof resting with the insurance company to establish responsibility in case of suicide is not shifted by proof of death, with a coronor's verdict showing suicide attached, when the proof, taken as a whole, contained no concession of fact, and denied the existence and authenticity of such verdict. *Goldschmidt* v. *Mutual L. Ins. Co.* 102 N. Y. 486, 7 N. E. 408.

[80] This rule, which seems to be universal, is supported by many cases, among which are: *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *State* v. *Johnson*, 40 Conn. 136; *Duffield* v. *Robeson*, 2

ing restoration or a lucid interval at the very time of the act in question.[81] These rules apply to criminal prosecutions, so that where general insanity appears, the prosecution is bound to prove that the criminal act was committed during a lucid interval, or after recovery.[82] And where a party to a contract is afflicted with insanity of a permanent nature, one who claims the performance of the contract

Harr. (Del.) 375; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Dicken* v. *Johnson*, 7 Ga. 484; *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874; *Wallis* v. *Luhring*, 134 Ind. 447, 34 N. E. 231; *Corbit* v. *Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *State* v. *Reddick*, 7 Kan. 143; *Carpenter* v. *Carpenter*, 8 Bush, 283; *Weston* v. *Higgins*, 40 Me. 102; *Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380; *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63; *Ricketts* v. *Jolliff*, 62 Miss. 440; *Von De Veld* v. *Judy*, 143 Mo. 348, 44 S. W. 1117; *State* v. *Spencer*, 21 N. J. L. 196; *Cook* v. *Cook*, 53 Barb. 180; *Grabill* v. *Barr*, 5 Pa. 441, 47 Am. Dec. 418; *Kinloch* v. *Palmer*, 1 Mill, Const. 215; *Green* v. *State*, 88 Tenn. 614, 14 S. W. 430; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *State* v. *Wilner*, 40 Wis. 304; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *Kellogg* v. *United States*, 43 C. C. A. 179, 103 Fed. 200; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18.

But while permanent insanity, once established, will be presumed to continue, an objection to a complaint seeking relief from a transaction had while a party was of unsound mind will be considered waived unless the want of capacity to sue was presented by demurrer or answer. *Wade* v. *State*, 37 Ind. 180, 10 Am. Rep. 86.

[81] This rule, which is based upon and grows out of the one last expressed above, also seems to be universal, and is supported by many cases, among which are: *O'Donnell* v. *Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Ball* v. *Kane*, 1 Penn. (Del.) 90, 39 Atl. 778; *Dicken* v. *Johnson*, 7 Ga. 484; *James White Memorial Home* v. *Haeg*, 204 Ill. 422, 68 N. E. 569; *Achey* v. *Stephens*, 8 Ind. 411; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Re Cochran*, 1 T. B. Mon. 264, 15 Am. Dec. 116; *Halley* v. *Webster*, 21 Me. 461; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Ricketts* v. *Jolliff*, 62 Miss. 440; *State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447; *Gingrich* v. *Rogers* (Neb.) 96 N. W. 156; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Morrison* v. *Smith*, 3 Bradf. 209; *Ballew* v. *Clark*, 24 N. C. (2 Ired. L.) 23; *Wilson* v. *Mitchell*, 101 Pa. 495; *Lee* v. *Lee*, 4 M'Cord L. 183, 17 Am. Dec. 722; *Purvear* v. *Reese*, 6 Coldw. 21; *Hunt* v. *State*, 33 Tex. Crim. Rep. 252, 26 S. W. 206; *Fishburne* v. *Ferguson*, 84 Va. 87, 4 S. E. 575; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *Young* v. *Young*, 10 Grant Ch. (U. C.) 365; *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18. But see *Fay* v. *Burdett*, 81 Ind. 435, 42 Am. Rep. 142.

The rule that a person adjudged insane is deemed to continue so until the contrary is shown, independent of statute, is one of evidence, subject to reasonable change by the legislative will. *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596.

[82] *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *State* v. *Johnson*, 40 Conn. 136; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *State* v. *Reddick*, 7 Kan. 143; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447; *State* v. *Lowe*, 93 Mo. 547, 5 S. W. 889; *State* v. *Wade*, 161 Mo. 441, 61 S. W. 800; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356; *Hunt* v. *State*, 33 Tex. Crim. Rep. 252, 26 S. W. 206; *State* v. *Brown*, Houst. Crim. Rep. (Del.) 539.

But refusal to instruct, in a criminal prosecution in which insanity is relied upon as a defense, that, if the defendant was insane a short time before the commission of the act, he is presumed to be insane when he committed it, is not ground for reversal on appeal, where the testimony does not appear in the transcript, and it cannot be seen whether there was any evidence upon which to base it. *People* v. *Smith*, 57 Cal. 130.

Or where the bare fact that the defendant had been transferred from the

must prove that it was entered into during a lucid interval,[83] or that the party had recovered.[84] Likewise, where general insanity on the part of a grantor is shown, it is presumed to continue to the time of the execution of the deed in question.[85] And the burden of proving his sanity at that time rests with the person claiming under it, or seeking to prove it.[86] And where permanent insanity of a testator is established previous to the making of his will, its continuance is presumed.[87] Proof of such insanity casts the burden of proof of restoration to sanity or a lucid interval on those who seek to support the will.[88] And where the burden rests with the contestants, and

penitentiary to the insane hospital several years before is the only evidence of unsoundness of mind. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

[83]*Emery* v. *Hoyt*, 46 Ill. 258; *Rawdon* v. *Rawdon*, 28 Ala. 565; *Wade* v. *State*, 37 Ind. 180, 10 Am. Rep. 86; *State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447.

But an instruction that a contract made by a person who was at times insane, during a lucid interval, is binding, is not erroneous because unaccompanied by a qualification to the effect that if a person is shown to be insane he is presumed to remain so, and that a person may have a lucid interval, and yet not have sufficient mind to contract, in the absence of a request for a charge to that effect. *Norman* v. *Georgia Loan & T. Co.* 92 Ga. 295, 18 S. E. 27.

[84]*Russell* v. *Lefrancois*, 8 Can. S. C. 335; *Snow* v. *Benton*, 28 Ill. 306; *Ricketts* v. *Jolliff*, 62 Miss. 440; *State* v. *Spencer*, 21 N. J. L. 196.

[85]*Rogers* v. *Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Aurentz* v. *Anderson*, 3 Pittsb. 310; *Dicken* v. *Johnson*, 7 Ga. 484; *Raymond* v. *Wathen*, 142 Ind. 367, 41 N. E. 815.

A recovery or lucid interval, to uphold a deed, must be such as to enable the grantor to comprehend intelligently the nature and character of the transaction in which he is engaged. *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689.

So, where the existence of insanity is once established in an action to annul a marriage, the burden of proof is cast upon the party seeking to sustain the marriage to prove, by testimony as clearly convincing as that required to establish insanity, that the particular contract was entered into during a lucid interval. *Rawdon* v. *Rawdon*, 28 Ala. 565.

[86]*Bullew* v. *Clark*, 24 N. C. (2 Ired. L.) 23; *Pike* v. *Pike*, 104 Ala. 642, 16 So. 689; *Dicken* v. *Johnson*, 7 Ga. 484; *Rogers* v. *Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Aurentz* v. *Anderson*, 3 Pittsb. 310; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Anderson* v. *Cranmer*, 11 W. Va. 562; *Ripley* v. *Babcock*, 13 Wis. 425; *Hoge* v. *Fisher*, Pet. C. C. 163, Fed. Cas. No. 6,585; *Young* v. *Young*, 10 Grant Ch. (U. C.) 365.

[87]*Kinloch* v. *Palmer*, 1 Mill, Const. 216; *Boylan* v. *Meeker*, 28 N. J. L. 274. And see *Clark* v. *Ellis*, 9 Or. 128.

If a testator is found to have been of unsound mind prior to the time of making his will, and such unsoundness was found to be of a permanent character, the presumption in favor of sanity no longer exists. *Turner* v. *Rusk*, 53 Md. 65.

[88]*O'Donnell* v. *Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Cubbage* v. *Cubbage*, 1 Harr. (Del.) 461, note; *Duffield* v. *Morris*, 2 Harr. (Del) 375; *Griffin* v. *Griffin*, R. M. Charlt. (Ga.) 217; *Kenworthy* v. *Williams*, 5 Ind. 375; *Harrison* v. *Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Halley* v. *Webster*, 21 Me. 461; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Goble* v. *Grant*, 3 N. J. Eq. 629; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Re Jones*, 2 Ohio S. & C. P. Dec. 409; *Harden* v. *Hays*, 9 Pa. 151; *Landis* v. *Landis*, 1 Grant Cas. 248; *Lee* v. *Lee*, 4 M'Cord L. 183, 17 Am. Dec. 722; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Burton* v. *Scott*, 3 Rand. (Va.) 399; *White* v. *Wilson*, 13 Ves. Jr. 87; *White* v. *Driver*, 1 Phillim. Eccl. Rep. 84; *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433; *Taylor* v. *Creswell*, 45 Md. 422; *Higgins* v. *Carlton*, 28

previous insanity is proved, the burden of proof is shifted, and rests with those who set up the will, to adduce satisfactory evidence of sanity at the time of the act.[89] So, the burden of proving restoration to reason, and the dissolution or abandonment of a guardianship of one who had been insane, rests with the person seeking to enforce a liability against which insanity is pleaded.[90] But an adjudication of insanity, followed by a commitment of the patient to an insane asylum, does not raise a conclusive presumption of continuance of insanity a long time after the discharge of the patient.[91]

305. Temporary insanity.—Insanity which is not shown to be settled or general, as distinguished from a mere temporary aberration or hallucination, is not presumed to continue until the contrary is shown.[92] Fitful and exceptional attacks of insanity are not presumed to be continuous.[93] And proof of such insanity does not suffice to change the burden of proof.[94] An instruction that insanity

Md. 115, 92 Am. Dec. 666; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

[89]*White* v. *Driver*, 1 Phillim. Eccl. Rep. 84; *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90; *Groom* v. *Thomas*, 2 Hagg. Eccl. Rep. 433; *Achey* v. *Stephens*, 8 Ind. 411; *Taylor* v. *Creswell*, 45 Md. 422; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 263, Fed. Cas. No. 13,412. And see *Clark* v. *Ellis*, 9 Or. 128.

Sanity at the time need not be proved by a preponderance of the evidence; it is sufficient if the scales are evenly balanced. *Roller* v. *Kling*, 150 Ind. 159, 49 N. E. 948.

In *Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380, however, it was held that evidence that a person whose sanity was in issue at a certain date was insane at an earlier date, and that the insanity was not of a temporary character, does not shift the burden of proof to show sanity; a prima facie case might be made out in that way, but the burden does not shift.

[90]*Elston* v. *Jasper*, 45 Tex. 409; *Hoopes' Estate*, 174 Pa. 373, 34 Atl. 603.

[91]*Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996.

The presumption of continued insanity of a man adjudged insane who marries a woman with whom he lived for more than thirty years will not prevail against the presumption of the legality of the marriage. *Castor* v. *Davis*, 120 Ind. 231, 22 N. E. 110.

[92]*People* v. *Francis*, 38 Cal. 183; *Turner* v. *Rush*, 53 Md. 65; *Murphree* v. *Senn*, 107 Ala. 424, 18 So. 264; *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874; *Menkins* v. *Lightner*, 18 Ill. 282; *Binyon* v. *United States* (Ind. Terr.) 76 S. W. 265; *McMasters* v. *Blair*, 29 Pa. 298; *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *Townshend* v. *Townshend*, 7 Gill, 10; *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41; *Von De Veld* v. *Judy*, 143 Mo. 348, 44 S. W. 1117; *Wright* v. *Market Bank* (Tenn. Ch. App.) 60 S. W. 623; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596; *Lewis* v. *Baird*, 3 McLean, 56, Fed. Cas. No. 8,316.

And an instruction in an action to set aside a deed, that if the jury believe that at the time of the execution of the deed, or before, the grantor was incapable, from mental inability to execute a valid deed or contract, then the deed is void, should not be given, since the presumption of continuance of insanity does not apply to every species of insanity, without exception. *Stewart* v. *Redditt*, 3 Md. 67.

[93]*Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *Ward* v. *State*, 19 Tex. App. 664; *Ford* v. *State*, 71 Ala. 385; *Carpenter* v. *Carpenter*, 8 Bush, 283; *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63; *State* v. *Wilner*, 40 Wis. 304. And see *Weston* v. *Higgins*, 40 Me. 102; *Halley* v. *Webster*, 21 Me. 461; *Staples* v. *Wellington*, 58 Me. 453; *Puryear* v. *Reese*, 6 Coldw. 21.

[94]*Hall* v. *Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949; *Dexter* v. *Hall*, 15

proved is presumed to continue, however, is not erroneous as an abstract proposition of law, and is not subject to exception, in the absence of evidence upon which to base it.[95] And the whole burden of proving sanity at the exact time in question is not thrown on a party by the mere fact that he had become incompetent at some previous time in his life, no matter how briefly.[96]

306. Habitual and temporary insanity distinguished.—Reference must be had in an action in which insanity is alleged, to its character, —whether habitual and frequent, or only temporary, and not continuous, in determining the existence of presumptions and the order of proof.[97] And to establish the basis of a presumption that insanity once shown to have existed continues to exist, it must appear to have been of such duration and character as to indicate the probability of its continuance.[98] Bare proof of mental unsoundness some time after the execution of an instrument, without regard to its nature and character, is not sufficient to rebut the presumption of sanity, and shift the burden of proof.[99] And insanity induced by disease

Wall. 9, 21 L. ed. 73; *Corbit* v. *Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Trimbo* v. *Trimbo*, 47 Minn. 389, 50 N. W. 350; *Cutler* v. *Zollinger*, 117 Mo. 92, 22 S. W. 895.

If general insanity on the part of one charged with murder is shown, the burden of showing that the act was committed during a lucid interval rests with the state; but if only temporary or recurrent insanity is shown, without raising a reasonable doubt as to whether or not it existed at the time of the commission of the act in question, the presumption of continuance of general sanity may be relied on without offering proof of a lucid interval. *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665.

And the mere fact of previous insanity on the part of a grantor does not render it necessary to give evidence of sanity at the time of making a deed, in order to uphold it, where such insanity was not habitual. *Aurentz* v. *Anderson*, 3 Pittsb. 310.

[95] *Weston* v. *Higgins*, 40 Me. 102; *Fulwider* v. *Ingels*, 87 Ind. 414.

[96] *Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432; *Staples* v. *Wellington*, 58 Me. 453; *Trimbo* v. *Trimbo*, 47 Minn. 389, 50 N. W. 350.

[97] *Corbit* v. *Smith*, 7 Iowa, 60, 74 Am. Dec. 431.

[98] *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204; *People* v. *Francis*, 38 Cal. 183; *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874; *Thompson* v. *Kyner*, 65 Pa. 368; *Green* v. *State*, 88 Tenn. 614, 14 S. W. 430.

The fact that insanity had continued for a number of years is strong, though not conclusive, evidence of permanence. *Manley* v. *Staples*, 65 Vt. 370, 26 Atl. 630.

But proof that on the day a will was signed the testatrix was sick and flighty, and that during part of the time she knew what she was doing and part of the time she did not, is not sufficient to cast on the proponent of the will the burden of showing that she was sane at the particular instant when the will was made. *O'Donnell* v. *Rodiger*, 76 Ala. 222, 52 Am. Rep. 322.

And the question whether a testator could have recovered possession of his mental faculties sufficiently to enable him to comprehend the nature of the act he was engaged in and make an intelligent disposition of his estate is one for the jury, under evidence that the will was made at about half past three P. M., and that at nine o'clock that morning he was wholly unconscious, or unable to speak, hear, or see. *Re Hcenan*, 15 Phila. 588.

[99] *Taylor* v. *Creswell*, 45 Md. 422; *Stewart* v. *Flint*, 59 Vt. 144, 8 Atl. 801.

is temporary in its nature, and is not presumed to continue.[100] Where insanity not due to violent disease is established at a period not too far back, however, it will be presumed to continue unless there is evidence to control the presumption.[1] And the presumption of continuance of an insane condition applies to periodical lunacy as well as to permanent derangement.[2] And the burden of proof that a person who had been subject to delusions had become freed from them rests with those who assert his soundness of mind.[3] Nor is there any presumption either of law or of fact of recovery from

[100]*Turner* v. *Rusk*, 53 Md. 65; *Clarke* v. *Sawyer*, 3 Sandf. Ch. 351; *O'Donnell* v. *Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Trish* v. *Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Achey* v. *Stephens*, 8 Ind. 411; *Blake* v. *Rourke*, 74 Iowa, 519, 38 N. W. 392; *Kirsher* v. *Kirsher* (Iowa) 94 N. W. 846; *Hix* v. *Whittemore*, 4 Met. 545; *Staples* v. *Wellington*, 58 Me. 453; *Richardson* v. *Smart*, 65 Mo. App. 14; *Clark* v. *Ellis*, 9 Or. 128; *Wright* v. *Market Bank* (Tenn. Ch. App.) 60 S. W. 623; *Webb* v. *State*, 5 Tex. App. 596; *Kellogg* v. *United States*, 43 C. C. A. 179, 103 Fed. 200.

The presumption of the continuance of an incapacity once established does not apply even to insanity induced by epilepsy, where the paroxysms are periodical, the patient generally recovering from them in a few days. *Carpenter* v. *Carpenter*, 8 Bush, 283; *Brown* v. *Riggin*, 94 Ill. 560.

But epilepsy together with an injury in childhood, and other evidence of insanity, may be sufficient to raise a presumption of continuance. *State* v. *Robbins*, 109 Iowa, 650, 80 N. W. 1061.

And occasional incapacity upon the part of a testator, arising from nervous attacks, coming on at different times, their effect being of different duration, during which he was incapable of any rational act, renders his capacity conflicting, and imposes upon the party claiming under his will the obligation of proving that at other times he was capable, and that the will was made during capacity. *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449.

[1]*Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380.

[2]*Overall* v. *State*, 15 Lea, 672 And see *Thompson* v. *Kyner*, 65 Pa. 368.

But it does not apply to imbecility, set up as a defense in a criminal prosecution. *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651.

And refusal to give a sufficient instruction to the effect that the law presumes insanity to continue after it is once shown to exist is not error in a criminal prosecution, in a case of recurrent insanity. *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *Smith* v. *State*, 22 Tex. App. 316, 3 S. W. 684.

[3]*Boughton* v. *Knight*, 28 L. T. N. S. 562, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 28 Week. Rep. 703, 44 J. P. 220, 49 L. J. Prob. N. S. 8; *Waring* v. *Waring*, 12 Jur. 947, 6 Moore, P. C. C. 341; *Jenckes* v. *Probate Court*, 2 R. I. 255; *Fowlis* v. *Davidson*, 6 Notes of Cases, 461.

Where insanity once existed in the shape of delusion, the absence of such delusion is the test of restoration; and where the evidence in a will contest fails to show the application of such test, the will may be pronounced against on the ground of failure of proof, though the testator was apparently of sound mind. *Grimani* v. *Draper*, 12 Jur. 925.

But, where there is proof of general rationality and also of delusion in a testator, the court will not assume that the delusion was habitual, thus casting the burden of proof that he was free from such delusion at the time of making the will on the proponents. *Townshend* v. *Townshend*, 7 Gill, 10.

And proof of an insane delusion on the part of a party to a contract that his lands were wearing out, and his plantation and buildings going to ruin, and that he was threatened with starvation and the poorhouse, does not show such a state of lunacy as will cast upon the other party to the contract the burden of showing a lucid interval when it was made. *Gillespie* v. *Shuliberrier*, 50 N. C. (5 Jones L.) 157; and see *Staples* v. *Wellington*, 58 Me. 453.

mental weakness resulting from the infirmities of old age.[4] And insanity found upon an inquisition of lunacy, or a judicial determination, is presumed to continue, and the burden of proof rests with those asserting restoration or a lucid interval, to show it.[5] As a general rule, no presumption of absolute recovery arises from lapse of time alone; something more is required to relieve the person asserting it of the burden of proof.[6] Whether unsoundness of mind is progressive and permanent is a question of fact for the jury.[7]

307. Presumption as to continuance of lucid intervals.— A lucid interval, as distinguished from an entire recovery, is in its nature temporary and uncertain in its duration, and there is no legal presumption of its continuance.[8] And delusions or unsoundness of mind proved to have existed before and after a designated period will be

[4]*Physio-Medical College* v. *Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072.

Where a will is made upon a death bed, and shortly before death, and stupor from drugs, or delirium, is shown, there is no presumption that it was made during a lucid interval, though such intervals are shown to have existed. *Elliott* v. *Welby*, 13 Mo. App. 19.

[5]*Terry* v. *Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Harrison* v. *Bishop*, 131 Ind. 161, 30 N. E. 1069; *Lilly* v. *Waggoner*, 27 Ill. 395; *Haynes* v. *Swann*, 6 Heisk. 560; *Herndon* v. *Vick*, 18 Tex. Civ. App. 583, 45 S. W. 852; *Eakin* v. *Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Small* v. *Champeny*, 102 Wis. 61, 78 N. W. 407; *Prinsep* v. *Dyce Sombre*, 10 Moore, P. C. C. 232. And see *Leckey* v. *Cunningham*, 56 Pa. 370.

But where insanity of a person accused of crime has been established by the fact of his commitment to a lunatic asylum, it cannot be said, as matter of law, that it is presumed to continue to exist until the contrary is shown by proof of a final discharge; such presumption may be rebutted by any satisfactory evidence of restoration. *State* v. *Davis*, 27 S. C. 609, 4 S. E. 567.

And where a person called upon to act as a juror is shown to have been adjudged insane some time before, and sent to an asylum for treatment, and the records of the county show that his insanity was of less than a year's duration, the court is warranted in presuming that his insanity was temporary, and that he was sane at the time of his selection, where he then appeared so, though it did not appear that he had been discharged from the asylum. *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41.

And the presumption of continued insanity of a married man, arising from an adjudication thereof, is overcome by evidence that he deserted his family, went to another state, and resided there for several years, where he was considered sane, and where he procured a divorce on service by publication, although there had been no adjudication of restoration. *Rodgers* v. *Rodgers*, 56 Kan. 483, 43 Pac. 779.

[6]*People ex. rel. Norton* v. *New York Hospital*, 3 Abb. N. C. 229.

But insanity once established, though habitual, will not be presumed to continue, where a very long period of time has elapsed between the proved insanity and the date of the subsequent inquiry. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874; *Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996.

And confinement of a man ten years before in an insane asylum does not create a presumption that his insanity still continues, where such confinement was followed by at least eight years' successful practice as a physician. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

[7]*White* v. *McPherson*, 183 Mass. 533, 67 N. E. 643.

[8]*Pike* v. *Pike*, 104 Ala. 642, 16 So. 689.

In *Ford* v. *State*, 71 Ala. 385, however, it was held, that where an insane person has lucid intervals, the law will presume an offense committed by him to have been committed in a lucid interval, unless the contrary appears.

deemed to have existed at that time unless satisfactory proof is adduced that the individual had recovered, and had not afterwards suffered a relapse.[9] But when a will is proved to have been made by a testator himself, unaided by others, and its provisions are wise and judicious, a presumption is established, even in the case of a person habitually insane, that it was made during a lucid interval, which imposes upon those who attack it the burden of proving insanity at the moment it was made.[10] And where a lucid interval is established upon the part of one previously insane, a short time before the act in question, the burden is thereby placed upon the party claiming insanity to show that he had again become insane.[11]

308. Nature of presumption of continuance.—The presumption that insanity continues is not a presumption of law, but an inference of fact, varying with the circumstances of the case.[12] And the question whether a delusion is temporary or habitual is one exclusively within the province of the jury.[13] And such presumptions may be rebutted by proof of a change of mental condition or of a lucid interval at the time of the act which is called in question.[14]

309. Measure of proof; civil cases.— No particular quantity of evidence is necessary to establish responsibility, or to sustain the validity of an act, on the question of mental capacity; the jury must determine the facts upon the weight of evidence, as on any other ques-

[9] *Fowlis* v. *Davidson*, 6 Notes of Cases, 461; *Snow* v. *Benton*, 28 Ill. 306.

Where a delusion is established on the part of a testator, in a will contest, which naturally affects the testamentary act, the burden of showing that such delusion did not exist at the time the will was made rests with the proponents. *Morse* v. *Scott*, 4 Dem. 507.

[10] *Kingsbury* v. *Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 557, 15 So. 297.

[11] *Wright* v. *Jackson*, 59 Wis. 569, 18 N. W. 486.

But the fact that a testator proved to be insane had lucid intervals on the morning of and before the execution of his will does not shift the burden of proof to the contestant of the will to establish that he was not in a lucid state when he executed the instrument, since it rests with the proponent to prove a lucid interval at the very moment of its execution. *Saxton* v. *Whitaker*, 30 Ala. 237.

[12] *Manley* v. *Staples*, 65 Vt. 370, 26 Atl. 630; *Missouri P. R. Co.* v. *Brazzil*, 72 Tex. 233, 10 S. W. 403.

So, in *Webb* v. *State*, 5 Tex. App. 596, it was said that the presumption of continuance of insanity is rather matter of fact than of law, or, at most, partly of law and partly of fact.

[13] *Townshend* v. *Townshend*, 7 Gill, 10.

Whether a disability once shown to have existed did in truth continue to exist until the time in question is a question of fact, in view of a consideration of the whole case. *Fay* v. *Burditt*, 81 Ind. 433, 42 Am. Rep. 142.

And where evidence is introduced upon an issue as to sanity, tending to show insanity, it is error for the court to instruct that the law raises a presumption one way or another. *Missouri P. R. Co.* v. *Brazzil*, 72 Tex. 233, 10 S. W. 403; *Manley* v. *Staples*, 65 Vt. 370, 26 Atl. 630.

[14] *Mullins* v. *Cottrell*, 41 Miss. 291; *Snow* v. *Benton*, 28 Ill. 306; *State* v. *Spencer*, 21 N. J. L. 196. And see *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618.

tion,[15] the general rule being that evidence of insanity, to overcome the presumption that all acts performed by an adult are valid and binding, must be clear and satisfactory,[16] or that it must preponderate.[17] To invalidate a contract, proof of insanity must preponderate or the presumption in favor of sanity will prevail,[18] though a fair preponderance is all that is required.[19] With reference to wills under this rule that the burden of proof of insanity rests with him who alleges it, it is incumbent upon the contestant to prove incapacity to the satisfaction of the jury in order to justify setting aside a will.[20] And this should be by preponderance of the evidence.[21] And where incompetency and undue influence are the issue, positive proof must

[15]*Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419.

The question, where sanity is impeached and the evidence is conflicting, is not whether the facts adduced in support of sanity are, in general, indications of sanity, but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced by the other side. *Steed* v. *Cally*, 1 Keen, 620.

[16]*Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Kennedy* v. *Marrast*, 46 Ala. 161; *McCarty* v. *Kearnan*, 86 Ill. 291; *English* v. *Porter*, 109 Ill. 285; *Titcomb* v. *Vantyle*, 84 Ill. 371; *Myatt* v. *Walker*, 44 Ill. 487; *State* v. *Geddis*, 42 Iowa, 268; *Howe* v. *Howe*, 99 Mass. 88; *Com. ex rel. Helmbold* v. *Kirkbride*, 11 Phila. 427; *Gibbons* v. *Dunn*, 46 Mich. 146, 9 N. W. 140; *Dorchester* v. *Dorchester*, 18 N. Y. S. R. 402, 3 N. Y. Supp. 238, Reversed on other grounds in 121 N. Y. 156, 23 N. E. 1043.

The proof of insanity is required to be sufficient to overcome the presumption of sanity. *Sloan* v. *Maxwell*, 3 N. J. Eq. 563.

But it need not be beyond a reasonable doubt. *King* v. *Rowan* (Miss.) 34 So. 325.

And an instruction that it is incumbent on those seeking to establish a will made by a person adjudged to be of unsound mind to show by clear, explicit, and satisfactory evidence that he had sufficient mental capacity is not rendered objectionable by the use of the words "clear, explicit, and satisfactory," as an invasion of the province of the jury. *Stevens* v. *Stevens*, 127 Ind. 560, 26 N. E. 1078.

[17]*Clarke* v. *Irwin*, 63 Neb. 539, 88 N. W. 783; *Harrison* v. *Harrison*, 126 Ala. 323, 28 So. 586. And see *Clements* v. *McGinn* (Cal.) 33 Pac. 920.

[18]*Lilly* v. *Waggoner*, 27 Ill. 395; *Myatt* v. *Walker*, 44 Ill. 485; *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Aurentz* v. *Anderson*, 3 Pittsb. 310; *Laing* v. *Bruce*, 1 Dunlop, B. & M. 59. And see *Latner* v. *Long* (Tenn. Ch. App.) 47 S. W. 1111.

The opinions of five witnesses, that a party to a contract was of feeble intellect, are not sufficient to establish universal insanity so that it could not but be known to a party dealing with him, as against testimony of seven witnesses that he was of average mind. *Martinez* v. *Moll*, 46 Fed. 724.

[19]*Missouri P. R. Co.* v. *Brazzil*, 72 Tex. 233, 10 S. W. 403.

Where the evidence on the question of the sanity or insanity of the grantor is evenly balanced, the admission on the part of the grantee, who was the grantor's general agent, that the grantor was incapable of transacting business, corroborates the affirmative of the issue, and warrants a finding of mental incapacity. *Brooke* v. *Berry*, 2 Gill, 83.

[20]*Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Mullins* v. *Cottrell*, 41 Miss. 291; *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Gass* v. *Gass*, 3 Humph. 278.

[21]*Clements* v. *McGinn* (Cal.) 33 Pac. 920; *Newhard* v. *Yundt*, 132 Pa. 324, 19 Atl. 288; *Messner* v. *Elliott*, 184 Pa. 41, 39 Atl. 46; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

In *Morris* v. *Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287, however, it was held that a requirement that the proponent of a will shall prove its execution, and that the contestants shall prove the unsoundness of mind by a preponderance

be made to support each proposition.[22] And where, upon the evidence, the fact of capacity or incapacity remains doubtful, the will cannot be rejected on that ground.[23] Likewise, where the burden of proof of sanity rests with the proponent, he is usually required to prove soundness on the part of the testator to the satisfaction of the court and jury.[24] Or by a preponderance of the evidence.[25] The evidence of the proponent must be sufficient to outweigh that offered by the contestants.[26] The presumption of sanity, however, cannot be given the effect of an independent fact, to relieve, as a substantial make-weight, against counter proof. Whatever force is given to the presumption is due, not to its own intrinsic weight as an item of proof, but to its operation in rendering the circumstances adduced more persuasive.[27] But where, upon the whole evidence, it is doubtful whether the party is sane or insane, the presumption in favor of sanity may decide the question.[28] So, that an act questioned on the

of the evidence does not justify a reversal, though the word "preponderance" might well have been omitted.

[22]*Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637.

Whenever business transactions with persons of weak minds are brought in review before a court of equity, and such transactions appear to be wholly against their interests, and greatly to the advantage of the other party, or wholly without consideration, the court will require clear proof of a comprehension of the nature, character, and effect of the acts, though such weakness does not amount to total incapacity. *Jones* v. *Thompson*, 5 Del. Ch. 374.

[23]*Miller* v. *White*, 5 Redf. 320; *Grubbs* v. *McDonald*, 91 Pa. 236. But see *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

[24]*Delafield* v. *Parish*, 25 N. Y. 9; *Re Flansburgh*, 82 Hun, 49, 31 N. Y. Supp. 177; *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Riddell* v. *Johnson*, 26 Gratt. 152; *Gray* v. *Rumrill* (Va.) 44 S. E. 697; *Browning* v. *Budd*, 6 Moore P. C. C. 430. And see *Keeler* v. *Keeler*, 20 N. Y. S. R. 439, 3 N. Y. Supp. 629.

[25]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Williams* v. *Robinson*, 42 Vt. 658, 1 Am. Rep. 359. And see *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Fulton* v. *Umbehend*, 182 Mass. 487, 65 N. E. 829.

The propounder of a will must satisfy the conscience of the court that the instrument propounded was the last will of a free and capable testator. *Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Riddell* v. *Johnson*, 26 Gratt. 152; *Delafield* v. *Parish*, 25 N. Y. 9; *Re Flansburgh*, 82 Hun, 49, 31 N. Y. Supp. 177; *Browning* v. *Budd*, 6 Moore, P. C. C. 430.

But when this is done, insanity must be proved by a preponderance of the evidence. *Egbers* v. *Egbers*, 177 Ill. 82, 52 N. E. 285; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Hollenbeck* v. *Cook*, 180 Ill. 65, 54 N. E. 154; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410.

[26]*Aikin* v. *Weekerley*, 19 Mich. 482; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 3 Jur. N. S. 1150, 26 L. J. C. P. N. S. 284, 5 Week. Rep. 880.

And an absolute refusal to charge the jury that they must rest their verdict upon a preponderance of proof, without any other instruction upon the point, is erroneous, as tending to lead them to imply that they are not authorized to find the will well executed upon a balance of the testimony. *Aikin* v. *Weekerly*, 19 Mich. 482.

[27]*McGinnis* v. *Kempsey*, 27 Mich. 363.

[28]*Bachmeyer* v. *Mutual Reserve Fund Life Asso.* 87 Wis. 328, 58 N. W. 399; *Gibbons* v. *Dunn*, 46 Mich. 146, 9 N. W. 140.

But an instruction to the jury in a will contest that the burden rests with the proponents of a will to establish testamentary capacity, and that they must fail if, at the close of the evidence,

ground of incapacity was done in a lucid interval must be shown by clear and satisfactory evidence.[29]

310. Criminal cases; beyond a reasonable doubt.—The theory was formerly acted upon by some of the cases, that in order to warrant a conviction in a criminal prosecution when insanity is interposed as a defense, the jury must be satisfied of the existence of insanity beyond a reasonable doubt of a well-ordered mind,[30] the theory being that the proof of insanity ought to be as clear and satisfactory, in order to acquit the accused on that ground, as proof of committing the act ought to be to warrant finding a sane man guilty.[31] And the rule has been stated to be that if the proof of insanity does not arise out of the evidence offered by the state, the accused must establish the fact of insanity by distinct evidence proving it beyond a reasonable doubt.[32] This doctrine, however, has been rejected in all states in which it originally existed,[33] except in Oregon, in which the defense of insanity is required by statute to be established beyond a reasonable doubt.[34]

311. To the satisfaction of the jury.— A theory of the measure of proof in criminal cases, extensively adopted, is, that the plea of insanity is to be regarded as one of confession and avoidance.[35] And under this theory the rule is variously stated that insanity as a de-

the "scales stand evenly balanced," without instructing as to the legal presumption of sanity, is reversible error. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

[29]*Cochran's Will*, 1 T. B. Mon. 263, 15 Am. Dec. 116.

[30]*State* v. *Brinyea*, 5 Ala. 241; *State* v. *Newman*, 7 Ala. 69; *State* v. *Marler*, 2 Ala. 43, 36 Am. Dec. 398; *State* v. *West*, 1 Houst. Crim. Rep. (Del.) 371; *State* v. *Coleman*, 27 La. Ann. 691; *People* v. *McCann*, 3 Park. Crim. Rep. 272; *Sellick's Case*, 1 N. Y. City Hall Rec. 185; *State* v. *Murray*, 11 Or. 413, 5 Pac. 55; *State* v. *De Rancé*, 34 La. Ann. 186, 44 Am. Rep. 426; *State* v. *Clements*, 47 La. Ann. 1088, 17 So. 502; *Bellingham's Case*, cited in 1 Collinson on Lunacy, 636; *Rex* v. *Offord*, 5 Car. & P. 168. And see *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271; *Cunningham* v. *State*, 56 Miss. 272, 31 Am. Rep. 360.

[31]*State* v. *Spencer*, 21 N. J. L. 197.

[32]*State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249.

[33] See *infra*, succeeding sections.

This rule was changed in Louisiana by *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271, refusing to follow previous Louisiana decisions on the subject, and holding that insanity must be established to the satisfaction of the jury by clear and convincing proof, and that they should consider all the testimony before them, whether produced by the accused or the state, and give due weight to the presumption of sanity, and if, on the whole testimony, and giving such presumption its full operation, they were satisfied that the accused was insane when the act was committed, they should acquit; but, if not thus satisfied, they should deem him sane and responsible.

[34]*State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

And a finding of a jury in a criminal prosecution in which insanity is interposed as a defense, on the question of sanity, cannot be disturbed on appeal, under the Oregon statute. *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

[35]*State* v. *Lewis*, 136 Mo. 84, 37 S. W. 806; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145.

fense must be established by the accused to the satisfaction of the jury,[36] and that it is to be established by the accused by evidence which satisfies the jury;[37] or, to the reasonable satisfaction of the jury.[38] Under these rules insanity interposed as a defense in a prosecution for crime need not be established beyond a reasonable doubt.[39] And a mere reasonable doubt upon the part of the jury as to the

[36] The rule is thus stated in the following, among other cases: *People* v. *Methever*, 132 Cal. 326, 64 Pac. 481; *State* v. *Danby*, Houst. Crim. Rep. (Del.) 166; *State* v. *Cole*, 2 Penn. (Del.) 344, 45 Atl. 391; *Beck* v. *State*, 76 Ga. 452; *Fisher* v. *People*, 23 Ill. 283; *People* v. *Walter*, 1 Idaho, 386; *State* v. *Felter*, 32 Iowa, 49; *Graham* v. *Com.* 16 B. Mon. 587; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447; *Genz* v. *State*, 58 N. J. L. 482, 34 Atl. 816; *State* v. *Haywood*, 61 N. C. (Phill. L.) 376; *State* v. *Spivey*, 132 N. C. 989, 43 S. E. 475; *Loeffner* v. *State*, 10 Ohio St. 599; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com.* v. *Kilpatrick*, 204 Pa. 218, 53 Atl. 774; *State* v. *Stark*, 1 Strobh. L. 479; *Carter* v. *State*, 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508; *Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note; *Rex* v. *Offord*, 5 Car. & P. 168.

The question for the jury was not whether the person was of sound mind, but whether he had made out, to their satisfaction, that he was not of sound mind. *Reg.* v. *Layton*, 4 Cox C. C. 149; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

And it is not medical but legal insanity which is required to be proved to the satisfaction of the jury to excuse from criminal responsibility. *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

And an instruction in a prosecution for homicide that a man is presumed to be sane until the contrary is shown to the satisfaction of the jury, accompanied by a subsequent statement that the burden of proof of insanity rests with the defendant, is not objectionable as making the presumption of sanity too prominent. *Massengale* v. *State*, 24 Tex. App. 181, 5 S. W. 650, 6 S. W. 35.

[37] *Beck* v. *State*, 76 Ga. 452; *State* v. *Geddis*, 42 Iowa, 268; *Kriel* v. *Com.* 5 Bush, 362; *Graham* v. *Com.* 16 B. Mon. 587; *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271; *Com.* v. *Heath*, 11 Gray, 303; *State* v. *Smith*, 53 Mo. 267; *People* v. *Pine*, 2 Barb. 566; *State* v. *Brandon*, 53 N. C. (8 Jones L.) 463; *State* v. *Davis*, 109 N. C. 780, 14 S. E. 55; *Lynch* v. *Com.* 77 Pa. 205; *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 109; *Com.* v. *Lynch*, 3 Pittsb. 412; *Johnson* v. *State*, 10 Tex. App. 571; *Dejarnette* v. *Com.* 75 Va. 867; *Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795, *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679. And see *Holsenbake* v. *State*, 45 Ga. 43.

The presumption of sanity will of itself sustain the burden of proof resting upon the state in a criminal case, so far as the issue of sanity is involved, until it is rebutted and overcome by satisfactory evidence to the contrary. *King* v. *State*, 9 Tex. App. 515; *Kriel* v. *Com.* 5 Bush, 363.

[38] *Choice* v. *State*, 31 Ga. 424; *State* v. *Bruce*, 48 Iowa, 530, 30 Am. Rep. 403; *State* v. *Duestrow*, 137 Mo. 44, 91, 38 S. W. 554, 39 S. W. 266; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *State* v. *Smith*, 53 Mo. 267; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Hundley*, 46 Mo. 414; *State* v. *Lewis*, 136 Mo. 84, 37 S. W. 806; *State* v. *Palmer*, 161 Mo. 158, 61 S. W. 651; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note; *Reg.* v. *Stokes*, 3 Car. & K. 185.

[39] *State* v. *Wright*, 134 Mo. 404; 35 S. W. 1145; *Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Ford* v. *State*, 71 Ala. 385; *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Danforth* v. *State*, 75 Ga. 614, 58 Am. Rep. 480; *State* v. *Bruce*, 48 Iowa, 533, 30 Am. Rep. 403; *State* v. *Felter*, 32 Iowa, 53; *Kriel* v. *Com.* 5 Bush, 363; *State* v. *Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *State* v. *Hundley*, 46 Mo. 414; *Genz* v. *State*, 58

sanity of the accused does not entitle him to an acquittal.[40] But, in passing upon the question, the jury must look at the whole evidence in the case, as well that for the state as for the prisoner;[41] and if, upon the whole evidence, they believe the accused to have been insane when he committed the act, they must acquit him.[42]

312. By a preponderance of the evidence.— Another rule well supported by authority regards insanity as an independent and affirmative defense in a criminal prosecution,[43] and requires a person accused of crime who interposes insanity as a defense, to prove it by a preponderance of the evidence.[44] Within this rule insanity is not

N. J. L. 482, 34 Atl. 816; *State* v. *Davis*, 109 N. C. 780, 14 S. E. 55; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Pannell* v. *Com.* 86 Pa. 260; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Burt* v. *State*, 38 Tex. Crim. App. 397, 39 L. R. A. 305, 40 S. W. 1000, 43 S. W. 344; *Boswell* v. *Com.* 20 Gratt. 860; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Dove* v. *State*, 3 Heisk. 348.

[40] *State* v. *Erb*, 74 Mo. 199; *State* v. *Johnson*, 91 Mo. 439, 3 S. W. 868; *State* v. *McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *State* v. *Huting*, 21 Mo. 464; *Baldwin* v. *State*, 12 Mo. 223; *State* v. *Hanley*, 34 Minn. 430, 26 N. W. 397; *Bonfanti* v. *State*, 2 Minn. 123, Gil. 99; *Lynch* v. *Com.* 77 Pa. 205; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com.* v. *Lynch*, 3 Pittsb. 412; *Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795; *Boswell* v. *Com.* 20 Gratt. 860; *Dejarnette* v. *Com.* 75 Va. 867; *State* v. *Douglass*, 28 W. Va. 297; *State* v. *Strauder*, 11 W. Va. 745, 27 Am. Rep. 606; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112.

[41] *State* v. *Strauder*, 11 W. Va. 745; 27 Am. Rep. 606; *Com.* v. *Heath*, 11 Gray, 303; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Kriel* v. *Com.* 5 Bush, 363.

[42] *Dejarnette* v. *Com.* 75 Va. 867; *Boswell* v. *Com.* 20 Gratt. 860; *State* v. *Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State* v. *Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271.

[43] *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 109; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *State* v. *Gut*, 13 Minn. 343, Gil. 315.

[44] Among numerous other cases stating the rule in this form are: *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *Lide* v. *State*, 133 Ala. 43, 31 So. 953; *Coates* v. *State*, 50 Ark. 330, 7 S. W. 304; *People* v. *Myers*, 20 Cal. 518; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *State* v. *Larkins*, 5 Idaho, 200, 47 Pac. 945; *State* v. *Felter*, 32 Iowa, 53; *State* v. *Robbins*, 109 Iowa, 650, 80 N. W. 1061; *Moore* v. *Com.* 92 Ky. 630, 18 S. W. 833; *State* v. *Burns*, 25 La. Ann. 302; *State* v. *Parks*, 93 Me. 208, 44 Atl. 899; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State* v. *McCoy*, 34 Mo. 531, 86 Am. Dec. 123; *State* v. *Williamson*, 106 Mo. 162, 17 S. W. 172; *Graves* v. *State*, 45 N. J. L. 203, 347, 46 Am. Rep. 778; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Kelch* v. *State*, 55 Ohio St. 146, 39 L. R. A. 737, 60 Am. St. Rep. 680, 45 N. E. 6; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Barner*, 199 Pa. 335, 49 Atl. 60; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *Lovegrove* v. *State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191; *Riley* v. *State* (Tex. Crim. App.) 44 S. W. 498; *People* v. *Dillon*, 8 Utah, 92, 30 Pac. 150.

The accused in a criminal prosecution must establish, by a preponderance of proof, not only the fact of insanity, but insanity of such a character as will amount in law to a defense. *People* v. *Bell*, 49 Cal. 485; *Williams* v. *State*, 50 Ark. 517, 9 S. W. 5.

And error in instructing that insanity must be clearly proved is not remedied by a subsequent instruction that it must be proved by a preponderance of the evidence, since it cannot be determined which of the two measures the jury adopted. *Com.* v. *Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464.

So it rests with a person accused of crime to show present insanity by a preponderance of the proof. *State* v *O'Grady*, 3 Ohio Legal News, 137.

required to be proved beyond a reasonable doubt.[45] And a reasonable doubt as to sanity does not authorize an acquittal.[46] The accused, however, should be held to no higher degree of proof; and the presumption of sanity is overcome, and the burden of proof resting with the defendant is satisfied, by a mere preponderance of the evidence.[47]

313. What is a sufficient preponderance.— Proof of insanity in a criminal prosecution should be deemed to preponderate whenever the existence of insanity is made probable upon a full and fair consideration of all the evidence adduced for and against it.[48] It is not a pre-

[45]*Martin* v. *State*, 119 Ala. 1, 25 So. 255; *People* v. *Methever;* 132 Cal. 326, 64 Pac. 481; *People* v. *Coffman*, 24 Cal. 230; *People* v. *Wilson*, 49 Cal. 13; *People* v. *Ward*, 105 Cal. 335, 38 Pac. 945; *State* v. *Hurley*, Houst. Crim. Rep. (Del.) 28; *State* v. *Larkins*, 5 Idaho, 200, 47 Pac. 945; *Danforth* v. *State*, 75 Ga. 614, 58 Am. Rep. 480; *Ball* v. *Com.* 81 Ky. 662; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Hundley*, 46 Mo. 414; *State* v. *Klinger*, 43 Mo. 127; *Graves* v. *State*, 45 N. J. L. 203; *State* v. *Starling*, 51 N. C. (6 Jones L.) 366; *Cottell* v. *State*, 12 Ohio C. C. 467; *Loeffner* v. *State*, 10 Ohio St. 599; *Pannell* v. *Com.* 86 Pa. 260; *Meyers* v. *Com.* 83 Pa. 141; *Com.* v. *Werling*, 164 Pa. 559, 30 Atl. 406; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440.

Where a preponderance of the testimony shows the insanity of the accused in a criminal prosecution, it raises a reasonable doubt of guilt. *State* v. *Bruce*, 48 Iowa, 533, 30 Am. Rep. 403.

[46]*Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854; *Maxwell* v. *State*, 89 Ala. 150, 7 So. 824; *Ford* v. *State*, 71 Ala. 385; *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Cavaness* v. *State*, 43 Ark. 331; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *People* v. *Myers*, 20 Cal. 518; *People* v. *Bawden*, 90 Cal. 195, 27 Pac. 204; *Kriel* v. *Com.* 5 Bush, 363; *State* v. *Bell*, 136 Mo. 120, 37 S. W. 823; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Graves* v. *State*, 45 N. J. L. 347, 46 Am. Rep. 778; *State* v. *Starling*, 51 N. C. (6 Jones L.) 366; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420.

And it is immaterial whether the reasonable doubt arises as to the fact of insanity, or as to the actual connection between it and the criminal act. *Gunter* v. *State*, 83 Ala. 96, 3 So. 600.

And an instruction that, while insanity, when set up as a defense in a criminal case, must be established to the reasonable satisfaction of the jury by preponderance of evidence, yet, after consideration of all the evidence in the case, the jury must acquit if they have a reasonable doubt of guilt, is improper, as tending to mislead the jury as to the proper burden and degree of proof. *Porter* v. *State*, 135 Ala. 51, 33 So. 694.

[47]*State* v. *Larkins*, 5 Idaho, 200, 47 Pac. 945; *People* v. *Messersmith*, 57 Cal. 575; *State* v. *Jones*, 64 Iowa, 356, 17 N. W. 911, 20 N. W. 470; *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470; *Ball* v. *Com.* 81 Ky. 662; *Kriel* v. *Com.* 5 Bush, 363; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Williamson*, 106 Mo. 162, 17 S. W. 172; *State* v. *Hundley*, 46 Mo. 414; *State* v. *Klinger*, 43 Mo. 127; *State* v. *McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *Cottell* v. *State*, 12 Ohio C. C. 467; *Bond* v. *State*, 23 Ohio St. 349; *Loeffner* v. *State*, 10 Ohio St. 599; *Sharkey* v. *State*, 4 Ohio C. C. 101; *Kelch* v. *State*, 55 Ohio St. 146, 39 L. R. A. 737, 60 Am. St. Rep. 680, 45 N. E. 6; *Com.* v. *Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464; *Pannell* v. *Com.* 86 Pa. 260; *Meyers* v. *Com.* 83 Pa. 131; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Newberry* v. *State*, 32 Tex. Crim. Rep. 145, 22 S. W. 412; *Carlisle* v. *State* (Tex. Crim. App.) 56 S. W. 365.

But where the claim of insanity set up in a criminal action is unusual, unnatural, and out of the ordinary course of affairs, the jury is not required to take the same for granted upon slight evidence, and should not find its existence except on evidence of a reliable character, which satisfies them that the defense has been made out. *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742.

[48]*Kelch* v. *State*, 55 Ohio St. 146, 39 L. R. A. 737, 60 Am. St. Rep. 680, 45 N. E. 6; *State* v. *Grear*, 29 Minn. 221,

ponderance in point of the number of witnesses, but a preponderance of facts and circumstances which are convincing to the minds of the jurors, that is required.[49] And it consists of the greater weight of credible evidence in the case,[50] and must be sufficient to overturn the presumption of sanity.[51] It is sufficient to establish insanity as a defense to crime, however, if the evidence be such as would justify a jury in a civil case in finding the defendant insane if the single issue, sane or insane, was submitted to them.[52] Some of the cases have qualified the rule by requiring fairly preponderating evidence of insanity.[53] And a satisfactory preponderance has been required;[54]

13 N. W. 140; *Meyers* v. *Com.* 83 Pa. 141; *State* v. *Jones*, 64 Iowa, 356, 17 N. W. 911, 20 N. W. 470; *State* v. *Thiele* (Iowa) 94 N. W. 256.

A mere probability of insanity is not sufficient to warrant an acquittal. *Sharkey* v. *State*, 4 Ohio C. C. 101.

And an instruction in a criminal prosecution that the accused should be held responsible for his acts until the fact is positively proved that he is not responsible is objectionable as requiring too high a measure of proof; but it is not reversible error, where it is followed by a statement that the jury should be satisfied, not clearly, but by the weight of evidence simply, since the accused is not bound to prove irresponsibility except by the weight of evidence, or a fair preponderance of evidence. *Com.* v. *Woodley*, 166 Pa. 463, 31 Atl. 202.

[49]*People* v. *Barberi*, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.

And positive and direct proof of insanity is not necessary. *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931.

[50]*State* v. *Trout*, 74 Iowa, 545, 7 Am. St. Rep. 499, 38 N. W. 405; *Wall* v. *Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Farrer* v. *State*, 2 Ohio St. 54; *Com.* v. *Woodley*, 166 Pac. 463, 31 Atl. 202; *Com.* v. *Werling*, 164 Pa. 559, 30 Atl. 406. And see *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

If the proofs, on an issue of sanity or insanity, are of equal weight and reliability, the presumption of sanity must prevail. *Nonnemacher* v. *Nonnemacher*, 159 Pa. 634, 28 Atl. 439; *Reg.* v. *Stokes*, 3 Car. & K. 185.

And refusal to instruct that if the evidence points to two conclusions, one consistent with the defendant's guilt, and the other consistent with his innocence, the jury is bound to adopt the one of innocence, and acquit him, is not error when the only defense is insanity. *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112.

[51]*Moore* v. *Com.* 92 Ky. 630, 18 S. W. 833; *State* v. *Lewis*. 20 Nev. 333, 22 Pac. 241; *State* v. *Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *McKenzie* v. *State*, 26 Ark. 334.

But to overcome the presumption of sanity and responsibility for crime, the evidence may come as well from the witnesses for the government as from the witnesses for the defense. *Com.* v. *Heath*, 11 Gray, 303.

And though the burden of proving insanity in a criminal prosecution may not be successfully carried so as to authorize an acquittal on that ground, it is, nevertheless, the duty of the jury to consider the evidence touching the alleged insanity, in connection with the other evidence in the case, and then, in view of all, to determine whether or not a reasonable doubt of the guilt of the accused exists in their minds. *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

[52]*People* v. *Hamilton*, 62 Cal. 377; *People* v. *Messersmith*, 61 Cal. 246; *People* v. *Wilson*, 49 Cal. 13; *People* v. *McDonell*, 47 Cal. 134; *People* v. *Coffman*, 24 Cal. 230; *Com.* v. *Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464.

The person who alleges insanity as a defense must prove it with the same degree of cogency as other material allegations are proved. *State* v. *Starling*, 51 N. C. (6 Jones L.) 366.

[53]*Com.* v. *Bezek*, 168 Pa. 606, 32 Atl. 109; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Pannell* v. *Com.* 86 Pa. 260.

[54]*State* v. *Felter*, 32 Iowa, 53.

And an instruction that insanity must be shown by the weight and preponder-

and also a clear preponderance;[55] and some cases have held that insanity must be established to the satisfaction of the jury by a preponderance of proof.[56]

314. Clearly proved, reasonable certainty.—The rule has also been laid down by some of the cases that, to warrant an acquittal on the ground of insanity, it must be clearly proved.[57] And it has been held that insanity must be made plainly to appear;[58] and that it must be made to appear with reasonable certainty.[59] And it has been held that the evidence must be such as to rationally convince the jury of the existence of insanity.[60] Such requirements, however, are

ance of the testimony is a mere informality, and not a ground for reversal, though the jury might be led to believe therefrom that it takes something more than a conviction of the mind to find in favor of a plea of insanity. *State* v. *Smith*, 53 Mo. 267.

[55]*State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Graves* v. *State*, 45 N. J. L. 203; *Farrer* v. *State*, 2 Ohio St. 70.

In *State* v. *Hundley*, 46 Mo. 414, however, it was held that an instruction in a criminal action that insanity as a defense should be shown to the satisfaction of the jury by a clear preponderance of the testimony is objectionable in the use of the word "clear," as tending to lead the jury to believe that something more than a preponderance, or what would reasonably satisfy them, was necessary.

And the same result was arrived at in *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397.

[56]*Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Ford* v. *State*, 71 Ala. 385; *Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *People* v. *Messersmith*, 57 Cal. 575; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Com.* v. *Eddy*, 7 Gray, 583; *State* v. *Burns*, 25 La. Ann. 302; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Hundley*, 46 Mo. 414; *State* v. *Klinger*, 43 Mo. 127; *State* v. *Williamson*, 106 Mo. 162, 17 S. W. 172; *Loeffner* v. *State*, 10 Ohio St. 598; *Cottell* v. *State*, 12 Ohio C. C. 469; *Pannell* v. *Com.* 86 Pa. 260; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Carlisle* v. *State* (Tex. Crim. App.) 56 S. W. 365.

There is nothing wrong in telling the jury in a criminal prosecution that, after weighing the evidence, they must decide according to their consciences. *People* v. *Hubert*, 119 Cal. 216, 51 Pac. 329.

[57]*Porter* v. *State*, 135 Ala. 51, 33 So. 694; *Casat* v. *State*, 40 Ark. 511; *People* v. *McDonell*, 47 Cal. 134; *State* v. *Burns*, 25 La. Ann. 302; *Newcomb* v. *State*, 37 Miss. 383; *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *State* v. *Spencer*, 21 N. J. L. 196; *State* v. *Scott*, 8 N. C. (1 Hawks) 24; *Com.* v. *McCaulley*, 16 Phila. 502; *Com.* v. *Farkin*, 2 Clark (Pa.) 208; *Webb* v. *State*, 5 Tex. App. 596; *Clark* v. *State*, 8 Tex. App. 350; *Smith* v. *State*, 19 Tex. App. 95; *State* v. *Smith*, 31 Tex. Crim. Rep. 14, 19 S. W. 252; *King* v. *State*, 9 Tex. App. 558; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note; *People* v. *Klein*, 1 Edm. Sel. Cas. 13, cited in Ray, Med. Jur. 5th ed. § 42.

An instruction in a criminal action requiring insanity to be clearly proved to establish a defense is not objectionable as a charge upon the degree or measure, or upon the weight, of evidence. *Giebel* v. *State*, 28 Tex. App. 151, 12 S. W. 591.

[58]*Sanders* v. *State*, 18 Tex. App. 372.

[59]*Humphreys* v. *State*, 45 Ga. 190; *Beck* v. *State*, 76 Ga. 452; *Holsenbake* v. *State*, 45 Ga. 43; *Minder* v. *State*, 113 Ga. 772, 39 S. E. 284. And see *Bellingham's Case*, cited in 1 Collinson on Lunacy, 636.

So. in *Bellingham's Case*, cited in 1 Collinson on Lunacy, 636, it was held that to support the defense of insanity in a prosecution for murder, it ought to be proved by the most distinct and unquestionable evidence, that the accused was incapable of judging between right and wrong, and did not consider that murder was a crime.

[60]*State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742; *Kriel* v. *Com.* 5 Bush, 363; *Com.* v. *Lynch*, 3 Pittsb. 412; *Webb* v. *State*, 9 Tex. App. 490. And see *Par-*

usually deemed to require something more than a mere preponderance of the evidence, and therefore, such directions are usually deemed improper in jurisdictions in which the general rule requiring a preponderance of the evidence has been adopted.[61]

315. Reasonable doubt of insanity.— The rule adopted by the Federal courts and those of many of the states regards insanity as an ingredient in a crime, as necessary as the overt act itself, without which there can be no crime.[62] And where insanity is relied on as a defense in a prosecution for crime within this rule, and evidence is given tending to show it, and a reasonable, well-founded doubt is thereby raised of the sanity of the accused, he is entitled to the benefit of the doubt,[63] the burden of proof, where sanity is questioned, resting with the prosecution to establish sanity beyond a reasonable doubt.[64] And the defendant is to be acquitted unless the

ker's Case, cited in 1 Collinson on Lunacy, 477.

[61]In *People* v. *Nino,* 149 N. Y. 327, 43 N. E. 853, it was said that it would be error to declare that insanity as an affirmative defense must be clearly proved, since a preponderance of the evidence meets the legal requirement; and the same ruling was made in *Com.* v. *Gerade,* 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464.

So, "clearly proved" and "proved beyond a reasonable doubt" are not convertible terms; the latter implies a higher degree of certainty than the former. If the preponderance of testimony is on the side of insanity, it is regarded as clearly proved, although there is a reasonable doubt of its existence. *Farrer* v. *State,* 2 Ohio St. 70.

[62]*Chase* v. *People,* 40 Ill. 353; *Hopps* v. *People,* 31 Ill. 385, 83 Am. Dec. 231; *People* v. *McCann,* 16 N. Y. 58, 69 Am. Dec. 642.

[63]Among the numerous cases by which this rule has been adopted are: *Henson* v. *State,* 112 Ala. 41, 21 So. 79; *State* v. *Reidill,* 9 Houst. (Del.) 470, 14 Atl. 550; *Armstrong* v. *State,* 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Anderson* v. *State,* 42 Ga. 9; *Langdon* v. *People,* 133 Ill. 382, 24 N. E. 874; *Grubb* v. *State,* 117 Ind. 277, 20 N. E. 257, 725; *State* v. *Nixon,* 32 Kan. 205, 4 Pac. 159; *Smith* v. *Com.* 1 Duv. 224; *Ford* v. *State,* 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *State* v. *Peel,* 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State* v. *Bartlett,* 43 N. H. 224, 80 Am. Dec. 154; *People* v. *McCann,* 16 N. Y. 58, 69 Am. Dec. 642; *People* v. *Nino,* 149 N. Y. 317, 43 N. E. 853; *Farrer* v. *State,* 2 Ohio St. 54; *Com.* v. *Gentry,* 5 Pa. Dist. R. 703; *State* v. *McIntosh,* 39 S. C. 97, 17 S. E. 446; *King* v. *State,* 91 Tenn. 617, 20 S. W. 169; *Revoir* v. *State,* 82 Wis. 295, 52 N. W. 84; *Davis* v. *United States,* 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *German* v. *United States,* 57 C. C. A. 128, 120 Fed. 666.

An instruction, in a criminal prosecution, that insanity, interposed as a defense, must be clearly proved, is not incorrect, where the jury is also told that a person must be given the benefit of any doubt as to his sanity, resting upon the evidence in the case. *Walker* v. *People,* 26 Hun, 67, Affirmed in 88 N. Y. 81; *Brown* v. *Com.* 14 Bush, 398.

And an instruction that the accused is presumed to be sane until he convinces the jury by evidence to the contrary is not error, where the trial was conducted upon the theory that the burden rests with the prosecution to maintain the sanity of the prisoner, and the jury had also been instructed that if they had a reasonable doubt, from the evidence, that the prisoner was sane they should give him the benefit of the doubt. *O'Connell* v. *People,* 87 N. Y. 377, 41 Am. Rep. 379.

[64]*State* v. *Johnson,* 40 Conn. 136; *Stevens* v. *State,* 31 Ind. 486, 99 Am. Dec. 634; *Hite* v. *Sims,* 94 Ind. 333; *Bradley* v. *State,* 31 Ind. 492; *Hiler* v. *State,* 4 Blackf. 552; *Wheeler* v. *State,* 158 Ind. 687, 63 N. E. 975; *State* v. *Reddick,* 7 Kan. 143; *State* v. *Crawford,* 11 Kan. 32; *Russell* v. *State,* 53 Miss.

jury are satisfied beyond a reasonable doubt that the criminal act was not produced by mental disease.[65] It is not necessary, under this rule, that insanity be established by a preponderance of evidence,[66] or beyond a reasonable doubt.[67] Sanity is presumed, however, and the prosecutor may rest upon such presumption, without other proof; but upon the general question whether the crime committed was committed by a person responsible for his acts, the presumption of sanity and the evidence are both to be considered, the affirmative resting with the prosecution; and if a reasonable doubt exists as to whether the person was sane, he should be acquitted.[68] And it is immaterial

367; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *People* v. *Finley*, 38 Mich. 482; *Wright* v. *People*, 4 Neb. 407; *Furst* v. *State*, 31 Neb. 403, 47 N. W. 1116; *Ballard* v. *State*, 19 Neb. 609, 28 N. W. 271; *Smith* v. *State*, 4 Neb. 277; *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Moett* v. *People*, 85 N. Y. 373; *People* v. *Nino*, 149 N. Y. 318, 43 N. E. 853; *Walker* v. *People*, 88 N. Y. 81; *O'Brien* v. *People*, 48 Barb. 274; *People* v. *Egnor*, 175 N. Y. 419, 67 N. E. 906; *Maas* v. *Territory*, 10 Okla. 714, 53 L. R. A. 814, 63 Pac. 960; *Davis* v. *United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353.

An instruction in a criminal prosecution that the jury is to presume the defendant innocent until his guilt is established beyond a reasonable doubt is not inconsistent with another instruction that every man is presumed to be sane, and to intend the natural and ordinary consequences of his acts. *Greenley* v. *State*, 60 Ind. 141.

[65]*Bradley* v. *State*, 31 Ind. 492; *Ford* v. *State*, 73 Miss. 734, 35 L. R. A. 117, 19 So. 665; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Wright* v. *People*, 4 Neb. 407; *Ballard* v. *State*, 19 Neb. 609, 28 N. W. 271.

A prisoner charged with murder is entitled to an acquittal if the jury entertain a reasonable doubt as to his soundness of mind at the time of the homicide, although they believe that he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. *Stevens* v. *State*, 31 Ind. 485, 99 Am. Dec. 634.

But where the jury believe, beyond a reasonable doubt, that the defendant committed the crime charged, and that at the time he knew that it was wrong, and was mentally capable of choosing either to do or not to do it, and of governing his conduct in accordance with such choice, they should find him guilty, though they believe that he was not entirely and perfectly sane. *Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677.

[66]*State* v. *Shuff* (Idaho) 72 Pac. 664; *Dacey* v. *People*, 116 Ill. 555, 6 N. E. 165; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Polk* v. *State*, 19 Ind. 170, 81 Am. Dec. 382; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *State* v. *Crawford*, 11 Kan. 32.

[67]*Armstrong* v. *State*, 27 Fla. 366, 26 Am. St. Rep. 72, 9 So. 1; *Smith* v. *Com.* 1 Duv. 224; *People* v. *McCann*, 16 N. Y. 58, 69 Am. Dec. 642.

[68]*Dacey* v. *People*, 116 Ill. 555, 6 N. E. 165; *Montag* v. *People*, 141 Ill. 75, 30 N. E. 337; *Bradley* v. *State*, 31 Ind. 492; *Wright* v. *Com.* 24 Ky. L. Rep. 1838, 72 S. W. 340; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep 360; *Ford* v. *State*, 73 Miss. 734, 35 L R. A. 117, 19 So. 665; *Brotherton* v. *People*, 75 N. Y. 159; *Walker* v. *People*, 26 Hun, 67; *People* v. *Coleman*, 1 N. Y. Crim. Rep. 1; *Casey* v. *People*, 31 Hun 158; *People* v. *O'Connell*, 62 How. Pr 436, Affirmed in 87 N. Y. 377, 41 Am. Rep. 379; *State* v. *McIntosh*, 39 S. C. 97, 17 S. E. 446; *State* v. *Coleman*, 26 S. C. 441; *Dove* v. *State*, 3 Heisk. 348; *Coffee* v. *State*, 3 Yerg. 283, 24 Am. Dec. 570; *King* v. *State*, 91 Tenn. 617, 20 S W 169; *United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555; *Guiteau's Case*, 10 Fed. 161.

It is never incumbent upon the prosecution in a criminal case to give evidence that sanity, which is presumed to exist, existed in a particular case. *Walter* v. *People*, 32 N. Y. 147; *Ferris* v.

whether the evidence tending to show insanity was adduced by the prosecution or the defense.[69]

316. What constitutes reasonable doubt.— The reasonable doubt which will result in an acquittal in a criminal case is doubt as to all or any of the constituent elements essential to legal responsibility;[70] and consists of a fair doubt growing out of the testimony in the case, and not a mere imaginary, captious, or possible doubt.[71] It is such a doubt as will leave the minds of the jury, after a careful examination of all the evidence in the case, in such a condition that they cannot say they have an abiding conviction, to a moral certainty, of the truth of the charge.[72] A person accused of crime is not to be acquitted upon any fanciful ground, that though the jury believe he

People, 35 N. Y. 125; *O'Brien* v. *People*, 48 Barb. 274; *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State* v. *Hoyt*, 46 Conn. 331.

The defendant bringing insanity into the case must, at least, create a reasonable doubt as to responsibility. *State* v. *Shuff* (Idaho) 72 Pac. 664; *Faulkner* v. *Territory*, 6 N. M. 464, 30 Pac. 905.

He is entitled to an instruction that the jury must be satisfied of his guilt beyond a reasonable doubt; and this is true of the defense of insanity so far as the facts attending the crime are concerned, or at least, so far as such facts are included in the *res gestæ;* but if insanity is set up as a separate and distinct defense, and its proof does not consist of the facts attending the criminal act, then the proof must be made out by the defendant, the legal presumption of sanity being sufficient, in the absence of evidence to the contrary. *McAllister* v. *Territory*, 1 Wash. Terr. 360.

[69]*Hodge* v. *State*, 26 Fla. 11, 7 So. 593; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Montag* v. *People*, 141 Ill. 75, 30 N. E. 337; *McDougal* v. *State*, 88 Ind. 24; *Cunningham* v. *State*, 56 Miss. 269, 31 Am. Rep. 360; *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *King* v. *State*, 91 Tenn. 617, 20 S. W. 169.

The accused, in a prosecution for murder, is entitled to an acquittal, where the whole evidence, including that supplied by the presumption of sanity, does not exclude, beyond a reasonable doubt, the hypothesis of insanity, some proof of insanity having been adduced, *Davis* v. *United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *State* v. *Crawford*, 11 Kan. 32; *State* v. *Smith*, 53 Mo. 267.

[70]*Smith* v. *Com.* 1 Duv. 224.

[71]*People* v. *Finley*, 38 Mich. 482; *State* v. *Coleman*, 20 S. C. 441; *People* v. *Barberi*, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.

[72]*People* v. *Finley*, 38 Mich. 482; *State* v. *Holloway*, 156 Mo. 222, 56 S. W. 734.

A juror, to convict, should be so convinced, by the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in the matters of highest concern and importance to himself and to his own dearest personal interests, under circumstances in which there was no compulsion resting upon him at all. *Bradley* v. *State*, 31 Ind. 492.

But an instruction in a criminal case in which insanity is interposed as a defense, that the presumption of innocence is so far of greater strength than that of sanity, that when evidence appears tending to prove insanity, it compels the prosecution to show, from all the evidence, mental soundness beyond a reasonable doubt, is objectionable, since there may be evidence tending to prove insanity which is not sufficiently strong to raise a reasonable doubt of mental soundness. It is not erroneous as against the accused, however, since it is favorable to him. *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99.

And an instruction that the evidence as to insanity should be carefully considered, for the reason that if the accused was in truth insane he ought not to be punished, is not subject to objection that the question was not whether the accused was in truth insane, but whether the jury entertained a reason-

was sane, yet there might be a rational doubt of such sanity.[73] And the defense should not be sustained upon vague and shadowy hearsay, or mere conjecture.[74] There should be clear and satisfactory evidence of insanity.[75] The insanity of a defendant in a criminal case need not be submitted to the jury, however, as a separate issue, of the absence of which they must be satisfied beyond a reasonable doubt; it is sufficient if they are required to be satisfied of the defendant's guilt beyond a reasonable doubt.[76] A reasonable doubt as to the sanity of a person on trial for crime is a reasonable doubt as to his guilt, and entitles him to an acquittal.[77] When the evidence

able doubt as to his sanity, since the charge was not as to the degree of evidence, but referred merely to the duty of careful scrutiny. *Goodwin* v. *State*, 96 Ind. 550.

It is not reversible error in a criminal prosecution to define a reasonable doubt of sanity as a fair doubt. *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329.

[73]*Hodge* v. *State*, 26 Fla. 11, 7 So. 593; *Armstrong* v. *State*, 27 Fla. 366, 26 Am. St. Rep. 72, 9 So. 1; *Freese* v. *State* (Ind.) 65 N. E. 915; *Newcomb* v. *State*, 37 Miss. 383; *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007.

Evidence in a criminal prosecution in which the defendant was accused of killing his wife, that his conduct was at times peculiar, and that he was nervous, and, especially when talking about trouble with his wife, became greatly excited, is insufficient to overcome the presumption of sanity to the extent of raising a reasonable doubt, so as to require the prosecution to prove it, where it appears that he pursued his daily avocation as men usually do, and was treated by others as sane, and that he entertained a feeling of malignancy toward his wife. *Lilly* v. *People*, 148 Ill. 467, 36 N. E. 95.

[74]*Walker* v. *People*, 1 N. Y. Crim. Rep. 22; *Boswell* v. *Com.* 20 Gratt. 860. And see *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

But an instruction in a murder trial in which insanity was interposed as a defense, that if the accused had been subject to attacks of epilepsy, and epilepsy is a disease which tends to produce insanity, these facts alone are not sufficient to raise a reasonable doubt of sanity at the time of the offense, is erroneous as tending to mislead the jury, and as interfering with its province to weigh the evidence. *Guetig* v. *State*, 63 Ind. 278.

[75]*Walker* v. *People*, 1 N. Y. Crim. Rep. 22; *People* v. *Coleman*, 1 N. Y. Crim. Rep. 1; *State* v. *Marler*, 2 Ala. 43, 36 Am. Dec. 398. And see *Wheeler* v. *State* 158 Ind. 687, 63 N. E. 975.

Evidence that the accused in a criminal prosecution was in trouble with his family, and was disturbed in mind, and perhaps excited, is not sufficient to raise a reasonable doubt in regard to his sanity which will require the people to establish his sanity in order to convict. *Montag* v. *People*, 141 Ill. 75, 30 N. E. 337.

[76]*Hornish* v. *People*, 142 Ill. 620, 18 L. R. A. 237, 32 N. E. 677; *Walker* v. *People*, 88 N. Y. 81. And see *Carr* v. *State*, 96 Ga. 284, 22 S. E. 570.

Evidence bearing upon the question of insanity in a criminal prosecution should be considered in connection with all the other evidence, in determining whether or not, upon a view of the whole case, there was reasonable doubt of guilt. *Carr* v. *State*, 96 Ga. 284, 22 S. E. 570; *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486.

And refusal to instruct the jury in a criminal prosecution that, if they entertained a reasonable doubt of the sanity of the accused at the time of the act, they should acquit him, is not error, where the court had charged fully with reference to reasonable doubt with regard to the whole case. *Webb* v. *State*, 9 Tex. App. 490; *Westmoreland* v. *State*, 45 Ga. 225; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379.

[77]*State* v. *Nixon*, 32 Kan. 205, 4 Pac. 159; *State* v. *Crawford*, 11 Kan. 32; *Polk* v. *State*, 19 Ind. 172, 81 Am. Dec. 382. And see *Upstone* v. *People*, 109 Ill. 169.

An instruction in a prosecution for

is of such a character that the jury may reasonably infer either sanity or insanity, the question is for them to decide, and is not open to review on appeal.[78]

317. Summary as to measure of proof.—It is to be observed that the terms "by a preponderance of the evidence" and "by satisfactory evidence," or "to the satisfaction of the jury" have been used interchangeably and indiscriminately. This gives rise to the inference that they are all regarded as meaning the same thing, and that the several states and jurisdictions in which such terms have been adopted may be deemed to have one and the same measure of proof to establish insanity.[79] The requirement of proof sufficient to raise a reasonable doubt of sanity, however, adopted by Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, Tennessee, Washington, and the United States, and perhaps other jurisdictions, cannot be regarded as the same as that elsewhere adopted; but must be deemed to require a lesser degree of proof.[80] State courts are not bound by the views of the Supreme Court of the United States on the question of the measure of proof of insanity.[81]

b. Drunkenness.

318. Presumptions and burden of proof.—Where irresponsible drunkenness is relied upon as a defense in a criminal prosecution, the burden of proving it rests with the accused.[82] And the burden rests with one who relies upon alcoholic insanity as an excuse for

homicide, authorizing conviction only if the jury believes from the evidence, beyond a reasonable doubt, that the blows were struck with malice or forethought, is not objectionable as requiring the jury to find the defendant guilty regardless of the question of mental condition. *Upstone* v. *People*, 109 Ill. 169.

[78] *Sharp* v. *State* (Ind.) 68 N. E. 286; *Rinkard* v. *State*, 157 Ind. 534, 62 N. E. 14; *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771; *State* v. *Sigler*, 114 Iowa, 408, 87 N. W. 283.

[79] "Clearly proved" and "proved by a preponderance of the evidence" mean the same. *Hurst* v. *State*, 40 Tex. Crim. Rep. 378, 46 S. W. 635, 50 S. W. 719; *Smith* v. *State*, 19 Tex. App. 95. And see *State* v. *Payne*, 86 N. C. 609.

And an instruction that insanity must be clearly established is not objectionable as requiring that the evidence must more than predominate, since it only requires that the preponderance must be plainly apparent. *People* v. *Hamilton*, 62 Cal. 377, Overruling *People* v. *Wreden*, 59 Cal. 392.

[80] See *supra*, § 315, and cases there cited.

[81] *People* v. *Allender*, 117 Cal. 81, 48 Pac. 1014.

[82] *State* v. *Grear*, 29 Minn. 221, 13 N. W. 140; *Fonville* v. *State*, 91 Ala. 39, 8 So. 688; *State* v. *Pasnau*, 118 Iowa, 501, 92 N. W. 682; *State* v. *Hill*, 46 La. Ann. 27, 49 Am. St. Rep. 316, 14 So. 294.

But an instruction as to the burden of proof of intoxication, and as to intoxication as a defense, is justified in a prosecution for homicide by evidence that the accused had been drinking ardent spirits, and engaged in a quarrel with the person killed, there being no proof of previous acquaintance between them. *Honesty* v. *Com.* 81 Va. 283.

crime to establish that it was caused by the habitual and long continued intemperate use of liquor, as distinguished from the immediate result of intoxication.[83] And drunkenness which is available to lower the grade of an offense must also be established by the accused.[84] Likewise, the burden of proof of intoxication and consequent want of capacity to contract rests with the party alleging it.[85] And one addicted to intemperance, though subject to fits of derangement, is not without testamentary capacity, if *compos mentis* at the time, and it rests with those who assert it to show incapacity.[86] Though one is an habitual drunkard, he is presumed to be competent to make a valid will or gift, in the absence of proof to the contrary.[87] And the burden of proof, in an action upon an insurance policy, of death from intemperance, forfeiting the policy, rests with the company.[88] So, the presumption of sobriety stands in favor of a party injured by the alleged negligence of another, in place of proof.[89] And while the intoxication of the person injured at the time of the injury is a circumstance to go to the jury, on the ground of contributory negligence, it does not change the burden of proof unless the intoxication was of such a degree as to render him imbecile.[90] But

[83]*People* v. *Bell*, 49 Cal. 485.

But where the prosecution, in a trial for homicide, asserts that the accused was guilty, though insane, because his insanity was drunken madness, the allegation must be proved. *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679.

[84]*Reg.* v. *Monkhouse*, 4 Cox. C. C. 55; *Fonville* v. *State*, 91 Ala. 39, 8 So. 688; *State* v. *Kavanaugh* (Del.) 53 Atl. 335; *Com.* v. *Hart*, 2 Brewst. (Pa.) 546; *Honesty* v. *Com.* 81 Va. 283.

And an instruction in a criminal prosecution, that one who kills another by the use of means appropriate to the end is presumed, drunk or sober, to have intended what he did, is not ground for a new trial, though in some respects inaccurate, where the evidence supports the verdict. *Wise* v. *State*, 34 Ga. 348.

[85]*Conant* v. *Jackson*, 16 Vt. 335; *Harbison* v. *Lemon*, 3 Blackf. 51, 23 Am. Dec. 376; *Youn* v. *Lamont*, 56 Minn. 216, 57 N. W. 478.

But the burden rests with a party entering into a settlement with another, to prove his competency at the time, where he was subsequently found to be an habitual drunkard, and to have been such from a time preceding the day of the settlement. *Klohs* v. *Klohs*, 61 Pa. 245.

[86]*Hebert* v. *Winn*, 24 La. Ann. 385; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Black* v. *Ellis*, 3 Hill L. 68; *Temple* v. *Temple*, 1 Hen. & M. 476.

[87]*Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340. And see *Koegel* v. *Egner*, 54 N. J. Eq. 623, 35 Atl. 394.

Where a will is read to a testatrix correctly, and she is of sound mind, the legal presumption is that she understands its contents; but the presumption is prima facie only where she is of great age and addicted to the use of intoxicating liquors to such an extent as to impair her faculties. *Rutland* v. *Gleaves*, 1 Swan, 198.

[88]*Van Valkenburgh* v. *American Popular L. Ins. Co.* 9 Hun, 583.

[89]*Cramer* v. *Burlington*, 42 Iowa, 315.

Where it appears that a conductor running a train which caused a personal injury was a man of intemperate habits, however, the burden is cast upon the railroad company, in an action for the injury, to prove that he was not intoxicated at the time, and used proper care. *Pennsylvania R. Co.* v. *Books*, 57 Pa. 339. 98 Am. Dec. 229.

[90]*Seymer* v. *Lake*, 66 Wis. 651, 29 N. W. 554. And see *Ford* v. *Umatilla County*, 15 Or. 315, 16 Pac. 33; *Fitzgerald* v. *Weston*, 52 Wis. 354, 9 N. W. 13.

where it is negligence to be in a particular place in an intoxicated condition, and there is evidence tending to show that a person receiving an injury at such a place was intoxicated, the burden rests with him to show either the absence of intoxication, or that it did not contribute to the injury.[91]

319. Presumption of continuance.— Insanity arising from intemperance is usually of a temporary nature, and followed not simply by a lucid interval, but by permanent restoration to reason; and to such insanity the presumption of continuance does not apply.[92] And delirium tremens passes away with the removal of its exciting cause, and is not presumed to continue.[93] And where it is set up as a defense in a criminal prosecution, the existence of a paroxysm of the disorder at the very time the criminal act was done must be shown.[94] And one who seeks to avoid a contract upon the ground of intoxication must produce clear and satisfactory proof that he was in such a state of drunkenness as not to know what he was doing.[95] But when alcoholism has produced permanent derangement, it is presumed to continue, and proof of a lucid interval is necessary to give validity to

An instruction in an action for damages for alleged negligence, that the burden of proof rests with the defendant to show that the plaintiff's injury resulted from his own intoxication and negligence, means negligence superinduced by intoxication, and is not, therefore, misleading. *Loewer* v. *Sedalia*, 77 Mo. 431.

[91]*Cramer* v. *Burlington*, 42 Iowa, 315; *Hubbard* v. *Mason City*, 60 Iowa, 400, 14 N. W. 772.

But refusal to instruct the jury, in an action for an injury received upon a public highway, that, if the person injured was so intoxicated as to be incapable of properly conducting himself and his team, no recovery can be had, is not erroneous, where the jury were told that if he was thus intoxicated at the time of the injury, that, of itself, would throw the burden of proof upon him to show that he exercised ordinary care and prudence, and that his intoxication was prima facie evidence of want of ordinary care. *Burns* v. *Elba*, 32 Wis. 605.

[92]*Duffield* v. *Robeson*, 2 Harr. (Del.) 379; *People* v. *Findley*, 132 Cal. 301, 64 Pac. 472; *Hart* v. *Thompson*, 15 La. 88; *State* v. *Reddick*, 7 Kan. 143; *Halley* v. *Webster*, 21 Me. 461; *Pierce* v. *Pierce*, 38 Mich. 412; *State* v. *Lowe*, 93 Mo. 547, 5 S. W. 889; *Re Lee*, 46 N. J. Eq. 193, 18 Atl. 525; *Goble* v. *Grant*, 3 N. J. Eq. 629; *Kahl* v. *Schober*, 35 N. J. Eq. 461; *Gardner* v. *Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Julke* v. *Adam*, 1 Redf. 454; *Black* v. *Ellis*, 3 Hill L. 68; *Bannister* v. *Jackson*, 45 N. J. Eq. 702, 17 Atl. 692; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Andress* v. *Weller*, 3 N. J. Eq. 604; *Koegel* v. *Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Rather* v. *State*, 25 Tex. App. 624, 9 S. W. 69; *Lewis* v. *Baird*, 3 Mclean, 56, Fed. Cas. No. 8,316; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574.

So, the incapacity arising from the use of morphine by one who did not have the habit fixed upon him is but temporary, and there is no presumption in favor of a continuance of it. *Camp* v. *Shaw*, 52 Ill. App. 241.

[93]*State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *State* v. *Sewell*, 48 N. C. (3 Jones L.) 249; *Goodwin* v. *State*, 96 Ind. 550; *Kellogg* v. *United States*, 43 C. C. A. 179, 103 Fed. 200.

[94]*State* v. *Sewell*, 48 N. C. (3 Jones L.) 245; *Goodwin* v. *State*, 96 Ind. 550; *Elkinton* v. *Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Andress* v. *Weller*, 3 N. J. Eq. 604.

[95]*Johns* v. *Fritchey*, 39 Md. 259; *Youn* v. *Lamont*, 56 Minn. 216, 57 N. W. 478.

Evidence in a contract action in which the defense was incompetency to contract, that the party had fixed habit

subsequent acts.[96] And a habit of intoxication upon the part of a person injured, once proved to exist, is presumed to continue, and raises a presumption of negligence in case of accident to him, which stands until rebutted.[97]

320. Measure of proof.—Proof of drunkenness set up to excuse or mitigate crime should be deliberately scrutinized.[98] And it has been held that it should be made out by a fair preponderance of the evidence;[99] and to the satisfaction of the jury;[100] and that delirium tremens or *mania a potu,* which is the secondary effect of intemperance, and a species of insanity, must be established to the satisfaction of the jury;[1] and that a reasonable doubt of rationality or sanity does not justify an acquittal.[2] The doctrine that the jury must be satisfied, beyond a reasonable doubt, that the accused was in such a state of mind as to be able to form a malicious or premeditated intent, and to be responsible for the act charged, however, has also been held applicable to incapacity from drunkenness as well as from insanity.[3] So, clear and satisfactory proof that a party was in such a state of

of intemperance for two years before it was made, is not sufficient, in the absence of a proceeding *de lunatico inquirendo,* to shift the burden of proof of competency to the party seeking to support the contract. *Noel* v. *Karper,* 53 Pa. 97.

[96]*Gardner* v. *Gardner,* 22 Wend. 526, 34 Am. Dec. 340; *Cochran's Will,* 1 T. B. Mon. 263, 15 Am. Dec. 116; *State* v. *Potts,* 100 N. C. 457, 6 S. E. 657; *People* v. *Findley,* 132 Cal. 301, 64 Pac. 472.

And evidence of a mere sober interval of a few hours or days is not sufficient to sustain a contract made by one who, for nearly four years, had had fits of *mania a potu* and delirium tremens, and was in the habit of daily drunkenness, and became foolish and crazy when drinking. *Menkins* v. *Lightner,* 18 Ill. 282.

[97]*Lane* v. *Missouri P. R. Co.* 132 Mo. 4, 33 S. W. 645, 1128. And see *Crew* v. *St. Louis, K. & N. W. R. Co.* 20 Fed. 87; *Chapman* v. *Erie R. Co.* 55 N. Y. 579.

[98]*Jones* v. *Com.* 30 Pittsb. L. J. 423.

[99]*State* v. *Grear,* 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *Fonville* v. *State,* 91 Ala. 39, 8 So. 688; *Jones* v. *Com.* 30 Pittsb. L. J. 423.

[100]*Fonville* v. *State,* 91 Ala. 39, 8 So. 688; *State* v. *Bowen,* Houst. Crim. Rep. (Del.) 91; *State* v. *Hill,* 46 La. Ann. 27, 49 Am. St. Rep. 316, 14 So. 294; *Com.* v. *Hart,* 2 Brewst. (Pa.) 546.

[1]*State* v. *Thomas,* Houst. Crim. Rep. (Del.) 511; *State* v. *Hurley,* Houst. Crim. Rep. (Del.) 28.

[2]*Fonville* v. *State,* 91 Ala. 39, 8 So. 688.

The state is not bound to make proof of a negative by showing, beyond a reasonable doubt, in a criminal prosecution, that the defendant's intoxication was of a degree not to interfere with his judgment and intelligence, or preclude the possibility of his entertaining malice. *State* v. *Hill,* 46 La. Ann. 27, 49 Am. St. Rep. 316, 14 So. 294.

[3]*State* v. *Fiske,* 63 Conn. 388, 28 Atl. 572; *State* v. *Rigley,* 7 Idaho, 292, 62 Pac. 679; *Smith* v. *State,* 4 Neb. 277; *State* v. *Cross,* 42 W. Va. 253, 24 S. E. 996.

But even under this rule, an instruction in a prosecution for murder, that the burden rests with the defendant to prove the defense of insanity by a preponderance of the evidence, is not prejudicial error, where the defendant admits the murder and claims as his sole defense, that he inherited an impaired mentality from an insane mother, which had been further weakened by the use of liquor, so as to incapacitate him for entertaining the intent necessary to constitute murder in the first degree, and the jury was instructed to give him the benefit of every reasonable doubt as to other matters. *People* v. *Eubanks,* 86 Cal. 295, 24 Pac. 1014.

drunkenness as not to know what he was doing is necessary to avoid a contract on that ground.[4] And that a person suffering a personal injury was sober at the time must be shown by a preponderance of the evidence.[5] And so must the fact that an injury was caused in whole or in part by the negligence of a drunken employee, improperly retained in the service.[6]

II. Competency and admissibility.

a. With reference to lunacy.

321. Previous and subsequent condition.— Evidence of the state of mind of a person accused of crime, before and after the commission of the act, is admissible where insanity is alleged as a defense, as tending to show his mental condition at the time,[7] and may be given under a plea of not guilty.[8] Previous and subsequent condition, however, is competent only as tending to throw light on the condition of the mind of the accused at the time of the commission of the crime.[9] And evidence of acts, conduct, and habits of the accused at

[4] *Johns* v. *Fritchey*, 39 Md. 259. And see *White* v. *Davis*, 43 N. Y. S. R. 901, 17 N. Y. Supp. 548.

[5] *Hubbard* v. *Mason City*, 60 Iowa, 400, 14 N. W. 772; *Cramer* v. *Burlington*, 42 Iowa, 315.

[6] *Crew* v. *St. Louis, K. & N. W. R. Co.* 20 Fed. 87.

But proof of drunkenness on the part of a servant, so habitual as to be generally known, is sufficient to raise a presumption of knowledge thereof on the part of his master, which will render him responsible for injuries resulting therefrom. *Sawyer* v. *Sauer*, 10 Kan. 466.

[7] *McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *McLean* v. *State*, 16 Ala. 672; *People* v. *Lee Fook*, 85 Cal. 300, 24 Pac. 654; *People* v. *Farrell*, 31 Cal. 576; *State* v. *Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *Carr* v. *State*, 96 Ga. 284, 22 S. E. 570; *State* v. *Jones*, 64 Iowa, 356, 20 N. W. 470, 17 N. W. 911; *State* v. *Felter*, 25 Iowa, 67; *Moore* v. *Com.* 92 Ky. 630, 18 S. W. 833; *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475; *State* v. *Kelley*, 57 N. H. 549; *Russell* v. *State*, 53 Miss. 367; *People* v. *Whedon*, 2 N. Y. Crim. Rep. 318; *Queenan* v. *Territory*, 11 Okla. 261, 61 L. R. A. 324, 71 Pac. 218; *Burkhard* v. *State*, 18 Tex. App. 599; *Warren* v. *State*, 9 Tex. App. 619, 35 Am. Rep. 745; *Johnson* v. *State*, 1 Tex. App. 146; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351.

The superintendent of an insane asylum to which a person accused of crime who pleaded insanity is sent, may testify, upon a subsequent trial for the offense, as to his condition while in the asylum, and as to whether he had recovered his sanity sufficiently to be tried. *State* v. *Pritchett*, 106 N. C. 667, 11 S. E. 357.

[8] *People* v. *Farrell*, 31 Cal. 576; *Carr* v. *State*, 96 Ga. 284, 22 S. E. 570.

[9] *State* v. *Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *State* v. *Hays*, 22 La. Ann. 39; *People* v. *Clendennin*, 91 Cal. 35, 27 Pac. 418; *Choice* v. *State*, 31 Ga. 424; *Com.* v. *Pomeroy*, 117 Mass. 143; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

Subsequent acts of a person accused of crime who alleges insanity as a defense are not to be admitted unless followed up by proof of facts tending to show that he was insane at the time of the offense. *Spencer* v. *State*, 69 Md. 28, 13 Atl. 809.

But it is not necessary to give evidence of insanity at the time of the commission of a criminal act before offering evidence of subsequent insanity; it is sufficient if the evidence of insanity at

a subsequent time are only admissible when so connected with, or corresponding with, evidence of weakened mental condition preceding the offense, as to strengthen the inference of continuance, and carry it to the time to which the inquiry relates.[10] Likewise, evidence of the state of mind of a party to a contract, both before and after the time it was made, is admissible to show his sanity or insanity at that time.[11] And evidence tending to prove the sanity or insanity of a grantor previous or subsequent to the execution of his deed is admissible in an action to set it aside,[12] there being no absolute rule as to the period within which such inquiry may be made.[13] So, evidence of sanity or insanity of a testator, both before and after the making of his will, is admissible in a proceeding to contest the will, to show his mental condition at the time it was made,[14] great latitude

the time is subsequently given. *Vance* v. *Com.* 2 Va. Cas. 132.

[10]*Com.* v. *Pomeroy*, 117 Mass. 143; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241.

But when this is the case, it is admissible, though remote as to time. *Windisch & M. Brewing Co.* v. *Opp*, 17 Ohio C. C. 465.

[11]*Grant* v. *Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Clinton* v. *Estes*, 20 Ark. 216; *Walker* v. *Clay*, 21 Ala. 797; *Small* v. *Champeny*, 102 Wis. 61, 78 N. W. 407; *Beavan* v. *M'Donnell*, 26 Eng. L. & Eq. Rep. 540, 10 Exch. 184, 23 L. J. Exch. N. S. 326.

Previous and subsequent state of mind of a party to a contract is also admissible to prove that the other party to the contract had notice of his insanity. *Beavan* v. *M'Donnell*, 26 Eng. L. & Eq. Rep. 540, 10 Exch. 184, 23 L. J. Exch. N. S. 326.

And evidence of the incapacity of a payee when a note was given him is admissible as tending to prove his incapacity to make a valid transfer of it at the time when he subsequently indorsed it. *Peaslee* v. *Robbins*, 3 Met. 164.

[12]*Nichol* v. *Thomas*, 53 Ind. 42; *Ashcraft* v. *De Armond*, 44 Iowa, 229; *Wilkinson* v. *Pearson*, 23 Pa. 117; *Williams* v. *Sapieha* (Tex. Civ. App.) 62 S. W. 72.

Where witnesses give evidence of previous insanity, they may also testify to the state of the party's mind subsequent to the act in question, and that the insanity was continuing and permanent in character. *Jerry* v. *Townshend*, 9 Md. 145.

[13]*Clinton* v. *Estes*, 20 Ark. 216.

The appearance of a party alleged to be insane may be noted at the time of trial, where he does not appear to have changed since the performance of the act in question, with reference to which insanity is claimed. *Koile* v. *Ellis*, 16 Ind. 301.

But the exclusion of evidence of the mental condition of a person making an assignment which is sought to be invalidated, eight months afterwards, after the person had been sent to a lunatic asylum, is not an erroneous exercise of discretion. *Wright* v. *Wright*, 139 Mass. 177, 29 N. E. 380.

And evidence of the condition of a party's mind a year after the act in question may be excluded, in the discretion of the court, as too remote to tend to establish insanity. *White* v. *Crares*, 107 Mass. 325, 9 Am. Rep. 38.

And evidence of the insanity of a party about twenty years before taking out an insurance policy is inadmissible in an action on the policy, for the purpose of charging a false representation in procuring it, or of showing insanity at the time of a subsequent suicide, in the absence of anything tending to show insanity at the time his policy was issued. *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156.

So, in *Dickinson* v. *Barber*, 9 Mass. 225, 6 Am. Dec. 58, it was said that the period of remoteness should not be extended further than several months.

[14]*Knox* v. *Knox*, 95 Ala. 495, 36 Am. St. Rep. 235, 11 So. 125; *Kramer* v. *Weinert*, 81 Ala. 414, 1 So. 26; *Moore* v. *Spier*, 80 Ala. 129; *Tobin* v. *Jenkins*, 29 Ark. 151; *Toomes's Estate*, 54 Cal. 516, 35 Am. Rep. 83; *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Terry* v. *Buffing-*

being allowed in such cases,[15] the remoteness of the facts testified to going to the effect, or weight, or importance to be attached to the evidence, rather than to its admissibility.[16] But such evidence is not admissible as proof of an independent fact, in the absence of evidence as to the mental condition of the testator at the time of making the will.[17] And it is only important as it throws light upon the actual

ton, 11 Ga. 337, 56 Am. Dec. 423; *Stasor* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990; *Colvin* v. *Warford*, 20 Md. 357; *Davis* v. *Calvert*, 5 Gill & J. 269, 25 Am. Dec. 28; *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620; *Conely* v. *McDonald*, 40 Mich. 150; *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Spencer* v. *Terry* (Mich.) 10 Det. L. N. 82, 94 N. W. 372; *Von De Veld* v. *Judy*, 143 Mo. 348, 44 S. W. 1117; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Swails* v. *White*, 149 Pa. 261, 24 Atl. 292; *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Ford* v. *Ford*, 7 Humph. 92; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Carpenter* v. *Hatch*, 64 N. H. 573, 15 Atl. 219.

Evidence of the state of mind of a testator on the day previous to the execution of his will is admissible on a proceeding to contest the will, and where it was made to supply the place of one executed on a previous day, which had been lost, it is part of the *res gestæ*. *Dyer* v. *Dyer*, 87 Ind. 13.

And witnesses with opportunity for observing may testify as to changes in the conduct and appearance of a person whose sanity is in question, as determined by observation made both before and after the designated time, where the question was one as to mental unsoundness beginning at a certain date, indicated by changes in appearance and conduct. *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245.

And permitting a witness in a will contest to state negatively that he did not observe anything peculiar about the mental condition of the testator at a time other than that when the will was executed does not furnish sufficient ground for an exception. *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473.

[15]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473. And see *Obear* v. *Gray*, 73 Ga. 455; *Carpenter* v. *Hatch*, 64 N. H. 573, 15 Atl. 219.

Where unsoundness of mind is proved to have existed on the day a will was made, or instructions were given, it is permissible to trace it both before and after that time, up to the time of the testator's death. *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181.

But statements made by a testator after making his will, relating to transactions which took place after it was made, though tending to show an insane delusion toward one who might have been a beneficiary, are not admissible in evidence to show the existence of such a delusion months before, when the will was made. *Re Merriman*, 108 Mich. 454, 66 N. W. 372.

[16]*Conely* v. *McDonald*, 40 Mich. 150. And see *Ross* v. *McQuiston*, 45 Iowa. 145; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Fairchild* v. *Bascomb*, 35 Vt. 398.

Evidence of subsequent capacity is admissible in a will contest, without regard to length of time, where the claim is weakness and imbecility from great age, though evidence of incapacity should be confined to a reasonable time after the making of a will. *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

And testimony in a will contest, covering a connected period of six years after the execution of a will, is not too remote to be admissible on the question of testamentary capacity, where it is claimed that the testator was afflicted with senile dementia, which, if it existed at all, must necessarily have been of long standing and progressive. *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072. And see *Ashcraft* v. *De Armond*, 44 Iowa, 229.

[17]*Terry* v. *Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Von De Veld* v. *Judy*, 143 Mo. 348, 44 S. E. 1117; *Grubbs* v. *McDonald*, 91 Pa. 236; *Dimond's Estate*, 3 Pa. Dist. R. 554. And see *Bowden* v. *People*, 12 Hun, 85.

So, the condition of the mind of a testator after making his will is irrelevant and inadmissible in a proceeding to con-

condition of his mind at that time.[18] So, evidence, in an action for slander, that the defendant was weak-minded, and at times, before and after speaking the slanderous words, was totally deranged, is competent on the question of his insanity at that time.[19]

It must be left to the presiding judge to determine, upon the facts before him, how far previous and subsequent acts have a tendency to throw light upon the actual condition of the mind at the date of the act in question.[20] And it is for the party offering such evidence to show its competency as against the objection that the acts detailed are previous or subsequent in point of time.[21] The weight of such evidence, with reference to the length of time elapsing, however, is for the determination of the jury.[22]

322. The act itself.— In criminal law, the criminal act and its nature are not admitted in evidence as bearing upon the sanity or insanity of the perpetrator.[23] But the rule appears to be different in civil cases, and where a will is offered for probate it may be considered in connection with other evidence in the case, for the purpose of ascertaining whether the testator had testamentary capacity at the time of its execution;[24] evidence tending to prove a will to be of unnatural

test it, where the provisions of the will depended for their operation upon the nonhappening of events which came to pass. *Magee* v. *McNeil*, 41 Miss. 17, 90 Am. Dec. 354.

[18]*Chrisman* v. *Chrisman*, 16 Or. 127, 18 Pac. 6; *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Philadelphia Trust & S. D. Co.* v. *Drinkhouse*, 17 Phila. 23; *Dickie* v. *Carter*, 42 Ill. 376. And see *Ashcraft* v. *De Armond*, 44 Iowa, 229; *Pavey* v. *Wintrode*, 87 Ind. 379; *Kenworthy* v. *Williams*, 5 Ind. 375.

[19]*Bryant* v. *Jackson*, 6 Humph. 199; *Dickinson* v. *Barber*, 9 Mass. 225, 6 Am. Dec. 58.

[20]*Shailer* v. *Bumstead*, 99 Mass. 112; *McCoy* v. *Jordan* (Mass.) 69 N. E. 358; *Hopkins* v. *Howard*, 20 R. I. 394, 39 Atl. 519.

The interval of time within which the acts, conduct, and habits of a person accused of crime may be reviewed, as bearing upon the question of his sanity at the time of the commission of the act in question, is to be measured with reference to the intervening events. *Com.* v. *Pomeroy*, 117 Mass. 143.

And evidence of character and conduct prior to a certain date is properly rejected in a criminal prosecution in which insanity is alleged, where the claim is that the insanity commenced at that time. *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

Where one party is permitted to offer evidence as to the previous and subsequent condition of mind of a party, the other party should be permitted to cover the same period. *Petefish* v. *Becker*, 176 Ill. 448, 52 N. E. 71.

[21]*Com.* v. *Pomeroy*, 117 Mass. 143.

[22]*Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

Evidence that a man went into the street dressed only in his underclothing does not indicate insanity existing thirty years previous to that time. *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

[23]See *Beasley* v. *State*, 50 Ala. 149, 20 Am. Rep. 292; *State* v. *Stark*, 1 Strobh. L. 479; *Laros* v. *Com.* 84 Pa. 200; *Com.* v. *Mosler*, 4 Pa. 264.

[24]*Curry* v. *Bratney*, 29 Ind. 195; *Summers* v. *Copeland*, 125 Ind. 466, 25 N. E. 555; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899; *Tobin* v. *Jenkins*, 29 Ark. 151; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562. And see *Summers* v. *Copeland*, 125 Ind. 466, 25 N. E. 555.

But the exclusion of a question put

character being admissible, as tending to show want of testamentary capacity;[25] and evidence tending to show consistency of the will with the natural inclinations and previously declared intentions of the testator being admissible, as tending to show testamentary capacity.[26]

323. Declarations and admissions of the party.— Whether declarations and admissions of a party would have any practical or material probative force on the question of his sanity or insanity is the true guide in determining their admissibility in evidence.[27] And declarations of a person accused of crime, made either before or after the criminal act, may be given in evidence on the question of his sanity or insanity, for the purpose of ascertaining the state of his mind.[28]

to a witness in a will contest, who had drawn the will, and had testified that the testator drew his attention to a memorandum respecting a land trade, as to what recollection he had upon the subject, is not error, the testator's recollection, and not that of the witness, being important. *McGinnis* v. *Kempsey*, 27 Mich. 363.

[25]*Roberts* v. *Trawick*, 13 Ala. 68; *Stubbs* v. *Houston*, 33 Ala. 555; *Newcomb* v. *Newcomb*, 96 Ky. 120, 27 S. W. 997; *Barker* v. *Comins*, 110 Mass. 477; *Carpenter* v. *Hatch*, 64 N. H. 573, 15 Atl. 219; *Re Burns*, 121 N. C. 336, 28 S. E. 519; *Ward* v. *Brown* (W. Va.) 44 S. E. 488; *Hollenbeck* v. *Cook*, 180 Ill. 65, 54 N. E. 154; *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 909.

Evidence that a testatrix undertook to devise property not her own is relevant and admissible in a will contest, on the issue of testamentary capacity and undue influence. *Re Buckman*, 64 Vt. 313, 33 Am. St. Rep. 930, 24 Atl. 252.

But where the provisions of a will are claimed to be unnatural because of an alleged gift to a stranger, evidence is admissible, for the purpose of explaining the bequest, as to the way in which the wife of the legatee cared for the testator. *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

And evidence that a testator understood that in order to render his will operative it would be necessary that he should name all his heirs is competent to explain numerous legacies of one dollar each in the will. *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899.

And the exclusion of a certified copy of a record of a suit in equity, and the report of the master therein, fixing the amount of interest of the son in a partnership with his father, in a contest of the father's will, in which defendants claim that the son had transferred his share to his father for the purpose of facilitating the settlement, with the understanding that he would have all his father's estate at death, offered for the purpose of showing that the will was unreasonable, as a ground for involving unsoundness of mind, is not a ground of exception. *Nash* v. *Hunt*, 116 Mass. 237.

[26]*Hammond* v. *Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; *Moore* v. *Moore*, 2 Bradf. 265; *Fitzgerald* v. *Shelton*, 95 N. C. 519.

The contents of a former will may be proved without producing it. *Den* v. *Vaneleve*, 5 N. J. L. 589.

And a will and the probate thereof are not rendered inadmissible in evidence in a will contest by the fact that the probate contained an *ex parte* affidavit of one of the witnesses, stating that the testator was of sound mind. *Summers* v. *Copeland*, 125 Ind. 466, 25 N. E. 555.

[27]*French* v. *State*, 93 Wis. 325, 67 N. W. 706.

Pleading insanity as a defense admits the act charged. *State* v. *Holloway*, 156 Mo. 222, 56 S. W. 734.

[28]*McLean* v. *State*, 16 Ala. 672; *Cawley* v. *State*, 133 Ala. 128, 32 So. 227; *State* v. *Hays*, 22 La. Ann. 39; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Com.* v. *Van Horn*, 188 Pa. 143, 41 Atl. 469; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382. And see *State* v. *Brooks*, 4 Wash. 328, 30 Pac. 147.

The fact that a conversation offered in evidence shows the accused in a criminal prosecution to have been guilty of another crime does not render it incompetent, where it was offered only to show the defendant's mental condition at the time of the interview, and not to reflect upon his connection with the other

So, while declarations of a grantor, made subsequent to the execution of his deed, cannot be given in evidence to invalidate it, declarations made near the time of its execution are admissible on the question of his sanity at the time.[29] And his declarations made both before and after the execution of the deed, tending to show undue influence to induce him to make it, are admissible to the same extent as if it were a will contest.[30] And declarations showing an intent to dispose of the property in the manner in which it was afterwards disposed of are admissible, as tending to show capacity;[31] as are also declarations showing a different intent, for the purpose of proving incapacity.[32] So, declarations of a testator are admissible in a proceeding to contest his will, to show his mental condition at the time of its execution,[33] or to show the presence or absence of insane delu-

crime. *People* v. *Truck*, 170 N. Y. 203, 63 N. E. 281.

And where acts, conduct, and declarations of a person accused of crime are introduced in evidence to prove his insanity at the time of the act, the prosecution, in rebuttal, is not limited to the explanation or denial thereof, but may also offer evidence of other acts, conduct, or declarations tending to show his sanity within the same period. *United States* v. *Holmes*, 1 Cliff. 110, Fed. Cas. No. 15,382.

But declarations are not admissible unless their purpose is disclosed. *State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038.

And declarations made by a person to a physician, as to his condition at a time prior to the making of the declarations, are not admissible in evidence. *People* v. *Hawkins*, 109 N. Y. 408, 17 N. E. 371.

And a confession made by a defendant in a criminal prosecution, while in jail, without being warned that it would be used against him, is not rendered admissible by the fact that the defense was insanity, and the jury were instructed to consider it only on the question of insanity. *Hurst* v. *State* (Tex. Crim. App.) 40 S. W. 264.

Nor are declarations and acts of the defendant tending to show, that he was, on the night of the criminal act, in great fear of his life, admissible as tending to show delusion. *People* v. *Ellsworth*, 127 Cal. 595, 60 Pac. 161.

[29] *Woodcock* v. *Johnson*, 36 Minn. 217, 30 N. W. 894; *Chess* v. *Chess*, 1 Penr. & W. 32, 21 Am. Dec. 350; *Rice* v. *Rice*, 127 Pa. 181, 14 Am. St. Rep. 831, 17 Atl. 888; *Norwood* v. *Marrow*, 20 N. C. 578 (4 Dev. & B. L. 442); *Dinges* v. *Branson*, 14 W. Va. 100.

[30] *Dinges* v. *Branson*, 14 W. Va. 100. And see *Howell* v. *Howell*, 47 Ga. 492; *Rice* v. *Rice*, 127 Pa. 181, 14 Am. St. Rep. 831, 17 Atl. 888; *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129.

[31] *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Howe* v. *Howe*, 99 Mass. 88; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *Muller* v. *St. Louis Hospital Asso.* 5 Mo. App. 390.

[32] *Wilkinson* v. *Pearson*, 23 Pa. 117; *Reel* v. *Reel*, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632.

[33] This proposition is supported by many authorities among which are: *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Nieman* v. *Schnitker*, 181 Ill. 400, 55 N. E. 151; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Mooney* v. *Olsen*, 22 Kan. 69; *Jones* v. *McLellan*, 76 Me. 49; *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620; *May* v. *Bradlee*, 127 Mass. 414; *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Re Brown*, 38 Minn. 112, 35 N. W. 726; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *Crowson* v. *Crowson*, 172 Mo. 691, 72 S. W. 1065; *Boylan* v. *Meeker*, 28 N. J. L. 274; *Waterman* v. *Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Reel* v. *Reel*, 8 N. C. (1 Hawks) 248, 9 Am. Dec. 632; *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Peery* v. *Peery*, 94 Tenn. 328, 29 S. W. 1; *Robinson* v. *Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298; *Thompson* v. *Updegraff*, 3 W. Va. 629; *Sutton* v. *Sadler*,

sions.[34] And the rule of admissibility is the same whether the declarations were consistent with the dispositions made,[35] or show a testamentary intent quite different from that manifested by the instrument.[36]

Declarations and admissions can only be considered, however, on the question of mental capacity.[37] They are not admissible to contradict a will, or show its revocation,[38] or for the purpose of establishing undue influence exercised upon the testator,[39] unless contemporaneously made,[40] or unless there is proof of other facts and circumstances indicating fraud.[41] They are not evidence of facts stated, but are merely admitted as tending to show the operations of the mind.[42] And they diminish in importance as the grade

3 C. B. N. S. 87, 26 L. J. C. P. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

This is the rule in case of senile dementia, though the declarations were made a long time after the execution of the will. *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717.

So, conversations had in the presence of a testator, regarding the condition of his mind, which would necessarily call for some response from him, during which he remained silent, are admissible in a will contest, it being left to the jury whether or not he heard them. *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

[34]*Brace* v. *Black*, 125 Ill. 33, 17 N. E. 66.

[35]*Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Hammond* v. *Dike*, 42 Minn. 273, 18 Am. St. Rep. 503, 44 N. W. 61; *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Brown* v. *Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Sutton* v. *Sadler*, 3 C. B. N. S. 87, 26 L. J. P. C. N. S. 284, 3 Jur. N. S. 1150, 5 Week. Rep. 880.

[36]*Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Boylan* v. *Meeker*, 15 N. J. Eq. 310; *Waterman* v. *Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Sisson* v. *Conger*, 1 Thomp. & C. 564; *Denison's Appeal*, 29 Conn. 399; *Norris* v. *Sheppard*, 20 Pa. 475.

[37]*Turner* v. *Cook*, 36 Ind. 129.

[38]*Reynolds* v. *Adams*, 90 Ill. 134, 32 Am. Rep. 15.

[39]*Dennis* v. *Weekes*, 46 Ga. 514; *Todd* v. *Fenton*, 66 Ind. 25; *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *Harring* v. *Allen*, 25 Mich. 505; *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Peery* v. *Peery*, 94 Tenn. 328, 29 S. W. 1; *Thompson* v. *Updegraff*, 3 W. Va. 629; *Smith* v. *Fenner*, 1 Gall. 170, Fed. Cas. No. 13,046. And see *Bundy* v. *McKnight*, 48 Ind. 502.

[40]See *Todd* v. *Fenton*, 66 Ind. 25; *Waterman* v. *Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Jackson ex dem. Coe* v. *Kniffen*, 2 Johns. 31, 3 Am. Dec. 390. But see *Bates* v. *Bates*, 27 Iowa, 110, 1 Am. Rep. 260.

The admission of declarations and admissions of a party on the question of undue influence depends largely upon the character of the unsoundness attempted to be proved. *Herster* v. *Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342.

[41]*Herster* v. *Herster*, 122 Pa. 256, 9 Am. St. Rep. 95, 16 Atl. 342.

Declarations and admissions of a party are admissible in evidence where the issue is both undue influence and mental incapacity (*Parsons* v. *Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *Mooney* v. *Olsen*, 22 Kan. 69); and also where they tend to show weakness of mind, operated upon by an excessive and undue importunity, though they were made in the absence of the person affected thereby. *Rambler* v. *Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

[42]*Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Comstock* v. *Hadlyme Ecclesiastical Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Mooney* v. *Olsen*, 22 Kan. 69; *Jones* v. *McLellan*, 76 Me. 49;

of capacity increases, and have no value at all when made by a person of sound mind.[43] So, as a general rule, they are regarded as admissible only when made shortly previous or subsequent to the act in question.[44] And it has been held that they must be near enough in point of time to be a part of the *res gestæ*.[45] But this has been denied.[46]

Harring v. *Allen*, 25 Mich. 505; *Pratte* v. *Coffman*, 33 Mo. 76; *Jones* v. *Roberts*, 37 Mo. App. 163; *Gibson* v. *Gibson*, 24 Mo. 227. And see *Stewart* v. *Redditt*, 3 Md. 67; *May* v. *Bradlee*, 127 Mass. 414; *Woodbury* v. *Obear*, 7 Gray, 467; *Wurzell* v. *Beckman*, 52 Mich. 478, 18 N. W. 226; *Frazer* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *State* v. *Dunn* (Mo.) 77 S. W. 848; *Rule* v. *Maupin*, 84 Mo. 587; *Norwood* v. *Marrow*, 20 N. C. 578, (4 Dev. & B. L. 442); *Kachline* v. *Clark*, 4 Whart. 316; *Crocker* v. *Chase*, 57 Vt. 413; *Hoffman* v. *Overbey*, 137 U. S. 465, 34 L. ed. 754, 11 Sup. Ct. Rep. 157.

A party cannot make substantive evidence in his own favor by proving his own declarations out of court, under the claim that his story would afford ground for argument that he was insane. *State* v. *Tatro*, 50 Vt. 483. And see *Bootle* v. *Blundell*, 19 Ves. Jr. 494, 15 Revised Rep. 93.

And testimony of a person accused of crime, to the effect that he was laboring under such a defect of reason at the time of the criminal act as not to know its nature, is inadmissible. *State* v. *Kluseman*, 53 Minn. 541, 55 N. W. 741.

And where a person upon whom a criminal assault was made is an incompetent witness by reason of idiocy or insanity, her assertions or declarations descriptive of the offenses or offender cannot be received in evidence, such declarations being proper only to affect the credibility of the person, after having testified in the cause. *People* v. *McGee*, 1 Denio, 19.

But testimony which is relevant and admissible as bearing upon the mental condition of the accused in a criminal prosecution is not rendered inadmissible by the fact that it prima facie connects the accused with the offense charged. *Cornell* v. *State*, 104 Wis. 527, 80 N. W. 745.

[43]*Tunison* v. *Tunison*, 4 Bradf. 138.

The exclusion of declarations of a person admitted to be sane is not error. *Harden* v. *Hays*, 14 Pa. 91.

And where declarations are given in evidence, it is within the discretion of the trial court to admit evidence that the person making them had first consulted with his lawyer. *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

[44]*La Bau* v. *Vanderbilt*, 3 Redf. 384; *Landis* v. *Landis*, 1 Grant Cas. 248; *Wilkinson* v. *Pearson*, 23 Pa. 117; *Durant* v. *Ashmore*, 2 Rich. L. 184; *Robinson* v. *Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298. But see *McLean* v. *State*, 16 Ala. 672; *Muller* v. *St. Louis Hospital Asso.* 5 Mo. App. 390; *Waterman* v. *Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *People* v. *Hawkins*, 109 N. Y. 408, 17 N. E. 371; *Norwood* v. *Marrow*, 20 N. C. 578, (4 Dev. & B. L. 442); *State* v. *Vann*, 82 N. C. 631; *State* v. *Tilly*, 25 N. C. (3 Ired. L.) 424.

The declarations of a grantor are admissible in evidence in an action to set aside his deed, upon the question of mental capacity, where they were made not more than fifteen months before the alleged insanity began, and not more than eighteen months before the disputed deed. *Rice* v. *Rice*, 127 Pa. 181, 14 Am. St. Rep. 831, 17 Atl. 888.

And the rejection of declarations made some time before the act in question is not error, where the person making them had not been restricted in his proof, and had closed his case without offering them. *State* v. *John*, 30 N. C. (8 Ired. L.) 330, 49 Am. Dec. 396.

[45]*State* v. *Scott*, 8 N. C. (1 Hawks) 24; *Marx* v. *McGlynn*, 4 Redf. 457, Affirmed in 88 N. Y. 357; *Waterman* v. *Whitney*, 11 N. Y. 157, 62 Am. Dec. 71. And see *Rutherford* v. *Norris*, 77 Ill. 397; *Hayes* v. *West*, 37 Ind. 21; *Quisenberry* v. *Quisenberry*, 14 B. Mon. 481; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Cawthorn* v. *Haynes*, 24 Mo. 236; *Gibson* v. *Gibson*, 24 Mo. 227; *Tingley* v. *Cowgill*, 48 Mo. 291; *Spoonemore* v. *Cables*, 66 Mo. 579.

This is the rule when declarations are offered in evidence to establish fraud. *Pratte* v. *Coffman*, 33 Mo. 76.

[46]*Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Dinges* v. *Branson*, 14 W. Va. 100; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658. And

324. Declarations, admissions, and acts of third persons.—The question of the admissibility of declarations and admissions of third persons for the purpose of showing sanity or insanity seems to depend upon whether or not they are against interest. Declarations by a person killed, made before the commission of the homicide, are not admissible to show insanity of the accused, though they were dying declarations.[47] Nor are admissions of friends or relatives of the person killed admissible.[48] Nor are admissions or declarations of relatives or friends of the accused admissible, where the declarants are living and within reach.[49] Declarations of a son, however, who had received a conveyance from his father, as to the capacity of his father, are admissible against him in an action to set aside the deed.[50] And statements, declarations, and admissions by a devisee or legatee in a will, against his interest, to the effect that the testator was incapable of making a will, are generally admissible in favor of the contestant.[51] And so are declarations and admissions of the executors pro-

see *Ross* v. *McQuiston*, 45 Iowa, 145; *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *McIntosh* v. *Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

Declarations and admissions offered in evidence for the purpose of proving unsoundness of mind have been held to be inadmissible under statutes prohibiting a party from giving evidence of conversations with a deceased party relative to any matter in issue between them, when unaccompanied by evidence of insanity at the time. *Howe* v. *Howe*, 99 Mass. 88; *Norwood* v. *Marrow*, 20 N. C. 578 (4 Dev. & B. L. 442); *Crocker* v. *Chase*, 57 Vt. 413. And see *Kaehline* v. *Clark*, 4 Whart. 316.

And so with reference to a statute rendering communications between husband and wife inadmissible. *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689; *Re Evans*, 114 Iowa, 240, 86 N. W. 283.

But the contrary rule, that they are not rendered inadmissible by such statutes, is laid down in *Re Brown*, 38 Minn. 112, 35 N. W. 726.

[47]*State* v. *Welsor*, 117 Mo. 570, 21 S. W. 443; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *State* v. *Spencer*, 21 N. J. L. 197.

[48]*Beck* v. *State*, 76 Ga. 452; *Warren* v. *Com.* 37 Pa. 45.

[49]*State* v. *Porter*, 34 Iowa, 131.

[50]*Boggess* v. *Boggess*, 127 Mo. 305, 29 S. W. 1018. And see *Gee* v. *Ward*, 5 Week. Rep. 579, 7 El. & Bl. 509, 3 Jur. N. S. 692.

But declarations of a father that his son was insane, made while making a provision for him, are not admissible in evidence. *Gray* v. *Obear*, 59 Ga. 675.

So, declarations of an attorney in fact that his principal was *non compos mentis* at the date of a deed executed by the attorney, and at the time of the execution of the power of attorney, are not admissible in evidence to defeat the deed, in behalf of devisees of the principal. *Bensell* v. *Chancellor*, 5 Whart. 371, 34 Am. Dec. 561.

[51]*Wallis* v. *Luhring*, 134 Ind. 447, 34 N. E. 231; *Milton* v. *Hunter*, 13 Bush, 163; *Phelps* v. *Hartwell*, 1 Mass. 71; *Armstrong* v. *Farrar*, 8 Mo. 627; *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Egbers* v. *Egbers*, 177 Ill. 82, 52 N. E. 285. And see *Ducker* v. *Whitson*, 112 N. C. 44, 16 S. E. 854; *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Horn* v. *Pullman*, 10 Hun, 471.

But a legatee who had expressed an opinion that the testator had not sufficient capacity to make a will may be properly permitted, on a contested probate thereof, to explain his change of mind as a result of information with reference to the requirements of law as to what constitutes testamentary capacity. *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

And statements made by the wife of a testator, that he was an old fool and

pounding the will, to that effect, where they were also legatees.[52] And so are declarations and acts of a contestant in favor of sanity, whether made before or after the execution of the will.[53] But when declarations against interest are given, the declarant may insist upon giving the whole conversation;[54] and they must relate to capacity at about the time in question.[55] And declarations of a party having no interest are not admissible because of the fact that he subsequently became interested.[56] So, the rule is prevalent that declarations or admissions of a legatee or devisee as to the mental incapacity of the testator are not admissible where there are other legatees or devisees whose interests may be injuriously affected, such other legatees not being jointly interested,[57] though the contrary doctrine, making such

was deranged, are not admissible in a will contest as admissions concerning his mental condition, when made under circumstances showing that they were the petulant reproaches of an irritable old woman, rather than the expression of an opinion. *Sellars* v. *Sellars*, 2 Heisk. 430.

And an admission of incompetency made a long time after the execution of the will is irrelevant. *Naul* v. *Naul*, 75 App. Div. 292, 78 N. Y. Supp. 101.

And the witness himself cannot be asked if he had not made such declarations. *Roush* v. *Wensel*, 15 Ohio C. C. 133, 8 Ohio C. D. 141.

[52]*Atkins* v. *Sanger*, 1 Pick. 192; *Peeples* v. *Stevens*, 8 Rich. L. 198, 64 Am. Dec. 750; *Re Brown*, 38 Minn. 112, 35 N. W. 726.

But letters of an executor, written before the date of the will, are only admissible to contradict his testimony. *Stevenson* v. *Kingsley*, 8 Pa. Dist. R. 245.

[53]*Ware* v. *Ware*, 8 Me. 42; *Kettemann* v. *Metzger*, 23 Ohio C. C. 61; *Peeples* v. *Stevens*, 8 Rich. L. 198, 64 Am. Dec. 750.

Letters passing between the legatees under a will and the heirs contesting it, with reference to the confinement of the testatrix in an insane asylum, and to her cure and release, are admissible, not only to show her state of mind toward the parties, but also her mental condition. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[54]*Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

[55]*Thompson* v. *Kyner*, 65 Pa. 368; *Hunt* v. *Hunt*, 3 B. Mon. 575.

[56]*Burton* v. *Scott*, 3 Rand. (Va.) 399; *Ware* v. *Ware*, 8 Me. 42. And see *Walker* v. *Jones*, 23 Ala. 448; *Coryell* v. *Stone*, 62 Ind. 307; *Brewer* v. *Ferguson*, 11 Humph. 565.

And declarations of a beneficiary are not admissible to defeat a will where the amount he would receive under it is less than he would take if the testator had died intestate. *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691.

[57]*Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Shorb* v. *Brubaker*, 94 Ind. 165, *Hayes* v. *Burkam*, 67 Ind. 359; *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689; *Dye* v. *Young*, 55 Iowa, 433, 7 N. W. 678; *Re Ames*, 51 Iowa, 596, 2 N. W. 408; *Shailer* v. *Bumstead*, 99 Mass. 112; *Phelps* v. *Hartwell*, 1 Mass. 71; *Wood* v. *Carpenter*, 166 Mo. 465, 66 S. W. 172; *La Bau* v. *Vanderbilt*, 3 Redf. 384, *Naul* v. *Naul*, 75 App. Div. 292, 78 N. Y. Supp. 101; *Thompson* v. *Thompson*, 13 Ohio St. 356; *Nusscar* v. *Arnold*, 13 Serg. & R. 323; *Bovard* v. *Wallace*, 4 Serg. & R. 499; *Boyd* v. *Eby*, 8 Watts, 66; *Dietrich* v. *Dietrich*, 4 Watts, 167, note; *Hauberger* v. *Root*, 6 Watts & S. 434; *Dotts* v. *Fetzer*, 9 Pa. 88; *Clark* v. *Morrison*, 25 Pa. 455; *Dillard* v. *Dillard*, 2 Strobh. L. 89; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Burton* v. *Scott*, 3 Rand. 399; *Forney* v. *Ferrell*, 4 W. Va. 729. And see *Hunt* v. *Hunt*, 3 B. Mon. 575; *Roberts* v. *Trawick*, 13 Ala. 68; *Blakey* v. *Blakey*, 33 Ala. 611; *Coryell* v. *Stone*, 62 Ind. 307.

This is so though a conspiracy between the legatees is alleged, where no preliminary evidence of the conspiracy is offered. *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689.

And it is immaterial on the question

declarations competent, has some support.[58] An admission made by an attesting witness to a will, however, that the testator was not competent at the time the will was made, and that he signed only to attest the signature, or to gratify the testator, is admissible for the purpose of rebutting the prima facie effect of his attestation.[59] And statements made in another connection, that the will was worthless, are admissible in evidence for the purpose of impeaching a witness called to testify to due execution.[60]

325. Letters, private writings, deeds, wills, etc.— Letters and private writings proving nothing on the question of mental capacity are not admissible in evidence on an issue of sanity or insanity, and their rejection is not erroneous.[61] And letters addressed to a person, found among his papers after death, written in reply to communications from him, are not admissible as evidence of his mental capacity, unless he is shown to have exercised some act, judgment, or understanding with reference to them.[62] A letter written by a person accused of crime, however, is admissible in evidence upon a prosecution therefor, to throw light upon the condition of his mind at the time.[63]

of the admissibility of declarations of a legatee where there were other legatees and devisees whose interests might be injuriously affected thereby, whether the declarant was a party to the issue or not. *Boyd* v. *Eby*, 8 Watts, 66.

Declarations and admissions of a legatee, however, are admissible in a will contest, in favor of the contestant, on the question of testamentary capacity, though there were other persons interested, where the whole estate was devised to him. *Nussear* v. *Arnold*, 13 Serg. & R. 323. And see *Ware* v. *Ware*, 8 Me. 42; *Blakey* v. *Blakey*, 33 Ala. 611.

[58] See *Dennis* v. *Weekes*, 46 Ga. 514; *Milton* v. *Hunter*, 13 Bush, 163; *Rogers* v. *Rogers*, 2 B. Mon. 324; *Beall* v. *Cunningham*, 1 B. Mon. 399; *Davis* v. *Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Armstrong* v. *Farrar*, 8 Mo. 627; *M'Craine* v. *Clarke*, 6 N. C. (2 Murph.) 317; *Peeples* v. *Stevens*, 8 Rich. L. 198, 64 Am. Dec. 750; *Brown* v. *Moore*, 6 Yerg. 272.

[59] *Colvin* v. *Warford*, 20 Md. 357; *Townshend* v. *Townshend*, 9 Gill, 506.

[60] *Beaubien* v. *Cicotte*, 12 Mich. 459; *Lewis* v. *Mason*, 109 Mass. 169.

[61] *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882.

A letter of a testator is not admissible on the question of his mental capacity to explain his peculiar actions, where it was not dated, and it did not appear whether it was written at about the time of such actions or not. *Clements* v. *McGinn* (Cal.) 33 Pac. 920.

[62] *Waters* v. *Waters*, 35 Md. 531; *Wright* v. *Doe ex dem. Tatham*, 7 Ad. & El. 313, 2 Nev. & P. 305, 7 L. J. Exch. N. S. 340, Affirmed in 4 Bing. N. C. 489, 5 Clark & F. 670, 6 Scott, 58, 2 Jur. 461; *Morgan* v. *Boys*, cited in 7 Ad. & El. 337; *Handley* v. *Jones*, cited in 7 Ad. & El. 337.

So, letters of a stranger, proved to be insane, are not admissible on an issue as to sanity, for the purpose of showing that insane persons might write rationally. *Ware* v. *Ware*, 8 Me. 42.

[63] *State* v. *Kring*, 64 Mo. 591; *Sayres* v. Com. 88 Pa. 291.

And such a letter is admissible for the purpose of obtaining the opinion of an expert thereon as to his sanity. *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771.

And the admission of a letter written by a person accused of crime, after his arrest, for the purpose of showing his sanity, which was claimed to have been obtained in an illegal manner, is not error, where the defense was permitted to introduce evidence with a view of proving the manner in which it was obtained. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

So, a journal kept by the master of

And where such letters have been destroyed, secondary evidence of their contents may be given.[64] And letters written by a testator either before or after the execution of his will are competent upon the question of his mental capacity and the condition of his mind with reference to the objects of his bounty,[65] as well as to show knowledge of the contents of the will, and assent to its provisions.[66] So, contracts between a contestant of a will and a testator, and checks, letters, receipts, deeds, and other papers of the testator, and his manner of transacting the matters in hand, sufficiently close in point of time to tend to illustrate the condition of his mind at the time the will was made, are admissible on the question of testamentary capacity,[67] and so are diaries kept by the testator;[68] though not as evidence of the fact stated or to prove fraud or undue influence.[69] And a memorandum of facts and suggestions concerning unsettled business, made by a testator for the use of his executors, which is substantially correct, is admissible in a will contest to strengthen the inference arising from a rational will.[70] So, a former will, executed at a time when there was no doubt of the capacity of the testator, and containing provisions similar to those of a later will, is competent, in connection with other evidence, on the contested probate of the latter, on the question as to whether the testator's mind was rational and unbiased at the time of the execution of the second will.[71] And the rule is the same whether

a ship is admissible in evidence in a prosecution against members of the crew for a revolt, to prove his sanity by the style in which it was kept, but not as evidence of any facts stated in it. *United States* v. *Sharp*, Pet. C. C. 118, Fed. Cas. No. 16,264.

[64] *State* v. *Kring*, 64 Mo. 591.

[65] *Marx* v. *McGlynn*, 88 N. Y. 357; *Dominick* v. *Dominick*, 20 Abb. N. C. 286; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 909; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179.

Letters which, though too remote in point of time, if standing alone, to be competent evidence as to the writer's mental condition, are admissible if their subject-matter is repeated in other letters which are competent in point of time. *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410.

[66] *McNinch* v. *Charles*, 2 Rich. L. 229.

[67] *Wise* v. *Foote*, 81 Ky. 10; *Morris* v. *Morton*, 14 Ky. L. Rep. 360, 20 S. W. 287. And see *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717.

But the contents of a bond executed by a testator are not admissible as evidence of his capacity to comprehend or transact business, where it does not appear that he read it or heard it read. *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

[68] *Marx* v. *McGlynn*, 88 N. Y. 357, Affirming 4 Redf. 455; *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

[69] *Marx* v. *McGlynn*, 88 N. Y. 357, Affirming 4 Redf. 455.

Papers made by a testator subsequent to his will, though sometimes admissible, are to be regarded with jealousy, since he is not to be permitted to prove his own sanity. *Wood* v. *Sawyer*, 61 N. C. (Phill. L.) 251; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, 15 Revised Rep. 93.

[70] *Weir's Will*, 9 Dana, 434.

[71] *Tobin* v. *Jenkins*, 29 Ark. 151; *Nieman* v. *Schnitker*, 181 Ill. 400, 55 N. E. 151; *Ross* v. *McQuiston*, 45 Iowa, 145; *Perkins* v. *Perkins*, 116 Iowa, 253, 90 N. W. 55; *Beaubien* v. *Cicotte*, 12 Mich. 459; *Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Muller* v. *St. Louis Hospital Asso.* 73 Mo. 243;

the will was formally executed or a mere draft.[72] And a previous will, making different dispositions of the testator's property, is also admissible on behalf of the contestants.[73]

326. Acts and conduct.—The question as to how one conducted himself in a recent transaction does not call for an opinion as to his sanity, but for a statement as to his conduct and appearance.[74] And every act of the party, and every other circumstance which could possibly aid the jury in correctly determining the question as to his sanity or insanity, is to be admitted, in evidence,[75] whether the acts and conduct of a person would have any practical or material probative force on the question of his sanity or insanity

Rankin v. *Rankin*, 61 Mo. 295; *Den* v. *Vancleve*, 5 N. J. L. 589; *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648; *Kerr* v. *Lunsford*, 3 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493. And see *Fountain* v. *Brown*, 38 Ala. 72; *Love* v. *Johnston*, 34 N. C. (12 Ired. L.) 355; *Dodge* v. *Meech*, 1 Hagg. Eccl. Rep. 612; *Mynn* v. *Robinson*, 2 Hagg. Eccl. Rep. 169; also *dicta* in *Brown* v. *Mitchell*, 87 Tex. 140, 26 S. W. 1059.

In such case, proof of soundness of mind when the former will was made may be admitted. *Nieman* v. *Schnitker*, 181 Ill. 400, 55 N. E. 151.

But refusal to admit proof as to contents of a former will in evidence in a will contest, where it had been destroyed, is not error, in the absence of any statement of counsel as to what were its contents, and as to whether it had any bearing upon the question of the testator's soundness or unsoundness of mind. *Lowder* v. *Lowder*, 58 Ind. 538.

And a will in which the testator made his nephew a residuary legatee, disinheriting his daughter, and a trust deed by him of certain stocks and notes to his former guardian, made for the purpose of carrying the provisions of the will into effect, are too remote and uncertain in character, and open to too many collateral issues, to be admissible as bearing on his mental capacity, in an action attacking the validity of the deed. *Hovey* v. *Hobson*, 55 Me. 256.

[72]*McConnell* v. *Wildes*, 153 Mass. 489, 26 N. E. 1114; *Thornton* v. *Thornton*, 39 Vt. 132.

On an issue of capacity to make a will, directions of the testatrix for the preparation of a will, which was not executed, may be proved, although the will was not shown her after it was prepared. *Brown* v. *Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621.

[73]*Hughes* v. *Hughes*, 31 Ala. 519, Overruling *Roberts* v. *Trawick*, 13 Ala. 68; *Varner* v. *Varner*, 16 Ohio C. C. 386. But see *Kaehline* v. *Clark*, 4 Whart. 316.

But special attention of the jury should not be called to irregularities in a will, as an indication of incapacity, unless more importance is attached to that circumstance than to others. *Stokes* v. *Shippen*, 13 Bush, 180.

And a variance between a declared intention to make a gift and a subsequent deed, constituting a better bargain, does not affect the admissibility of the declarations, in an action to set the deed aside. *Rice* v. *Rice*, 127 Pa. 181, 14 Am. St. Rep. 831, 17 Atl. 888.

[74]*Re Wax*, 106 Cal. 343, 39 Pac. 624.

[75]*Van Deusen* v. *Newcomer*, 40 Mich. 90; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Clark* v. *Periam*, 2 Atk. 337, 9 Mod. 346; and see *Hodges* v. *Scott*, 118 Mass. 530; *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129.

Testimony will not be rejected as irrelevant and immaterial on the issue of insanity merely because the facts testified to by each witness, taken separately, may not prove sanity or insanity to a sufficient extent to qualify him to express his individual opinion upon the question. *First Nat. Bank* v. *Wirebach*, 106 Pa. 37; *McTaggart* v. *Thompson*, 14 Pa. 149.

And the appearance and condition and actions of a person for some time prior to the act in question may be shown to furnish a basis for nonexpert opinions as to his sanity. *State* v. *McDonough*, 104 Iowa, 6, 73 N. W. 357.

Entire conversations should be given; when the witnesses are competent to

being the true guide in determining their admissibility.[76] These rules apply to the acts and conduct of the accused in a criminal prosecution, and they are admissible, whether previous or subsequent to the criminal act,[77] and though not forming a part of the *res gestæ*, whenever they are so connected with, or correspond with, evidence of disordered intellect preceding the offense, as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates.[78] To be admissible, however, the acts and conduct must have been offered with a view of proving insanity as a defense, and not for the purpose of showing disposition, or absence of intent or deliberation.[79]

These rules likewise apply in actions involving the validity of con-

testify to them. *Re Potter,* 161 N. Y. 84, 55 N. E. 387.

[76]*French* v. *State,* 93 Wis. 329, 67 N. W. 706.

Evidence merely calculated to arouse prejudice should not be admitted on an issue as to sanity, where it does not throw light on the question of capacity. *Pierce* v. *Pierce,* 38 Mich. 412.

And the mere fact that a person accused of crime was different from other people in his manner of living, or acting, or speaking, or eating, is not admissible upon the question of his insanity. *Goodwin* v. *State,* 96 Ind. 550.

And the rejection of evidence in a criminal prosecution that the accused ate with a hearty appetite, slept soundly and quietly, and evidenced no remorse or sense of guilt while in jail subsequent to the commission of the crime, is not error. *Com.* v. *Pomeroy,* 117 Mass. 143.

[77]*McLean* v. *State,* 16 Ala. 672; *Cawley* v. *State,* 133 Ala. 128, 32 So. 227; *State* v. *West,* Houst. Crim. Rep. (Del.) 371; *State* v. *Wright,* 112 Iowa, 436, 84 N. W. 541; *State* v. *Hays,* 22 La. Ann. 39; *State* v. *Privitt,* 175 Mo. 207, 75 S. W. 457; *Lake* v. *People,* 1 Park. Crim. Rep. 495; *Cannon* v. *State,* 41 Tex. Crim. Rep. 467, 56 S. W. 351; *United States* v. *Holmes,* 1 Cliff. 98, Fed. Cas. No. 15,382.

Evidence of the declarations, acts, and conduct of a person accused of crime, offered for the purpose of showing his sanity in rebuttal of evidence of insanity, is not objectionable as an attack upon character. *United States* v. *Holmes,* 1 Cliff. 110, Fed. Cas. No. 15,382.

And it is proper, in a criminal prosecution, to permit an officer to describe the conduct of a prisoner as seen by him while looking through a hole prepared in the wall so as to permit him to observe the accused, on the question whether the insanity was real or feigned. *M'Kee* v. *People,* 36 N. Y. 113.

And a defendant in a criminal action, who interposes insanity as a defense, may prove not only irrational and insane acts and conduct, but also facts which may account for such acts, and show an adequate cause for the aberrations of mind. *People* v. *Wood,* 126 N. Y. 249, 27 N. E. 362.

So, a person accused of crime may properly be asked why he pretended insanity. *State* v. *Pritchett,* 106 N. C. 167, 11 S. E. 357.

[78]*Bolling* v. *State,* 54 Ark. 588, 16 S. W. 658. And see *Hoover* v. *State* (Ind.) 68 N. E. 591; *State* v. *Kelley,* 57 N. H. 549.

And testimony of a witness in a criminal prosecution that just after the commission of the offense he asked the accused the amount of a payment he had made, to which he answered correctly, as a witness found by subsequent examination of his book, is not subject to the objection that the book should have been produced, the object not being to prove the account, but the fact that the statement agreed with the book. *State* v. *Hoyt,* 47 Conn. 518, 36 Am. Rep. 89.

[79]*Sindram* v. *People,* 88 N. Y. 196, Affirming 1 N. Y. Crim. Rep. 448; *State* v. *Welsor,* 117 Mo. 570, 21 S. W. 443.

And they must have some tendency toward showing insanity; violence toward another than the person killed is

tracts or deeds of alleged lunatics,[80] and to acts and conduct of a testator, whether before, at the time, or after the making of his will.[81] And it is competent to show that the testator was erratic, eccentric, unsettled, and excitable,[82] or that he made improvident bargains,[83] or that he had attempted to commit suicide.[84] And evidence that the acts, conduct, and habits of a person whose sanity was in question were changed and unnatural, and different from what they had previously been, is admissible as tending to show insanity,[85] or the existence of an insane delusion.[86] And where evidence of the acts and conduct of a person alleged to be insane has been given to prove his insanity, the other side is not limited to an explanation or denial of the particular act or conduct, but may offer evidence of other acts or

not admissible to show insanity in one accused of homicide. *State* v. *Marshall*, 35 Or. 265, 57 Pac. 902.

[80]*Howe* v. *Howe*, 99 Mass. 88.

[81]*Boylan* v. *Meeker*, 28 N. J. L. 274. And see *Haines* v. *Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620.

The fact that before his will was made a testator had conveyed away some of the property which he attempted to dispose of by will is admissible in a proceeding to contest the will. *Fountain* v. *Brown*, 38 Ala. 72.

And so is a claim by a testator to own more property that he actually does. *Waugh* v. *Moan*, 200 Ill. 298, 65 N. E. 713.

But a statement of a witness in a will contest, that the testator transacted no business, unless selling things that did not belong to him could be called transacting business, is properly excluded. *Re Blood*, 62 Vt. 359, 19 Atl. 770.

[82]*Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153. And see *Watson* v. *Anderson*, 11 Ala. 43; *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

But the fact that a testator, while traveling with one of his sons, wanted to stop at another man's house to see his daughter, is inadmissible on the question of testamentary capacity. *Rice* v. *Rice*, 53 Mich. 432, 19 N. W. 132.

And the fact that a testator was so irritable and abusive to his father that the doctors forbade his coming into the father's sick room is not admissible as bearing upon his mental condition a few hours later, when he made his will. *Re Blood*, 62 Vt. 359, 19 Atl. 770.

[83]*Re Carmichael*, 36 Ala. 514; *Stubbs* v. *Houston*, 33 Ala. 555; *Lewis* v. *Mason*, 109 Mass. 169.

And a transfer of property by a testator, for the purpose of better enabling him to contest a previous contract, is admissible upon the question of his testamentary capacity. *Stubbs* v. *Houston*, 33 Ala. 555.

[84]*Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620.

[85]*Watson* v. *Anderson*, 11 Ala. 43; *Conely* v. *McDonald*, 40 Mich. 150; *Bitner* v. *Bitner*, 65 Pa. 347; *Fairchild* v. *Bascomb*, 35 Vt. 398.

The question whether there was apparent change in a man's intelligence or understanding, or want of coherency in his remarks, is not a matter of opinion, but one of fact, as to which any witness who had opportunity to observe him may testify. *Barker* v. *Comins*, 110 Mass. 477.

But the fact that a testator did not keep his buildings in as good repair in the latter part of his life as previously is not admissible for the purpose of showing testamentary incapacity. *Hamilton* v. *Hamilton*, 10 R. I. 538.

[86]*Haines* v. *Hayden*, 95 Mich 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Titus* v. *Gage*, 70 Vt. 14, 39 Atl. 246.

And evidence of illtreatment of a testatrix by her husband, and of his conduct, reputation, and character with reference to other women, so far as they were known to her, are admissible in evidence in a will contest in which it was alleged that she was possessed of the insane delusion that he held improper relations with other women. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

conduct, tending to show that he was sane within the same period.[87] Preparations made by a party committing a murder, and subsequent conversation indicating that he understood what he was doing, may be considered on the question of his sanity as well as on that of premeditation.[88] And conduct or conversation showing subsequent knowledge of the contents of an instrument is admissible to show sanity when it was made.[89]

327. Surrounding circumstances.— A very broad inquiry is permitted, on the question of sanity or insanity, into the whole chain of surrounding circumstances attending the act in question, it being deemed to embrace all the important preliminaries.[90] And anything which tends to show the person's mental condition and the annoyances to which he was subject, and his susceptibility to the influence of those around him, is admissible in evidence.[91] In determining whether the

And where evidence of strangeness of conduct toward a particular person has been introduced by a contestant in a will contest to support an allegation of partial insanity, the propounder may show similar conduct toward other persons. *Wood* v. *Sawyer*, 61 N. C. (Phill. L.) 251.

But the habit of preserving worthless papers does not indicate insanity, where the person preserving them believed they might be valuable to him. *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

[87]*United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *United States* v. *Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247; *Hall* v. *State*, 31 Tex. Crim. Rep. 565, 21 S. W. 368; *People* v. *Miles*, 143 N. Y. 383, 38 N. E. 456. And see *Com.* v. *Brayman*, 136 Mass. 438; *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *Beaubien* v. *Cicotte*, 12 Mich. 459; *State* v. *Peacock*, 50 N. J. L. 34, 11 Atl. 270.

Evidence that a widow, upon the death of her husband, took into her house to live with her a man who had abandoned his own family, and of their living together for several years as husband and wife, is admissible on an application for the appointment of a conservator for her, upon the ground that, by reason of her debauched habits, she had become incapable of taking care of herself and managing her property. *Wickwire's Appeal*, 30 Conn. 86.

[88]*Cole's Trial*, 7 Abb. Pr. N. S. 321.

And evidence of improper conduct between a father and daughter is relevant and material in a prosecution against a father for murder, where the defense claimed that he became insane from fear that the person he killed entertained improper relations toward the daughter. *People* v. *Lane*, 101 Cal. 513, 36 Pac. 16.

[89]*Sargent* v. *Burton*, 74 Vt. 24, 52 Atl. 72.

[90]*Beaubien* v. *Cicotte*, 12 Mich. 459; *Tobin* v. *Jenkins*, 29 Ark. 151; *Boughton* v. *Knight*, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562. And see *Grant* v. *Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Henry* v. *Fine*, 23 Ark. 417; *Davis* v. *Rogers*, 1 Houst. (Del.) 44; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *McGinnis* v. *Kempsey*, 27 Mich. 363; *Re Merriman*, 108 Mich. 454, 66 N. W. 372; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Hepler* v. *Hosack*, 197 Pa. 631, 47 Atl. 847.

[91]*Reynolds* v. *Adams*, 90 Ill. 134, 32 Am. Rep. 15. And see *Greenley* v. *State*, 60 Ind. 141; *Stevens* v. *Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *McCarty* v. *Com.* 24 Ky. L. Rep. 1427, 71 S. W. 656.

The fact that a father, immediately before killing a person, received the information that such person had seduced his daughter, whether the information is true or not, is competent evidence in a prosecution for the homicide, to be considered with other evidence as bearing upon his plea of insanity. *Ragland* v. *State*, 125 Ala. 12, 27 So. 983.

But where it is claimed that the accused committed a murder while insane, and that the insanity was caused by the discovery of improper relations between

act is one of real or pretended insanity, the opportunity of the person to learn the symptoms of insanity may be shown.[92] But circumstances tending to show a state of frenzy can only be admitted when so near the time in question that there would not have been opportunity for the passion to subside.[93] In contract matters, the circumstance of inadequacy of consideration may be considered,[94] though it must have been so great as to be inconsistent with good faith upon the part of the other party.[95] And the pecuniary condition, means, and ability of a testator and his beneficiaries, and the contestants of the will, may be considered in determining whether the testator appreciated his relations to them.[96] But the fact that a testator had derived

the person killed and his wife, evidence that a few months previous to their marriage he had sought to procure improper relations between her and others, for purposes of gain, is also admissible. *State* v. *Bryant*, 93 Mo. 273, 6 S. W. 102.

And where it appears that the wife of a person committing a homicide had confessed to her husband that she had been guilty of improper conduct with the person killed, and that the confession was followed by great anger and mental depression on his part, evidence that she had been seen with the deceased under suspicious circumstances is not admissible, since it was her statement that is claimed to have deprived him of reason, and not the truth thereof. *People* v. *Hurtado*, 63 Cal. 288.

And such circumstances are merely admissible for the purpose of showing the state of mind of the accused, and should not be permitted to influence the verdict or sentence. *McCarty* v. *Com.* 24 Ky. L. Rep. 1427, 71 S. W. 656.

[92]*People* v. *Lake*, 2 Park. Crim. Rep. 215.

[93]*Sanchez* v. *People*, 22 N. Y. 147. And see *Sawyer* v. *State*, 35 Ind. 80.

[94]*Henry* v. *Fine*, 23 Ark. 417.

So, evidence that a maker of promissory notes of a large amount, made as a gift to a public enterprise, was a man of great wealth, is admissible on the question of his soundness of mind and capacity to make the notes. *School District* v. *Sheidley*, 138 Mo. 672, 37 L. R. A. 406, 60 Am. St. Rep. 576, 40 S. W. 656.

[95]*Cavender* v. *Waddingham*, 5 Mo. App. 487.

And evidence in an action upon a contract made with an alleged lunatic, that when he signed it he was security for the other party in a large amount, and that the other party had no means of credit, is inadmissible. *Noel* v. *Karper*, 53 Pa. 97.

So, a suspicion as to the character of a conveyance by a son to his father, that might be engendered by failure to produce the father as a witness in defense of the conveyance, cannot be used as evidence that the conveyance was fraudulent, where the father's mind was so impaired that no reliance could be placed upon his testimony. *Woodhull* v. *Whittle*, 63 Mich. 575, 30 N. W. 368.

[96]*Sim* v. *Russell*, 90 Iowa, 656, 57 N. W. 601; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Kenworthy* v. *Williams*, 5 Ind. 375; *Stubbs* v. *Houston*, 33 Ala. 555; *Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627; *Crocker* v. *Chase*, 57 Vt. 413, *Fairchild* v. *Bascomb*, 35 Vt. 398.

But the fact that the executor of a will was the father of the legatee, who was a stranger, and that the executor was a wealthy man, is not relevant on the issue of the testator's capacity. *Murphree* v. *Senn*, 107 Ala. 424, 18 So. 264.

And the amount of property possessed by a woman when she married is not admissible in evidence in a proceeding to contest the will of her husband upon the ground of unsoundness of mind. *Willett* v. *Porter*, 42 Ind. 250.

Nor is the fact that a person who formerly lived with the testator was poor, and therefore a more natural object of his bounty than the legatee named, admissible to show testamentary incapacity. *Re Merriman*, 108 Mich. 454, 66 N. W. 372.

And refusal to permit the contestant of a will to prove what certain property was worth is not reversible error in a

a large property from inheritance, and died poor, is not admissible to show unsoundness of mind.[97] And the rule which permits evidence as to pecuniary condition, means, and ability of beneficiaries in a will and those who might have been benefited, with a view to determining whether the testator appreciated his relations to them, and exhibited a disposing mind, has no application in case of a gift, accompanied by delivery.[98]

So, circumstances tending to show the exercise of sound judgment on the part of the testator are competent for the purpose of establishing his testamentary capacity.[99] And the character and motives of the persons surrounding a testator may be shown.[100] Likewise, evidence tending to show the want of any real or apparent cause for a belief alleged to be a delusion is competent and material,[1] as is also evidence of circumstances tending to show that a belief alleged to be a delusion was founded on fact.[2] Evidence of the good character of the contestants of a will, however, is inadmissible on the question of the testator's capacity.[3] Nor is the sanity of a testator to be determined by his religious creed, unless it is so absurd as to afford evidence of unsoundness of mind, though it may be shown for the purpose of showing his state of mind.[4]

328. Relationship between parties.— The relationship and feeling between parties concerned in the commission of a crime is proper to be considered in a prosecution therefor, in connection with their men-

will contest, where it was claimed and denied that the decedent had sold it for less than it was worth. *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493.

[97] *Hall* v. *Hall*, 17 Pick. 373.

[98] *Crum* v. *Thornley*, 47 Ill. 192.

[99] *Brownfield* v *Brownfield*, 43 Ill. 147.

It is competent, on the question of testamentary capacity, to show that a testator who had been confined in an insane asylum was sane, but remained there voluntarily. *Martin* v. *Johnston*, 1 Fost. & F. 122.

But evidence that other persons, while inmates of an insane asylum, had given intelligent depositions and been permitted to testify in court, is not admissible in a will contest, where the testatrix was confined in an asylum at the time of making the will. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[100] *Nusscar* v. *Arnold*, 13 Serg. & R. 323; *Frary* v. *Gusha*, 59 Vt. 257, 9 Atl. 549.

That the beneficiary was the testator's mistress may be shown. *Smith* v. *Henline*, 174 Ill. 184, 51 N. E. 227.

And evidence in a will contest that a woman whom the testator claimed to be his daughter, whom he took into his household, resembled one of his daughters, and was in fact his illegitimate daughter, is admissible on the question of his sanity. *Johnson* v. *Armstrong*, 97 Ala. 731, 12 So. 72.

[1] *Mullins* v. *Cottrell*, 41 Miss. 291; *Mills's Appeal*, 44 Conn. 484. And see *Burkhart* v. *Gladish*, 123 Ind. 337, 24 N. E. 118; *Florey* v. *Florey*, 24 Ala. 241.

And evidence that statements in a will that the testator had advanced designated sums of money to persons named were erroneous is competent in a will contest, for the purpose of showing the mental condition of the testator, but not to contradict the will. *Lamb* v. *Lamb*, 105 Ind. 456, 5 N. E. 171.

[2] *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491.

[3] *Tudor* v. *Tudor*, 17 B. Mon. 383.

[4] *Mullins* v. *Cottrell*, 41 Miss. 291.

tal condition and their surrounding circumstances.[5] And expressions of hostile feeling by the person killed toward the accused in a prosecution for homicide are admissible, where it is claimed that the crime was committed under an insane delusion that the deceased and others were engaged in a conspiracy against him.[6] So, evidence tending to show the relationship existing between a testator and the natural objects of his bounty is admissible on an issue of testamentary incapacity or undue influence.[7] And evidence of hostility and aversion to those who are bound to the testator by ties of kindred is admissible on the question of insanity, not alone because of the existence of the hostility, but because, if without cause, it would tend to show delusion.[8] And evidence of affectionate relations between a testator and the natural objects of his bounty is admissible as tending to show that the subsequent exclusion of such objects was the result of mental de-

[5] *Crawford* v. *Hoeft*, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870; *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 901. And see *Cole's Trial*, 7 Abb. Pr. N. S. 321; *People* v. *Wood*, 126 N. Y. 249, 27 N. E. 362.

But evidence in a prosecution of a person accused of killing his wife and her paramour, of acts of infidelity on her part, not known to the husband, is inadmissible. *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739.

And proof of statements made by a person accused of killing his wife, to the witnesses, from time to time before the homicide, that he was greatly attached to her, is not admissible in a prosecution for the killing. *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664.

[6] *Com.* v. *Wilson*, 1 Gray, 339.

But the fact that a witness bore ill-will toward a person alleged to be insane, at a time when he testified in a proceeding to test her sanity, is not competent evidence in an action by the witness against her for slander in charging him with perjury committed while so testifying. *Hutts* v. *Hutts*, 62 Ind. 214.

[7] *Staser* v. *Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Carter* v. *Dixon*, 69 Ga. 82; *Dunham's Appeal*, 27 Conn. 192; *Spratt* v. *Spratt*, 76 Mich. 384, 43 N. W. 627; *Crocker* v. *Chase*, 57 Vt. 413.

Evidence as to the amount and quality of labor performed for a testator by his children is admissible in a will contest, as tending to throw light upon his mental condition, though it would not be so if the labor was performed more than twenty-five years before. *Burkhart* v. *Gladish*, 123 Ind. 337, 24 N. E. 118. And see *Maddox* v. *Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734, 21 S. W. 499; *Canfield* v. *Fairbanks*, 63 Barb. 462.

And intemperate habits of relatives of a testatrix may be proved on an issue of testamentary incapacity and undue influence, as tending to show her feelings toward them, and to explain why she left them nominal legacies. *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899; *Fairchild* v. *Bascomb*, 35 Vt. 398.

And a witness in a will contest in which imbecility is alleged, who is called on to impeach the will, may be asked on cross-examination, whether he had ever accepted a devise under it. *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

[8] *Turner* v. *Rusk*, 53 Md. 65; *Brown* v. *Ward*, 53 Md. 376, 36 Am. Rep. 422; *Frary* v. *Gusha*, 59 Vt. 257, 9 Atl. 549; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179.

So, evidence that a father was very much cast down, and thought his children were not using him right, and were wasting his property, and that he wanted somebody to take care of it, is admissible in a lunacy proceeding, as tending to show that he was subject to delusions. *Smith* v. *Hickenbottom*, 57 Iowa, 733, 11 N. W. 664.

But evidence that a witness had been forbidden, by the contestant of a will, to go to see the testatrix, is not admissible in a proceeding to contest the will as tending to show testamentary incapacity, or undue influence. *Eckert* v. *Flowry*, 43 Pa. 46.

cay;[9] and so is evidence that a testator had received the larger portion of his father's estate, where it appears that he intended to return part of it by his will.[10] Evidence that a testator's widow, in his lifetime, and after the will was made, had filed a petition for divorce, however, which was pending at his death, is inadmissible.[11] And evidence as to improper conduct upon the part of a testator, or that one of the devisees had attempted to cast shame and disgrace upon his memory, is also irrelevant.[12] And that an alleged lunatic was controlled by another, is not admissible in a lunacy proceeding,[13] though it may be shown that a party was treated as a lunatic or otherwise by his friends.[14]

329. Physical and mental condition.— Independently of any question of sanity or insanity, the defendant in a criminal action has the right to have his general physical, as well as his mental, condition at the time of the commission of the act, explained to the jury.[15] And the character and quality of his mind, as to whether it was weak or strong, is a material fact where the defense is insanity.[16] Every-

[9] *Bost* v. *Bost*, 87 N. C. 477.

And evidence of the general good character and conduct of the wife of a testator's son is admissible on the question of imbecility and fraud in a will contest, where the testator had disinherited his son on account of her supposed extravagance. *Dietrick* v. *Dietrick*, 5 Serg. & R. 207.

That the reputation of the wife of a testator, whom he had recently married, was not good, however, is inadmissible in a proceeding to contest his will. *Thomas* v. *Stump*, 62 Mo. 275.

[10] *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

But evidence that a testator sold lumber as agent of his son-in-law, and the purchaser became embarrassed, and the son-in-law suffered a loss greater in amount than any advancements he had received from his father-in-law, is not admissible upon the theory that the advancements were made for the purpose of offsetting the loss, and that consequently there was no reason for giving his wife a smaller share than the other heirs. *Stokes* v. *Shippen*, 13 Bush, 180.

[11] *Willett* v. *Porter*, 42 Ind. 250.

[12] *Carpenter* v. *Calvert*, 83 Ill. 62.

[13] *Re Carmichael*, 36 Ala. 514.

And a petitioner in an inquisition may be asked if he had not offered to drop the matter if paid a certain sum. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

[14] *Williams* v. *Sapieha* (Tex. Civ. App.) 62 S. W. 72; *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541.

But statements by a witness that a wife treated her husband as a parent would treat a child are inadmissible to prove the insanity of the husband, being a mere expression of opinion. *Waters* v. *Waters*, 35 Md. 531.

[15] *Sage* v. *State*, 91 Ind. 141; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596; *Atty. Gen.* v. *Parnther*, 3 Bro. Ch. 441. And see *Miller* v. *State* (Tex. Crim. App.) 71 S. W. 20.

And evidence in a criminal prosecution in which it appeared that the accused was addicted to the habitual and excessive use of opium, and that, at the time of the alleged commission of the offense, he had been deprived of his customary supply, and as to the effect such deprivation would have upon his mental condition, is admissible as tending to show whether he was in such a mental condition as to be competent to commit the crime. *Rogers* v. *State*, 33 Ind. 543.

[16] *People* v. *Worthington*, 105 Cal. 166, 38 Pac. 689; *Fain* v. *Com.* 78 Ky. 183, 39 Am. Rep. 213.

And the competency of evidence in a prosecution for homicide, that a communication was made to the accused which caused him to become insane, where there was also evidence tending to show head injury and a diseased condition of the brain, is not affected by the fact that the homicide was committed de-

thing relating to the physical and mental history of the accused is relevant on that question.[17] But evidence as to the temperament and disposition of the accused is not admissible, where it is intended, not to show insanity or an insane impulse, but only to show an excitable temperament and momentary loss of self-government.[18] And evidence of peculiarity, eccentricity, nervousness, excitability, or inordinate passion, is not admissible to show insanity, or anything from which insanity could be inferred.[19] So, the age, health, mode of life, manners, conversation, and conduct of a party to a contract or deed, and the character and progress of decay of his mental faculties, may be shown in an action to set it aside on the ground of imbecility or sinister influences.[20] And the age and physical and mental condition of a testator are admissible for consideration in determining his testamentary capacity;[21] though these cannot be shown from the looks

liberately. *People* v. *Wood*, 126 N. Y. 249, 27 N. E. 362.

But the mother of a person on trial for homicide who sets up insanity as a defense cannot be permitted to tell what effect fits, which she testified he had when two years old, had on him, or whether they rendered him unconscious or not. *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742.

[17]*Guiteau's Case*, 10 Fed. 161. And see *Martin* v. *Baker*, 135 Mo. 495, 36 S. W. 369; *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541; *Miller* v. *State* (Tex. Crim. App.) 71 S. W. 20; *Spear* v. *Sweeney*, 88 Wis. 545, 60 N. W. 1060.

Where a person on trial for homicide who interposes epileptic insanity as a defense testifies in his own behalf, to his own insanity, the court may direct the attention of the jury, without comment, to his appearance and conduct as facts for their consideration with the other testimony. And evidence of neighbors that they had never seen him have an epileptic fit, but had seen him drunk, is admissible as tending to show that the stupor which he attributed to epilepsy was really due to drink. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

But where positive evidence of a testatrix's incapacity has been given, and it is shown that she had an epileptic attack shortly after the execution of her will, evidence that in nine cases out of ten paralysis does not produce any effect on the mind is incompetent. *Landis* v. *Landis*, 1 Grant's Cas. 248.

[18]*Jacobs* v. *Com.* 121 Pa. 586, 6 Am. St. Rep. 802, 15 Atl. 465; *State* v. *Flowers*, 58 Kan. 702, 50 Pac. 938.

And evidence in a prosecution for larceny, that about three years prior to the alleged offense, and also since the accused had been in jail, he had been subject to epileptic fits which had weakened his mind, and would tend to account for contradictory statements made by him about the possession of the stolen money, is not admissible unless followed by proof that such fits rendered him irresponsible for his acts. *Gross* v. *State*, 62 Md. 179.

[19]*Com.* v. *Cleary*, 148 Pa. 26, 23 Atl. 1110; *Sindram* v. *People*, 1 N. Y. Crim. Rep. 448, Affirmed in 88 N. Y. 196. And see *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

In *Porter* v. *State*, 135 Ala. 51, 33 So. 694, however, it was held that nervousness, sleeplessness, restlessness, and extravagant acts on the part of the accused, are proper to be proved in a prosecution for homicide, but whether they amount to symptoms of insanity is a question of fact for the jury.

[20]*Doe ex dem. Guest* v. *Becson*, 2 Houst. (Del.) 246; *Hendrix* v. *Money*, 1 Bush, 306.

[21]*Sutton* v. *Sutton*, 5 Harr. (Del.) 459; *Davis* v. *Rogers*, 1 Houst. (Del.) 44; *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899; *Egbert* v. *Egbert*, 78 Pa. 326; *Halley* v. *Webster*, 21 Me. 461; *Daly* v. *Daly*, 183 Ill. 269, 55 N. E. 671; *Lingle* v. *Lingle* (Iowa) 96 N. W. 708; *Sim* v. *Russell*, 90 Iowa, 656, 57 N. W. 601.

And a witness in a will contest, called

of the testator, as portrayed by his photograph.[22] And evidence tending to show failure of memory is admissible;[23] and the question whether the eyesight of a testator was good enough to enable him to recognize the witnesses when near to him, if in his right mind, may be asked.[24] So, evidence showing a knowledge on the part of a person deriving a benefit under a will, of the weak state of the testator's mind, is admissible as evidence in chief, where it is sought to be shown that he exercised an influence to have the will made.[25]

330. Hereditary insanity.—Inquiry into the mental condition of the immediate family and relatives of a person whose sanity is in question is permissible,[26] it having been established that the insanity in question was of an hereditary form.[27] This rule is applied to the insanity of a father, mother, brothers, sisters, uncles, nieces, and grandparents.[28] But this cannot be proved by reputation, tradition,

to prove the insanity of the testatrix, may be asked on cross-examination whether the testatrix did not attend a certain banquet, since it might be an important fact, if true, that she was able to attend. *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

But the exclusion of evidence of the mental and moral condition of a testatrix seventy-eight years old when her will was executed, fifteen months afterwards, when she was affected with paralysis, and of evidence of her bodily and mental condition at subsequent periods until her death at the age of ninety-one, offered to show that she was weak in body and mind when she executed it, is not sufficient ground for exception. *Shailer* v. *Bumstead*, 99 Mass. 112.

And such evidence as to physical condition has been held inadmissible. *The Berry Will Case*, 93 Md. 560, 49 Atl. 401.

[22] *Varner* v. *Varner*, 16 Ohio C. C. 386.

[23] *Fountain* v. *Brown*, 38 Ala. 72; *Aubert* v. *Aubert*, 6 La. Ann. 104.

[24] *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648.

[25] *Dennis* v. *Weekes*, 46 Ga. 514.

But the fact that the ordinary effect of morphine is to weaken the power of the will is immaterial in an action to set aside a will on the ground of undue influence, where the evidence shows that there was in fact no weakening, and no effort to control the testator. *Bush* v. *Isle*, 89 Ky. 393, 12 S. W. 762.

[26] *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *State* v. *Windsor*, 5 Harr. (Del.) 512; *Bradley* v. *State*, 31 Ind. 492; *State* v. *Felter*, 25 Iowa, 67; *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541; *Baxter* v. *Abbott*, 7 Gray, 71; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Walsh* v. *People*, 88 N. Y. 458; *Coughlin* v. *Poulson*, 2 MacArth. 308; *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356; *Hagan* v. *State*, 5 Baxt. 615; *Queen* v. *Tucket*, 1 Cox C. C. 103, 4 L. T. 50. But see *M'Adam* v. *Walker*, 1 Dow P. C. 148.

[27] *Queen* v. *Tucket*, 1 Cox C. C. 103, 4 L. T. 50. And see *State* v. *Simms*, 68 Mo. 305.

The insane relatives must have been lineal, not collateral; they must have been in the direct line of ascent or descent. *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007.

Where a defendant in a prosecution for murder in which insanity is alleged introduced evidence that his sister had been insane, the prosecution may inquire as to what caused the insanity, in order to show that it was not hereditary. *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

[28] *State* v. *Felter*, 25 Iowa, 67; *Baxter* v. *Abbott*, 7 Gray, 71; *People* v. *Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Queen* v. *Tucket*, 1 Cox C. C. 103, 4 L. T. 50.

or hearsay.[29] And such evidence is not relevant or admissible to show insanity, in the absence of proof or an offer to show that it was hereditary,[30] or that the disease was one which affects the mind.[31] And it must appear that the alleged insanity was not a temporary malady, but that it was of the same species as that with which other members of the family had been afflicted.[32] And in order to render hereditary insanity admissible, there must also be evidence tending to prove that the person whose act was questioned was himself insane;[33] or that the act was without apparent motive;[34] though it need not be such as to raise a reasonable doubt of sanity.[35]

331. Reputation and hearsay.— Family tradition is not available to prove a predisposition to insanity.[36] And insanity cannot be proved by reputation or public opinion;[37] nor can it be proved by

[29]*Snell* v. *United States*, 16 App. D. C. 501; *Coughlin* v. *Poulson*, 2 MacArth. 308.

But reputation in the family or family tradition as to previous cases of insanity may be proved in such case. *State* v. *Windsor*, 5 Harr. (Del.) 512.

[30]*Reichenbach* v. *Ruddach*, 127 Pa. 564, 18 Atl. 432; *State* v. *Van Tassel*, 103 Iowa, 6, 72 N. W. 497.

In Kentucky the action of the court below in admitting or rejecting evidence of hereditary taint will not be revised on appeal. *Wright* v. *Com.* 24 Ky. L. Rep. 1838, 72 S. W. 340.

That the father of a testatrix was of intemperate habits in early life, standing alone, is not admissible in evidence as tending to prove insanity of testatrix. *Titus* v. *Gcge*, 70 Vt. 14, 39 Atl. 246.

And the insanity of a grandchild, not of an hereditary character, and the imbecility of another grandchild, caused by disease with which the grandparent was not afflicted, is not proof of the grandparent's insanity. *Hawley* v. *Griffin* (Iowa) 82 N. W. 905.

[31]*Walsh* v. *People*, 88 N. Y. 458.

And where a testator is shown to have had three strokes of paralysis, one before his will and the second a short time afterwards, and the third resulting in his death, evidence that the same disease had affected his ancestors and blood relatives is properly excluded, since it does not show the effect of the malady upon him. *Mecker* v. *Mecker*, 75 Ill. 260.

[32]*State* v. *Christmas*, 51 N. C. (6 Jones L.) 471. And see *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63.

And evidence that a person on trial for homicide had one child who was subject to epileptic fits of the same character as those with which he claims to be afflicted is inadmissible as tending to show hereditary insanity. *Hall* v. *Com.* 22 W. N. C. 25.

[33]*Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *People* v. *Smith*, 31 Cal. 466; *Murphy* v. *Com.* 92 Ky. 485, 18 S. W. 163; *Berry* v. *Safe Deposit & T. Co.* 96 Md. 45, 53 Atl. 720; *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63; *Laros* v. *Com.* 84 Pa. 200; *Doe ex dem. Mather* v. *Whitefoot*, 8 Car. & P. 270. And see *State* v. *Cunningham*, 72 N. C. 469; *Snow* v. *Benton*, 28 Ill. 306.

Evidence that several of the family of a testatrix had been afflicted with paralysis in advanced age, accompanied by enfeeblement of the mental and moral powers, and that it was a family tendency, is not admissible in a will contest as bearing upon the question of her mental condition, where the only foundation laid therefor consisted of evidence that two years before she had complained of feeling numb, and at that time and afterwards she was physically weak and somnambulent and mentally inactive, and that she had paralysis fifteen years after the execution of the will. *Shailer* v. *Bumstead*, 99 Mass. 112.

[34]*People* v. *Smith*, 31 Cal. 466.

[35]*Jones* v. *People*, 23 Colo. 276, 47 Pac. 275.

[36]*Com.* v. *Moss*, 6 Kulp. 3[illegible]; *Coughlin* v. *Poulson*, 2 MacArth. 308; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730.

[37]*People* v. *Pico*, 62 Cal. 50; *State* v.

hearsay, or by what somebody else said.[38] Questions put to the witnesses in a will contest in which insanity is alleged, respecting family history, however, are not objectionable on the ground of being hearsay.[39] And conversations of a testator are admissible upon the question of insanity, to show the state of his mind.[40] But an inference of testamentary incapacity cannot be drawn from conversations between the testator and another, which are not disclosed to the jury,[41] though evidence of the universally good character, as a man and citizen, of a person accused of homicide, who pleads insanity, is competent as tending to show that he could not have been sane at the time the deed was done.[42]

332. Adjudications and certificates of lunacy.—Inquisitions of lu-

Hoyt, 47 Conn. 518, 36 Am. Rep. 89; *Snell* v. *United States*, 16 App. D. C. 501; *Brinkley* v. *State*, 58 Ga. 296; *Stewart* v. *State*, 58 Ga. 577; *Choice* v. *State*, 31 Ga. 424; *Foster* v. *Brooks*, 6 Ga. 291; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856; *Yeates* v. *Reed*, 4 Blackf. 463, 32 Am. Dec. 43; *Ashcraft* v. *De Armond*, 44 Iowa, 229; *Townsend* v. *Pepperell*, 99 Mass. 40; *Thompson* v. *Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Brinkman* v. *Rueggesick*, 71 Mo. 553; *Biddle* v. *Jenkins*, 61 Neb. 400, 88 N. W. 392; *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Pidcock* v. *Potter*, 68 Pa. 348, 8 Am. Rep. 181; *Hall* v. *Com.* 22 W. N. C. 25; *McLane* v. *Elder* (Tex. Civ. App.) 23 S. W. 758; *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351; *Ellis* v. *State*, 33 Tex. Crim. Rep. 86, 24 S. W. 894; *Wright* v. *Doe ex dem. Tatham*, 1 Ad. & El. 3, 3 Nev. & M. 268, 3 L. J. Exch. N. S. 366; *Greenslade* v. *Dare*, 20 Beav. 284, 24 L. J. Ch. N. S. 490, 1 Jur. N. S. 294, 3 Week. Rep. 220.

And evidence of a proceeding taken in which a commission declared a wife insane is inadmissible in a prosecution against her husband for conspiracy to confine her in a lunatic asylum, in the absence of an allegation of collusion or fraud between the husband and the commissioner. *Com.* v. *Spink*, 27 W. N. C. 37.

[38] *Myers* v. *Knabe*, 51 Kan. 720, 33 Pac. 602; *Kidder* v. *Stevens*, 60 Cal. 414; *Waters* v. *Waters*, 35 Md. 531; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Barker* v. *Pope*, 91 N. C. 165; *People* v. *Hurtado*, 63 Cal. 288; *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204; *Rush* v. *Magee*, 36 Ind. 69; *Staser* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *Clarke* v. *Irwin*, 63 Neb. 539, 88 N. W. 783; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Jones* v. *Galbraith* (Tenn. Ch. App.) 59 S. W. 350; *Hurst* v. *State* (Tex. Crim. App.) 40 S. W. 264; *Carlisle* v. *State* (Tex. Crim. App.) 56 S. W. 365.

And a question asked a witness as to what the person whose sanity is questioned had said became of a certain deed is irrelevant and immaterial, where it does not appear when the deed was made or what property was transferred by it, and there is nothing to show that the deed was treated otherwise than deeds usually are. *Re Wax*, 106 Cal. 343, 39 Pac. 624.

[39] *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *State* v. *Windsor*, 5 Harr. (Del.) 512; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856.

[40] *Mullins* v. *Cottrell*, 41 Miss. 291; *Staser* v. *Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

[41] *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648. And see *Lake* v. *People*, 1 Park. Crim. Rep. 495, Affirmed in 12 N. Y. 358; *Vance* v. *Vance*, 74 Ind. 370; *Hughes* v. *Hughes*, 31 Ala. 519; *Ware* v. *Ware*, 8 Me. 42; *Colvin* v. *Warford*, 20 Md. 357.

But conversations between plaintiff, in an action for a personal injury, and defendant's agent, at the time of making a settlement evidenced by a release, though alleged to have been improperly obtained, are admissible in evidence on the question of mental capacity. *Missouri P. R. Co.* v. *Brazzil*, 72 Tex. 233, 10 S. W. 403.

[42] *Hopps* v. *People*, 31 Ill. 385, 83 Am. Dec. 231.

nacy are admissible in evidence, as a general rule, to establish the insanity of the party against whom they are found, in all classes of actions,[43] even as against strangers to the proceedings, who had no opportunity to cross-examine witnesses.[44] And so are the records of a public hospital.[45] And the record of the appointment of a conservator is admissible to show such appointment.[46] So, records of a probate court, showing that a person was treated by it as the lawful guardian of a *non compos,* will be received as prima facie evidence of guardianship, after a long lapse of time, in the absence of direct proof of a probate appointment.[47] And orders in the course of lunacy proceedings are admissible as evidence that proceedings were had, but not as evidence of facts therein stated.[48] A determina-

[43]*Nichol* v. *Thomas,* 53 Ind. 42; *Oekendon* v. *Barnes,* 43 Iowa, 615; *State* v. *McMurry,* 61 Kan. 87, 58 Pac. 961; *Hawkins* v. *Grimes,* 13 B. Mon. 257; *Gibson* v. *Soper,* 6 Gray, 279, 66 Am. Dec. 414; *Yauger* v. *Skinner,* 14 N. J. Eq. 389; *Whitenack* v. *Stryker,* 2 N. J. Eq. 8; *Rider* v. *Miller,* 86 N. Y. 507; *Osterhout* v. *Shoemaker,* 3 Hill, 513; *Hart* v. *Deamer,* 6 Wend. 497; *Hoyt* v. *Adee,* 3 Lans. 173; *Goodell* v. *Harrington,* 3 Thomp. & C. 345; *Wheeler* v. *State,* 34 Ohio St. 394, 32 Am. Rep. 372; *Stauffer* v. *Young,* 39 Pa. 455; *Cathcart* v. *Sugenheimer,* 18 S. C. 123; *M'Creight* v. *Aiken,* Rice L. 56; *Kerr* v. *Lunsford,* 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *Burnham* v. *Mitchell,* 34 Wis. 117; *Hempton* v. *State,* 111 Wis. 127, 86 N. W. 596; *Hume* v. *Burton,* 1 Ridgw. P. C. 204; *Sergeson* v. *Sealy,* 2 Atk. 412, 9 Mod. 370; *Faulder* v. *Silk,* 3 Camph. 126; *Cooke* v. *Turner,* 15 Sim. 611, 16 L. J. Ch. N. S. 487, 11 Jur. 702. But see *Re Pinney,* 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

This is so though the decree be one of a court of another state. *Herndon* v. *Vick,* 18 Tex. Civ. App. 583, 45 S. W. 852; *Re Perkins,* 2 Johns. Ch. 124; *Re Linton,* 29 W. N. C. 550.

Though it would be of no effect if rendered in the absence of due notice. *Com. ex rel. Stewart* v. *Kirkbridge,* 2 Brewst. (Pa.) 419.

A record of proceedings of another court in lunacy, which had been quashed for irregularity, though not competent to prove the person's incapacity to contract, is competent when the proceedings were carried on with the knowledge of the person with whom he contracted, to show knowledge on his part of his state of mind. *Prather* v. *Naylor,* 1 B Mon. 244.

And an inquisition finding a party to have been a lunatic for a preceding period is not rendered incompetent by a statute providing that the inquiry must be confined to the question of incompetency at the time it was made, where it was submitted to the jury without remark as to its effect, other than that it was not conclusive. *Dominick* v. *Dominick,* 20 Abb. N. C. 286.

But a copy of the records of a probate court in another state, stating that the father of an insured person had been found to be insane, is not admissible in an action upon the insurance policy in which a breach of warranty that none of the family of the insured had been afflicted with insanity was claimed, where no proof was made as to the authority of the court under the laws of that state. *Newton* v. *Mutual Ben. L. Ins. Co.* 15 Hun, 597.

[44]*Osterhout* v. *Shoemaker,* 3 Hill, 513; *M'Creight* v. *Aiken,* Rice L. 56; *Sergeson* v. *Sealy,* 2 Atk. 412, 9 Mod. 370.

[45]*Hempton* v. *State,* 111 Wis. 127, 86 N. W. 596.

[46]*State* v. *Hyde,* 29 Conn. 564.

But the record of proceedings under the Nebraska statute, in which a person has been adjudged insane and a fit subject for treatment in the insane hospital, is not admissible in an action to avoid a deed on the ground of insanity. *Dewey* v. *Allgire,* 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276.

[47]*Thomas* v. *Hatch,* 3 Sumn. 170, Fed. Cas. No. 13,899. And see *Edson* v. *Munsell,* 10 Allen, 557.

[48]*Creagh* v. *Blood,* 2 Jones & L. 509, 8 Ir. Eq. Rep. 434.

tion or order in a proceeding not designed to fix the status of the party, however, is not admissible upon an issue as to the sanity of such party.[49] And records of a public hospital for the insane, to be admissible, must be kept in compliance with the laws of the institution, and such laws must be introduced to establish the fact.[50] And superfluous recitals in a finding or decision of the point in issue are not evidence.[51] Nor is a verdict or finding pronouncing a person sane admissible to establish his sanity.[52] And an inquisition of lunacy is not evidence of insanity prior to the date on which it was made,[53] unless it overreaches and embraces the time of the act in question.[54]

[49] See *Gridley* v. *Boggs*, 62 Cal. 190; *Leggate* v. *Clark*, 111 Mass. 308; *Wheeler* v. *State*, 34 Ohio St. 394, 32 Am. Rep. 372; *State* v. *Turner*, Wright (Ohio) 26; *Jones* v. *White*, 1 Strange, 68; *Martin* v. *Johnston*, 1 Fost. & F. 122.

Standing alone, the fact that a person accused of crime was an inmate of an insane hospital is not evidence of criminal irresponsibility or of incapacity to defend himself. *Caddell* v. *State*, 136 Ala. 9, 34 So. 191.

And a verdict of a jury upon an inquisition of lunacy is not admissible in evidence upon a traverse of a finding in the inquisition. *Com. ex rel. Haskell* v. *Haskell*, 2 Brewst. (Pa.) 491.

[50] *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93; *Snell* v. *United States*, 16 App. D. C. 501.

So, the testimony of a superintendent of a hospital for the insane in another state is not admissible to show the insanity of a person who had been confined there, where he knew nothing of the disease of such person, and based his statements upon what was shown by the records of the hospital. *Newton* v. *Mutual Ben. L. Ins. Co.* 15 Hun, 597.

[51] *Rice* v. *Rice*, 53 Mich. 432, 19 N. W. 132; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493.

But the admission in evidence of a record in a lunacy matter, containing recitals and statements which are not evidence, and might influence the verdict, is not a ground for a new trial, where the judge informs the jury that the recitals are not evidence, and cautions them to disregard them. *Creagh* v. *Blood*, 2 Jones & L. 509, 8 Ir. Eq. Rep. 434.

[52] *People* v. *Ward*, 105 Cal. 335, 38 Pac. 945; *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 815; *Naanes* v. *State*, 143 Ind. 299, 42 N. E. 609; *Lewis* v. *Mason*, 109 Mass. 169.

But a decree dismissing a petition for the appointment of a guardian for an alleged insane person, and a verdict and judgment on appeal from such decree, in favor of his sanity, may be given in evidence as tending to show capacity to make a deed. *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414.

And the offer of a verdict pronouncing a person sane, by the district attorney in a criminal case, as evidence of sanity, which was rejected, is not misconduct on his part, prejudicial to the defendant. *People* v. *Ward*, 105 Cal. 335, 38 Pac. 945.

[53] *Burnham* v. *Mitchell*, 34 Wis. 117; *Hovey* v. *Chase*, 52 Me. 304, 83 Am. Dec. 514; *Rhoades* v. *Fuller*, 139 Mo. 179, 40 S. W. 760; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Henry* v. *Brothers*, 48 Pa. 70. But see *Rider* v. *Miller*, 86 N. Y. 507.

So, a physician's certificate prepared from the statements of relatives and friends of a patient in an insane asylum is not competent to show the patient's mental condition previous to his confinement. *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93.

[54] *Re Blaker*, 27 N. Y. Week. Dig. 486, 12 N. Y. S. R. 741; *Goodell* v. *Harrington*, 3 Thomp. & C. 345.

And proceedings in lunacy, finding a mortgagor to have been a lunatic for a period covering the date of the mortgage, are not admissible in evidence to invalidate the mortgage, in the absence of proof of fraud or notice to the mortgagee of the mortgagor's mental incapacity. *Mills* v. *Slook*, 9 W. N. C. 379.

So, a judgment setting aside a will of a person is not admissible in an action to set aside a deed made by him, as tending to show his insanity, where it was rendered some time subsequent to the giving of the deed.[55] Where adjudications or certificates of lunacy are given in evidence to establish incompetency it is proper to prove recovery or a lucid interval at the time of the act in question.[56] And members of an inquisition which found a person insane are competent to prove the unsoundness or a lucid interval when the facts are within their knowledge, though they cannot be examined as to what they intended by their return.[57]

b. With reference to drunkenness.

333. The fact of intoxication.— Where malice or intent is an ingredient of a charge, whether civil or criminal, simple intoxication may be given in evidence to rebut it.[58] And the fact of drunkenness may be established by evidence of the quantity and quality of the liquor drunk.[59] But evidence going only to establish a mere conjecture that one might have drunk liquor, or might have been intoxi-

[55] *Hovey* v. *Chase,* 52 Me. 305, 83 Am. Dec. 514; *Gridley* v. *Boggs,* 62 Cal. 190. But see *Hanna* v. *Read,* 102 Ill. 596, 40 Am. Rep. 608.

And, a record of the proceedings in a separate trial, in which one of two defendants jointly indicted is adjudged insane, is not evidence either of the fact or of such insanity upon the trial of the indictment. *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95.

[56] *Knox* v. *Knox,* 30 S. C. 377, 9 S. E. 353.

In Missouri, evidence of a lucid interval is not admissible to controvert the insanity of a person who has been placed under guardianship as insane, and *non est factum* may be pleaded to a deed subsequently made by him, and the special matter given in evidence. *Rannells* v. *Gerner,* 80 Mo. 475.

[57] *Hutchinson* v. *Sandt,* 4 Rawle, 234, 26 Am. Dec. 127; *Bowman* v. *Van Baum,* 14 W. N. C. 185.

[58] *Dawson* v. *State,* 16 Ind. 428, 79 Am. Dec. 439; *Bruen* v. *People* (Ill.) 69 N. E. 24; *State* v. *Wright,* 112 Iowa, 436, 84 N. W. 541; *Bishop* v. *Com.* 109 Ky. 558, 60 S. W. 190; *State* v. *Koerner,* 8 N. D. 292, 78 N. W. 981.

The grossly intoxicated condition of a party immediately before and shortly after a transaction concerning which he testified, with reference to which testimony he is accused of having committed perjury, is admissible as tending to show whether or not it had the effect of rendering him incapable of remembering the facts while on the witness stand. *Lytle* v. *State,* 31 Ohio St. 196.

So, intoxication may be shown to explain appearances that otherwise might have been attributed to insanity. *Hoover* v. *State* (Ind.) 68 N. E. 591.

But instructions in such cases, singling out the fact of intoxication, should not be given. *Bishop* v. *Com.* 109 Ky. 558, 60 S .W. 190.

[59] *Fleming* v. *State,* 5 Humph. 564; *Wraqe* v. *State* (Tex. Crim. App.) 60 S. W. 55; *Reg.* v. *Monkhouse,* 4 Cox C. C. 55.

But on a trial for murder, in which it is claimed that the accused was rendered insane by drinking whisky furnished him, evidence of experiments that had been made with ordinary whisky and a liquid claimed to be of the same character as that furnished the accused is inadmissible, in the absence of anything to show that the liquor with which the experiments were made was of the same character as that drunk by the accused. *People* v. *Slack,* 90 Mich. 448, 51 N. W. 533.

cated, is inadmissible.[60] So, evidence is admissible in an action upon contract on the question as to whether a party was in such a state of intoxication at the time of making it as to be unfit for the transaction of business.[61] And evidence of the intoxication of a party to a contract, and that the other party caused it, and imposed upon him while in that condition, is admissible, and constitutes a good defense.[62] Also, intoxication in any degree of a person injured is proper to be considered in an action for damages for the injury in determining as to his contributory negligence.[63] And the intoxication of a person causing an injury may be considered on the question as to his negligence, as a part of the *res gestæ*.[64] And it may likewise be considered in an action of trespass or of tort generally.[65] But the intoxication of a person committing an assault is not a mitigating circumstance, to be taken into consideration in determining the amount of exemplary damages where it was not such as to render him irresponsible for his acts.[66] And intoxication at the time of uttering slanderous words is not a matter of mitigation,[67] and evidence thereof has been held to be inadmissible,[68] though it has also

[60] *Com.* v. *Cloonen*, 151 Pa. 605, 25 Atl. 145; *Com.* v. *Cleary*, 135 Pa. 64, 8 L. R. A. 301, 19 Atl. 1017. And see *Warren* v. *Com.* 37 Pa. 45; *Whitney* v. *State*, 8 Mo. 165; *Patterson* v. *State*, 66 Ind. 185.

But evidence on a trial for drunkenness that the defendant was found in the streets, behaving in a drunken manner, and that his breath smelled of liquor, and that he had been convicted of that offense twice before within a year upon his plea of guilty, is properly submitted to the jury to determine whether the drunkenness was voluntary or not. *Com.* v. *Hughes*, 133 Mass. 496.

[61] *Burroughs* v. *Richman*, 13 N. J. L. 233, 23 Am. Dec. 717.

[62] *Curtis* v. *Hall*, 4 N. J. L. 361. But see *Noel* v. *Karper*, 53 Pa. 97.

[63] *Fitzgerald* v. *Weston*, 52 Wis. 354, 9 N. W. 13; *Illinois C. R. Co.* v. *Cragin*, 71 Ill. 177; *Gulf, C. & S. F. R. Co.* v. *Gross* (Tex. Civ. App.) 21 S. W. 186.

But intoxication at another time is not admissible. *Story* v. *Norfolk & S. R. Co.* 133 N. C. 59, 45 S. E. 349.

[64] *Williams* v. *Edmunds*, 75 Mich. 92, 42 N. W. 534; *Northern P. R. Co.* v. *Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

[65] *Wynn* v. *Allard*, 5 Watts & S. 524; *Dimick* v. *Downs*, 82 Ill. 570.

Drunkenness of a sheriff is no legal defense for making an illegal arrest, but may, in the discretion of the jury, be regarded as an aggravation of the offense. *Hall* v. *O'Malley*, 49 Tex. 70.

But evidence that the plaintiff in an action for breach of promise of marriage drank to excess, and sometimes to intoxication, is inadmissible in mitigation of damages, where it does not appear under what circumstances the alleged excesses took place, or that her general reputation as to sobriety was bad. *Button* v. *McCauley*, 38 Barb. 413.

[66] *Schmidt* v. *Pfeil*, 24 Wis. 452.

[67] *Mix* v. *McCoy*, 22 Mo. App. 488; *Reed* v. *Harper*, 25 Iowa, 87, 95 Am. Dec. 774.

But evidence that at the time of speaking alleged slanderous words the defendant's mind was so excited by a long course of dissipation, and his character so depraved that no one who knew him would pay any attention to what he might say, or give any credence whatever to any charge he might make, is admissible in an action therefor. *Gates* v. *Meredith*, 7 Ind. 440.

[68] *Mix* v. *McCoy*, 22 Mo. App. 488.

been held that it may be considered in determining the amount of the verdict.[69]

334. General character and habits.— The general character and habits of a person, for drunkenness or sobriety, are generally inadmissible in evidence in all classes of actions, either to show responsibility or capacity on the one hand, or irresponsibility or incapacity upon the other.[70] Evidence of habits of intoxication, however, by which one's faculties had been so impaired as to deprive him of capacity to distinguish between right and wrong, is admissible on the question of intent.[71] And evidence of the general reputation of an employee for intoxication is admissible in an action for an injury caused by such employee, to show that the employer would, had he exercised due care, have known that he was an unsuitable servant to be employed,[72] and to show the incompetency of the servant,[73] though it is not admissible for the purpose of rebutting evidence of intoxication constituting contributory negligence of a person injured.[74] So, in-

[69] *Reed* v. *Harper*, 25 Iowa, 87, 95 Am. Dec. 774.

[70] See *Fahnestock* v. *State*, 23 Ind. 231; *Jenners* v. *Howard*, 6 Blackf. 240; *Hubbard* v. *Mason City*, 60 Iowa, 400, 14 N. W. 772; *Baltimore & O. R. Co.* v. *Boteler*, 38 Md. 568; *Robinson* v. *Fitchburg & W. R. Co.* 7 Gray, 92; *Gahagan* v. *Boston & L. R. Co.* 1 Allen, 189, 79 Am. Dec. 724; *Williams* v. *Edmunds*, 75 Mich. 92, 42 N. W. 534; *Barker* v. *Savage*, 1 Sweeny, 288; *Brindle* v. *M'Ilvaine*, 10 Serg. & R. 282; *Carter* v. *Seattle*, 19 Wash. 597, 53 Pac. 1102.

So, evidence of a habit of the maker of a note to gamble when drunk is not admissible to show that the note was given for money lost at play. *Thompson* v. *Bowie*, 4 Wall. 463, 18 L. ed. 423.

But the admission of evidence showing that the disposition of a person accused of homicide was extremely quarrelsome while he was drinking, to enable the jury to compare his acts at various times, is not a ground for reversal. *State* v. *Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

[71] *People* v. *Blake*, 65 Cal. 275, 4 Pac. 1.

[72] *Gilman* v. *Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210. And see *Cleghorn* v. *New York C. & H. R. R. Co.* 56 N. Y. 44, 15 Am. Rep. 375.

And evidence in an action for damages to an employee of a railway company, alleged to have been caused by the intoxication of a coemployee, as to his having been seen in an intoxicated condition on the day of the accident and at other times, is not rendered inadmissible by the fact that there was no allegation with reference to the condition or habits of such employees, but only as to their skill and experience. *Lyons* v. *New York C. & H. R. R. Co.* 39 Hun, 386.

But evidence that a flagman had been intoxicated on several occasions previous to an injury caused by a collision, and that his intemperate habits were known to the officers of the company, is inadmissible in an action for the injury, on an issue as to present negligence in failing to give a signal. *Warner* v. *New York C. R. Co.* 44 N. Y. 465.

[73] *Baltimore & O. R. Co.* v. *Henthorne*, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634.

[74] *Carter* v. *Seattle*, 19 Wash. 597, 53 Pac. 1102.

But the plaintiff in an action for a personal injury, who has testified that he was not drunk at the time, and had not been drinking, may be asked, on cross-examination, if he was not in the habit of getting drunk. *McCracken* v. *Markesan*, 76 Wis. 499, 45 N. W. 323.

And where a person who suffered a personal injury becomes insane and unable to testify in an action therefor, it is competent to introduce evidence as to her habits, tending to show that at the time of the injury she was not intoxicated, and was probably exercising ordinary care. *Chicago* v. *Doolan*, 99 Ill App. 143.

temperate habits may also be shown to establish violation of a warranty in an insurance contract, that the insured was a person of temperate habits.[75]

335. Previous and subsequent intoxication.—Evidence of the previous intoxication of a person accused of crime is admissible on a prosecution therefor, as bearing upon the question of his condition at the time of the act, and of his conduct while in that state, provided such testimony makes it probable that the intoxication continued and existed at the time of the offense.[76] Subsequent conduct of the accused, however, would be of less importance since the act itself might have caused the excitement.[77] And evidence that the accused was in the habit of drinking to excess, and of the effect upon his mind produced by such habit, is properly confined within a very short period of the time of the criminal act.[78] And the fact that the accused had, on a prior occasion, been so drunk that he was deprived of reason, does not establish his want of reason and responsibility at the time of the offense, and is therefore inadmissible.[79] But evidence of excessive drinking by the accused during the year preceding the commission of the crime is admissible as tending to explain or

[75] *United Brethren Mut. Aid Soc.* v. *O'Hara*, 120 Pa. 256, 13 Atl. 932.

But evidence in an action upon a life insurance policy conditioned against liability if the assured became so intemperate as to seriously or permanently impair his health, as to the quantity of liquor he drank, and that it was sufficient to impair his health, is irrelevant and inadmissible, in the absence of proof that it had affected his health, since the effect which it might have upon the health of different people might be different. *Odd Fellows' Mut. L. Ins. Co.* v. *Rohkopp*, 94 Pa. 59.

And evidence that the habits of intemperance of an insured person were known to the insurance agent who acted for the insurance company in negotiating the contract is not admissible in answer to the defense of misrepresentation as to such habits, where it was not pleaded in reply to that defense. *Texas Mut. L. Ins. Co.* v. *Davidge*, 51 Tex. 244.

[76] *Upstone* v. *People*, 109 Ill. 169; *Pierce* v. *State*, 53 Ga. 365; *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *People* v. *Gaynor*, 33 App. Div. 98, 53 N. Y. Supp. 86; *Reg.* v. *Monkhouse*, 4 Cox C. C. 55. But see *Dawson* v. *State*, 16 Ind. 428, 79 Am. Dec. 439.

And this is so, whether or not the intoxication had any relation to the occurrences disclosed by the testimony. *Porter* v. *State*, 135 Ala. 51, 33 So. 694.

Evidence of a robbery by a person accused of burglary, done just previous to the burglary, is admissible in a prosecution for the burglary, to rebut evidence of intoxication offered as a defense, as tending to show that he was not intoxicated at the time of the robbery. *State* v. *Harris*, 100 Iowa, 188, 69 N. W. 413.

[77] *Reg.* v. *Monkhouse*, 4 Cox. C. C. 55.

[78] *Real* v. *People*, 42 N. Y. 270; *Shufflin* v. *People*, 4 Hun, 16.

An instruction as to voluntary drunkenness is not irrelevant, where the proof shows that the homicide in question was committed on Sunday, and that the defendant had bought a pint of pure alcohol on the Friday before and drank it without water all the next day. *People* v. *Jones*, 63 Cal. 168.

[79] *State* v. *Hart*, 29 Iowa, 268.

And evidence of quarrelsomeness while drinking, and that the accused had been drinking on the day previous, does not require an instruction in a prosecution for homicide as to intoxication at the time of the act. *People* v. *Kloss*, 115 Cal. 567, 47 Pac. 459.

And refusal to instruct with reference to insanity or drunkenness is not error

account for changes of conduct or manner during that time.[80] So, previous intoxication is admissible on the question of capacity to contract.[81] And that a person had been drinking for a great part of the time for several weeks is admissible for the purpose of showing his mental condition at the time of making a settlement or giving a release.[82] And evidence of the repeated drunkenness of a person who suffered a personal injury, for some years before and afterwards, is admissible on an issue of contributory negligence, for the purpose of throwing light on the question whether or not he was drunk at the time.[83] Likewise, intoxication or stupefaction of a testator from drugs, at the time, is admissible on the question of his testamentary capacity.[84]

336. Acts and conduct.—The acts and conduct of a person committing a criminal act are admissible in evidence as bearing upon the question whether the act was done under the influence of insanity, or committed because of intoxication.[85] And they are also admissible where it is claimed that the act in question was done while the person doing it was so under the influence of liquor as not to know what he was doing, and as to be incapable of entertaining a wrongful or corrupt intent.[86] And expressions used by the accused soon after

in a criminal case, where there is no evidence of mental unsoundness, and the only proof of drunkenness is that the accused was drunk on the morning preceding the offense. *Cavaness* v. *State*, 43 Ark. 331.

[80] *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

But evidence that for four or five years the accused in a criminal case had been addicted to excessive drinking so as to become an habitual drunkard, and that he was quarrelsome while drunk, is inadmissible for the purpose of showing the state of his mind at the time of the criminal act. *Com.* v. *Werling*, 164 Pa. 559, 30 Atl. 406.

[81] *Rogers* v. *Warren*, 75 Mo. App. 271.

[82] *Foss* v. *Hildreth*, 10 Allen, 76.

So, evidence that a party to a settlement and receipt came home intoxicated several hours afterwards is admissible to show intoxication for the purpose of setting aside such settlement and receipt, where there was evidence tending to show that he was indulging in a protracted spree. *Phelan* v. *Gardner*, 43 Cal. 306.

[83] *Enright* v. *Atlanta*, 78 Ga. 288. But see *Shelly* v. *Brunswick Traction Co.* 65 N. J. L. 639, 48 Atl. 562.

So, evidence that a ship captain whose ship had gone ashore, and who had sold her to a party who succeeded in getting her off, was addicted to drunkenness within a short time before the vessel sailed, is admissible on an issue between the owner and the receiver as to whether there had been a total loss. *Alcock* v. *Royal Exchange Assurance*, 13 Q. B. 292.

[84] *Re Gilham*, 64 N. J. Eq. 715, 52 Atl. 690.

[85] *French* v. *State*, 93 Wis. 325, 67 N. W. 706; *Com.* v. *Curry*, 150 Mass. 509, 23 N. E. 212.

[86] *White* v. *State*, 103 Ala. 72, 16 So. 63. And see *Collins* v. *People*, 194 Ill. 506, 62 N. E. 903.

And so is the appearance of a person on the question whether he acted, in the commission of a criminal act, under the influence of drunkenness or an epileptic fit. *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541.

But evidence that a party to an action for damages endeavored to secure impecunious parties upon a bond for his appearance at court bears so remotely upon the question of his intoxication that a judgment would not be reversed on account of its exclusion. *Hubbard* v. *Mason City*, 60 Iowa, 400, 14 N. W. 772.

a criminal act are admissible on the question of intent.[87] What the demeanor of the person killed was when intoxicated, however, is not material in a prosecution for the killing, unless confined to that existing at the time of, or immediately preceding, the homicide.[88]

337. Confessions, admissions, and declarations.— A confession is not rendered inadmissible as evidence in a criminal prosecution by the mere fact that the person making it was drunk at the time, and it is not thereby rendered insufficient to sustain a conviction, where the *corpus delicti* was otherwise proved,[89] though the drunkenness was induced by a third person, for the purpose of procuring the confession.[90] The intoxication at the time of the confession affects its weight and not its admissibility.[91] That degree of intoxication which leaves a person capable of narrating past facts, or of stating his own participation in a crime, does not exclude his confession from the consideration of the jury upon a prosecution for such act.[92] But the submission to the court of the question whether the defendant, when making a confession, was so intoxicated as not to understand what he was confessing is preliminary to its admission and an important consideration furnishing ground for an exception.[93] And where there is evidence tending to prove that a person making a confession was laboring under delirium tremens, or was otherwise insane at the time, the opinion of an expert may properly be taken as

[87] *Reg.* v. *Dixon*, 11 Cox C. C. 341; *State* v. *Hurley*, Houst. Crim. Rep. (Del.) 28.

But threats against a person killed, made a long time before the killing, at a time when the person accused of killing was very drunk, are entitled to no weight, where it appears that the subsequent relations between them were friendly. *Willis* v. *Com.* 32 Gratt. 929.

And evidence that a few days before a criminal act, the accused had bought a pint of whisky, and said he was going to quit, is wholly immaterial and inadmissible on an issue as to whether he was insane at the time of the act or merely drunk. *Beck* v. *State*, 76 Ga. 452.

[88] *Shufflin* v. *People*, 4 Hun, 16.

[89] *Williams* v. *State*, 12 Lea, 211; *Lester* v. *State*, 32 Ark. 727; *State* v. *Grear*, 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *Rex* v. *Spilsbury*, 7 Car. & P. 187.

[90] *Rex* v. *Spilsbury*, 7 Car. & P. 187.

[91] *State* v. *Grear*, 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *Com.* v. *Howe*, 9 Gray, 110; *White* v. *State*, 32 Tex. Crim. Rep. 625, 25 S. W. 784; *Rex* v. *Spilsbury*, 7 Car. & P. 187.

Where a person making a confession was so much under the influence of liquor as not to understand what he was confessing, the jury should disregard the confession altogether. *Com.* v. *Howe*, 9 Gray, 110.

[92] *State* v. *Grear*, 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *White* v. *State*, 32 Tex. Crim. Rep. 625, 25 S. W. 784. And see *Eskridge* v. *State*, 25 Ala. 30.

And refusal to instruct the jury in a criminal case that, if the defendant was so intoxicated at the time he made a confession as not to be able to understand what he was doing or saying, the confession should not be regarded as evidence against him, is not error, where the only evidence of intoxication was that he had drunk four or five drinks of whisky within five or six hours of making it. *Zwicker* v. *State*, 27 Tex. App. 539, 11 S. W. 633.

[93] *Com.* v. *Howe*, 9 Gray, 110.

to his mental condition, indicated by the proved facts.[94] So, declarations of an agent of an employer that an employee who was competent when employed had become incompetent through habits of intoxication are admissible in an action by a coemployee against the employer for an injury caused by the incompetent employee while intoxicated, for the purpose of showing knowledge of his incompetency.[95] The intoxication of a person, and his consequent incompetency, however, cannot be established by his own declarations.[96]

III. Opinion evidence.

a. With reference to lunacy.

1. *Experts.*

338. Admissibility generally.—The opinions of medical experts and experts with relation to mental disease are admissible in evidence generally on an issue as to sanity or insanity,[97] without reference to the question of their weight;[98] and such opinions may be based upon the symptoms and circumstances which come within their own observation, or which are testified to by others, or upon hypothetical statements or questions assuming their existence.[99] The opinions of

[94]*State* v. *Feltes*, 51 Iowa, 495, 1 N. W. 755.

[95]*Chapman* v. *Erie R. Co.* 55 N. Y. 579; *Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

[96]*Gibson* v. *Gibson*, 24 Mo. 227; *Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221.

But a letter of a testator to his wife, shortly before death, in which he expressed regret that he was drunk when he made his will, and solicitude for the welfare of his children, is admissible in evidence on the question of his testamentary capacity. *Re Van Alstine* (Utah) 72 Pac. 942.

[97]*Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Choice* v. *State*, 31 Ga. 424; *Coryell* v. *Stone*, 62 Ind. 307; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Com.* v. *Brayman*, 136 Mass. 438; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Barter* v. *Abbott*, 7 Gray, 71; *Hastings* v. *Rider*, 99 Mass. 622; *McGinnis* v. *Kempsey*, 27 Mich. 363; *People* v. *Finley*, 38 Mich. 482; *Clarke* v. *Sawyer*, 3 Sandf. Ch. 351; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Re Kiedaisch*, 2 Connoly, 438, 13 N. Y. Supp. 255; *First Nat. Bank* v. *Wirebach*, 106 Pa. 37; *Gibson* v. *Gibson*, 9 Yerg. 329; *Puryear* v. *Reese*, 6 Coldw. 21; *Pigg* v. *State*, 43 Tex. 108; *Shelton* v. *State*, 34 Tex. 666; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232, 24 L. ed. 433; *Beavan* v. *M'Donnell*, 26 Eng. L. & Eq. 541, 10 Exch. 184, 23 L. J. Exch. N. S. 326.

But expert testimony based solely upon a supposed case of previous habits which might cause insanity is not admissible, in the absence of independent evidence tending to show insanity. *Bishop* v. *Com.* 109 Ky. 558, 60 S. W. 190.

[98]*Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232, 24 L. ed. 433.

[99]*Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *McAllister* v. *State*, 17 Ala. 439, 52 Am. Dec. 180; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Boardman* v. *Woodman*, 47 N. H. 120; *Pidcock* v. *Potter*, 68 Pa. 342, 8 Am. Rep. 181.

expert witnesses, based upon the facts of the case, are admissible as a scientific deduction from such facts, without which the jury would not be able to decide the question correctly.[100] And they are received because the facts are of such a nature that they cannot be weighed or understood by the jury, the expert giving his opinion as to what they do or do not indicate.[1] Expert testimony as to insanity, however, is to be received with caution, and subjected to patient and intelligent investigation.[2] And it is never received where all the facts upon which the opinions are founded can be ascertained and made intelligible to the court or jury.[3] And medical experts cannot testify as such in a will contest in behalf of the contestants, where a prima facie case of testamentary incapacity has not been made out.[4] And the exclusion of expert testimony as to sanity or insanity is not prejudicial error, where it does not appear to have been material.[5]

339. Application of doctrine as to privilege of witnesses. — The general rule regards a physician who goes in his professional capacity to see a patient, as within statutory provisions prohibiting the disclosure by a physician of any information received by him in his professional capacity; and he cannot be called upon for his opinion as to sanity or insanity of such person, based upon the information thus

[100] *Coyle* v. *Com.* 104 Pa. 117; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141.

[1] *People* v. *Youngs*, 151 N. Y. 210, 45 N. E. 460.

[2] *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312.

It is not an abuse of discretion for the court in a will contest, to limit the number of expert witnesses upon the question of insanity to five upon each side. *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882.

And the opinion of an expert as to the condition of a person's mind, based on her physical condition a year and a half afterwards, is too conjectural to be admissible. *Missouri P. R. Co.* v. *Lovelace*, 57 Kan. 195, 45 Pac. 590.

But testimony of an expert witness in an action against a railroad company for a personal injury, in which the person injured had given a receipt and release of all claims shortly after the accident, that his mind might have been dazed or confused as a result of the injury, is admissible, though it did not go so far as to show that that result was probable. *Bliss* v. *New York C. & H. R. R. Co.* 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65.

[3] *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402.

[4] *Re Miller*, 26 Pittsb. L. J. N. S. 428.

[5] *Morton* v. *Heidorn*, 135 Mo. 608, 37 S. W. 504.

So, refusal to allow a statement made by an expert called by the government in a prosecution for murder, of his opinion of the defendant's mental condition, to be read to the jury, but permitting defendant's counsel to use it to cross-examine the witnesses, furnishes no ground for exception. *Com.* v. *Pomeroy*, 117 Mass. 143.

Where the trial judge selects competent physicians as experts to make an examination of the mental condition of the accused in a criminal prosecution, for the purpose of better preparing them to intelligently state the situation to the jury, it is not a condition precedent to the trial being proceeded with that they should make a written and detailed report of such examination to the court. *State* v. *Paine*, 49 La. Ann. 1092, 22 So. 316.

obtained.[6] But the rule prohibiting the disclosure of information received in a professional capacity does not cover a case where its prohibition was invoked solely for the protection of a criminal, and not at all for the benefit or protection of the patient, who was dead, and a waiver of the prohibition had therefore become impossible; it is only applicable in civil cases.[7] And the mere fact that a medical expert was the physician of a person does not prevent him from giving an opinion as to such person's insanity, where it does not appear that he obtained his facts through the professional relation.[8] Nor does the fact that he was physician of a jail, in which an accused person was confined, or that he was in the employ of the district attorney, create the relation of physician and patient between him and the accused so as to exclude his opinion as to the sanity of the accused.[9] And the burden rests with the party seeking to exclude testimony of a physician under such statutes, to show not only that the information sought to be excluded was acquired in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity.[10] So, the privilege may be waived by those whose interest it is to sustain the competency of the patient,[11] and a request by a testator to sign his will as a witness consti-

[6] *Renihan* v. *Dennin*, 103 N. Y. 574, 57 Am. Rep. 770, 9 N. E. 320; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Re Connor*, 27 N. Y. S. R. 905, 7 N. Y. Supp. 855; *Davis* v. *Traver*, 65 Ala. 98; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Heuston* v. *Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *Re Van Alstine* (Utah) 72 Pac. 942. But see *contra*, *Allen* v. *Public Administrator*, 1 Bradf. 221.

A physician who had known the insured for a long time, and who attended him professionally a short time before his death, cannot state how he found him in an action upon an insurance policy in which he is claimed to have committed suicide while insane, the evidence being privileged. *Westover* v. *Ætna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104.

And the prohibition of the New York Code of Civil Procedure against the disclosure by physicians of professional information applies to an affidavit made by a physician for the purpose of supporting an application for an appointment of a committee for a lunatic or habitual drunkard. *Re Hoyt*, 20 Abb. N. C. 162.

[7] *Renihan* v. *Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320. And see *Staunton* v. *Parker*, 19 Hun, 56.

[8] *Wheeler* v. *State*, 158 Ind. 687, 63 N. E. 975.

[9] *People* v. *Schuyler*, 106 N. Y. 298, 12 N. E. 783; *People* v. *Hoch*, 150 N. Y. 291, 44 N. E. 976; *People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9.

[10] *People* v. *Schuyler*, 106 N. Y. 298, 12 N. E. 783; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Staunton* v. *Parker*, 19 Hun, 56.

[11] *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Thompson* v. *Ish*, 99 Md. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

Heirs at law who are the only representatives of a testator, and who succeed to his rights, are competent to waive the provisions of a statute prohibiting disclosure by a physician of information acquired in a professional capacity, so as to enable the physician to testify for the purpose of showing

tutes a waiver.[12] On executor or administrator, however, cannot waive the privilege given by the New York Code of Civil Procedure, so as to permit an attending physician to give evidence upon the subject, on the issue of mental capacity of the deceased.[13]

340. Opinions formed from observation or examination.—An expert witness who has had opportunities for knowing and observing a person whose sanity is in question may give an opinion on that subject on knowledge obtained from such observation, where he fully states the condition, appearances, and conversations of the person at the time.[14] And this may be done by the family physician as well as by any other.[15] As a general rule, however, an expert witness will not be allowed to give an opinion as to the mental condition of a person, founded upon personal examination, without first showing the circumstances and facts upon which such opinion is based.[16] And, as a rule, the court will not stop a trial and give a physician,

that the testator was of unsound mind, and incapable of making a will. *Staunton* v. *Parker*, 19 Hun, 56.

[12]*Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

[13]*Westover* v. *Ætna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104.

[14]*McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *People* v. *Worthington*, 105 Cal. 166, 38 Pac. 689; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Taylor* v. *State*, 83 Ga. 647, 10 S. E. 442; *Stevens* v. *Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27; *State* v. *Felter*, 25 Iowa, 67; *Murphy* v. *Com.* 92 Ky. 485, 18 S. W. 163; *Hathorn* v. *King*, 8 Mass. 371, 5 Am. Dec. 106; *Baxter* v. *Abbott*, 7 Gray, 71; *McHugh* v. *Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Rice* v. *Rice*, 53 Mich. 432, 19 N. W. 132; *Horah* v. *Knox*, 87 N. C. 490; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Bitner* v. *Bitner*, 65 Pa. 347; *Gibson* v. *Gibson*, 9 Yerg. 329; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Pigg* v. *State*, 43 Tex. 108; *Brown* v. *Mitchell*, 75 Tex. 9, 12 S. W. 606; *Harris* v. *State*, 18 Tex. App. 287; *McClackey* v. *State*, 5 Tex. App. 320; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Frary* v. *Gusha*, 59 Vt. 257, 9 Atl. 549.

A medical witness in a criminal prosecution in which insanity is alleged may be asked whether, from the whole of his intercourse with the accused, it appeared to him that he was insane. *Frith's Case*, 22 How. St. Tr. 307.

And one who states, on an inquisition of lunacy, that he has conversed with the alleged lunatic in order to test the condition of his mind, and noticed his general expression and appearance, but has formed no settled opinion as to the depth of his mind, may be asked whether he discovered any evidence of unsoundness of mind, and may be permitted to state his opinion on the question of sanity or insanity. *Re Carmichael*, 36 Ala. 514.

[15]*Hall* v. *Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 33 Atl. 160; *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21.

A question asked a physician as to the state of mind of a person whose sanity was in question, on a particular day, based upon his appearance, actions, condition, and conversation, is not objectionable as leading and suggestive, where he had previously testified at length that he had attended such person for some time, including the day specified, and described his ailments and physical condition, and that he had conversed with him. *Wheelock* v. *Godfrey*, 100 Cal. 578, 35 Pac. 317.

[16]*Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Raub* v. *Carpenter*, 17 App. D. C. 505; *Hawley* v. *Griffin* (Iowa) 92 N. W. 113; *Hathorn* v. *King*, 8 Mass. 371, 5 Am. Dec. 106; *Dickinson* v. *Barber*, 9 Mass. 225, 6 Am. Dec. 58; *White* v. *Bailey*, 10 Mich. 155; *People* v. *Truck*, 170 N. Y. 203, 63 N. E. 281; *Gibson* v. *Gibson*, 9 Yerg. 329; *Purycar* v. *Reese*, 6 Coldw. 21. But see *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398.

called as a witness, an opportunity to examine a party,[17] though it is within the discretion of the court to do so.[18] It is not necessary to the admissibility of the opinion of an expert that he should have heard all of the evidence, where his opinion is based upon his own knowledge and observation and what was said to him by the person whose sanity is questioned.[19] The evidence of a medical witness who had made a personal examination of a person accused of crime, and who gave his opinion, based on such examination, is not subject to the objection that the accused was thereby compelled to furnish evidence against himself.[20] And it is not an abuse of discretion for the court to exclude all medical experts from the court room in a criminal prosecution, where they were called, not to declare a scientific opinion upon other testimony, but simply as witnesses, to give their opinions on the question of mental capacity, as derived from personal acquaintance.[21]

341. Opinions based on evidence.— The general rule is that an expert witness in an action involving the question of sanity or insanity, who has heard all the testimony given on that question may be asked his opinion, upon the hypothesis that the testimony given by the witnesses is all true,[22] though he has not seen the patient,[23] and though

It is not error to permit a medical expert, who has made a personal examination of a patient for the purpose of determining his mental condition, to give his opinion as to that condition at the time of the examination, without, in the first instance, disclosing the particular facts upon which the opinion is based. *People* v. *Youngs*, 151 N. Y. 210, 45 N. E. 460; *Crockett* v. *Davis*, 81 Md. 134, 31 Atl. 710.

But the contrary is the better practice. *People* v. *Youngs*, 151 N. Y. 210, 45 N. E. 460.

[17]*State* v. *Crisp*, 126 Mo. 605, 29 S. W. 699; *Hull* v. *Louth*, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270.

[18]*Herndon* v. *State*, 111 Ga. 178, 36 S. E. 634.

[19]*State* v. *Hayden*, 51 Vt. 296; *State* v. *Gould*, 40 Kan. 258, 19 Pac. 739.

So, the opinion of an expert in a trial for murder, in which insanity is alleged, is not subject to objection, when offered in evidence, that he had not heard the testimony given with respect to the condition of the defendant's mind, where his opinion was given from his own personal knowledge. *State* v. *Gould*, 40 Kan. 258, 19 Pac. 739.

[20]*People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9; *People* v. *Truck*, 170 N. Y. 203, 63 N. E. 281.

And this is the rule though the court permitted expert witnesses for the prosecution to make an examination of the defendant in a criminal case. *People* v. *Truck*, 170 N. Y. 203, 63 N. E. 281.

And an opinion as to sanity, based on the observation of the accused, is not inadmissible because, at the time the observation was made, the accused was in jail, unwarned. *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344.

[21]*Johnson* v. *State*, 10 Tex. App. 571.

[22]*McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *Green* v. *State*, 64 Ark 523, 43 S. W. 973; *State* v. *Windsor*, 5 Harr. (Del.) 512; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Doe ex dem. Sutton* v. *Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Jerry* v. *Townshend*, 9 Md. 145; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Kempsey* v. *McGinniss*, 21 Mich. 123; *State* v. *Klinger*, 46 Mo. 224; *State* v. *Privitt*, 175 Mo. 207, 75 S. W. 457; *People* v. *Barber*, 115 N. Y. 475, 22 N. E. 182; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Yardley* v.

he has made no personal examination, and knows nothing of the actual facts.[24] The opinion of an expert witness, however, must be based upon evidence taken upon the trial then pending.[25] And the better practice has been held to be to allow the medical experts, called solely as such, to remain in the room and hear all the testimony, in order that from the whole they may be informed as to the matters upon which their opinions are desired.[26] Opinions may be based on both a personal examination and on evidence heard.[27] The facts upon which an opinion is founded may be stated, and the jury left to determine, not only the truth of the facts, but of the opinion founded thereon.[28]

But refusal to permit an expert witness who has heard all of the evidence to give his opinion upon the facts stated, is not error, where the court allowed him to give his opinion upon a hypothetical case corresponding with the testimony, or permitted the evidence to be read, and his opinion to be asked on the supposition that the facts were true.[29] And it has been held that an expert witness cannot be asked his opinion upon the whole evidence, where it is conflicting, and that in such case the question put to him should state the particu-

Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *Pidcock* v. *Potter*, 68 Pa. 342, 8 Am. Rep. 181; *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179; *Webb* v. *State*, 9 Tex. App. 490; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *State* v. *Hayden*, 51 Vt. 296; *Cornell* v. *State*, 104 Wis. 527, 80 N. W. 745; *Rex* v. *Wright*, Russ. & R. C. C. 456; *Rex* v. *Searle*, 1 Moody & R. 75; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note. And see *Re Storer*, 28 Minn. 9, 8 N. W. 827.

But the opinion of an expert witness in a criminal prosecution, founded upon the testimony, upon the general question of sanity or insanity, is not competent; the expert should merely give an opinion as to what the facts proved or claimed to be proved indicate as to the mental condition of the person in question. *People* v. *Lake*, 12 N. Y. 358.

[23] *State* v. *Windsor*, 5 Harr. (Del.) 512.

[24] *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458.

[25] *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Macfarland's Trial*, 8 Abb. Pr. N. S. 57; *Tingley* v. *Cowgill*, 48 Mo. 291.

A medical witness in a criminal prosecution in which insanity is alleged, who states that he has read all the evidence as published in the newspapers, with a view to making up his mind as to the person's sanity, cannot express an opinion on that subject; only a hypothetical question can be put, unless the witness has been in court, and himself heard the evidence. *Macfarland's Trial*, 8 Abb. Pr. N. S. 57.

And a physician who had visited an invalid on consultation with his attending physician cannot give his opinion of the mental condition of such invalid at that time, based upon representations by the invalid's wife, the attending physician, and the other attendants as to his previous symptoms or condition, in connection with symptoms he discovered by professional observation and examination. *Heald* v. *Thing*, 45 Me. 392; *Wetherbee* v. *Wetherbee*, 38 Vt. 454.

[26] *Johnson* v. *State*, 10 Tex. App. 571; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

[27] *Re Shelleig*, 11 Ohio S. & C. P. Dec. 81.

[28] *Kempsey* v. *McGinniss*, 21 Mich. 123; *Wetherbee* v. *Wetherbee*, 38 Vt. 454; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458.

[29] *McCann* v. *People*, 3 Park. Crim. Rep. 272; *Johnson* v. *State*, 10 Tex. App. 571.

lar facts in evidence hypothetically, assuming them to be true, so framed that the jury can see upon what particular assumed facts his opinion is based,[30]—a question calling for his opinion as to the facts involving a determination of the truth of such facts, as well as a scientific conclusion drawn from them;[31] and that an expert witness cannot be allowed to give an opinion as to sanity or insanity, where he had not heard all the evidence, and it did not appear what part he had not heard, and no hypothetical or agreed case had been submitted to him.[32] The contrary rule has been asserted, however, that expert witnesses who did not hear all the evidence may give an opinion founded upon the proof heard.[33] And error in permitting an expert witness to give his opinion as to mental condition upon the evidence instead of upon a hypothetical statement is not reversible error, where the answer to the question did not prejudice substantial rights.[34]

342. Opinions upon hypothetical questions or statements. — Wit-

[30]*Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *Choice* v. *State*, 31 Ga. 424; *McCarty* v. *Com.* 14 Ky. L. Rep. 285, 20 S. W. 229; *Jerry* v. *Townshend*, 9 Md. 145; *Woodbury* v. *Obear*, 7 Gray, 467; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Reed* v. *State*, 62 Miss. 405; *Tingley* v. *Cowgill*, 48 Mo. 291; *Coyle* v. *Com.* 104 Pa. 117; *State* v. *Coleman*, 20 S. C. 441; *Price* v. *Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *Kerr* v. *Lunsford*, 31 W. Va. 680. 2 L. R. A. 668, 8 S. E. 493; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Bennett* v. *State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Doe ex dem. Bainbridge* v. *Bainbridge*, 4 Cox C. C. 454; *Reg.* v. *Frances*, 4 Cox C. C. 57, Overruling *M'Naghten's Case*, 1 Car. & K. 130, note, 10 Clark & F. 200, 8 Scott N. R. 595.

Questions put to an expert witness on the question of sanity or insanity in a criminal prosecution, on direct examination, must be hypothetical in form, unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them. *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991.

[31]*Reed* v. *State*, 62 Miss. 408; *Porter* v. *State*, 135 Ala. 51, 33 So. 694; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

Medical experts will not be allowed to determine upon the evidence what the facts are, and give their opinions from them. *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73.

They are not to judge of the credibility of the witnesses or of the truth of the facts detailed by them; it is for the jury to decide whether such facts are satisfactorily proved. *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458.

[32]*Brown* v. *Com.* 14 Bush, 398; *Kempsey* v. *McGinniss*, 21 Mich. 123; *People* v. *Thurston*, 2 Park. Crim. Rep. 449; *Webb* v. *State*, 9 Tex. App. 490.

But an opinion of a medical expert, given on a former trial, is not rendered inadmissible on a subsequent one by the fact that new matters were interposed on the second trial, concerning which no cross-examination was had. *First Nat. Bank* v. *Wirebach*, 106 Pa. 37.

[33]*People* v. *Lake*, 12 N. Y. 358, Affirmed in 1 Park. Crim. Rep. 495; *State* v. *Gould*, 40 Kan. 258, 19 Pac. 739; *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218. 1 Atl. 765.

If an expert witness who has heard all the testimony of a particular witness or of all the witnesses is permitted to give his opinion upon such evidence as to sanity or insanity, and there is any conflict of evidence, or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established thereby. *Bennett* v. *State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912.

[34]*McCarty* v. *Com.* 14 Ky. L. Rep. 285, 20 S. W. 229; *Jones* v. *People*, 23 Colo. 276, 47 Pac. 275.

nesses who are experts upon the question of mental condition may give their opinions on an issue as to sanity or insanity upon a hypothetical question or statement of the facts established by the evidence.[35] A hypothetical question as to mental condition, addressed to an expert witness, should embrace all the facts of the case, when there is no dispute as to such facts, and the witness should take them all into consideration in giving his answer.[36] It must substantially embody the facts relating to the subject, as disclosed by the evidence, though it need not embody all matters of which there is any evidence.[37] And where the facts are in dispute, the question need not be based upon all the evidence, but should be based upon the facts which the evidence tends to prove;[38] and counsel may assume the

[35]*Pittard* v. *Foster*, 12 Ill. App. 132; *Choice* v. *State*, 31 Ga. 424; *Massie* v. *Com.* 15 Ky. L. Rep. 562, 24 S. W. 611; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *People* v. *Thurston*, 2 Park. Crim. Rep. 49; *Re Jacott*, 25 N. Y. S. R. 712, 6 N. Y. Supp. 122; *Pidcock* v. *Potter*, 68 Pa. 342, 8 Am. Rep. 181; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 346; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73.

But refusal to permit an expert witness on the question of testamentary capacity to answer proper hypothetical questions is not reversible error, where he had been permitted to answer other proper hypothetical questions covering the whole case, including everything covered by the questions he was not permitted to answer. *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493.

And an objection to evidence as to sanity or insanity, based upon a hypothetical case and an examination, that it is incompetent and immaterial, is insufficient. *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145.

[36]*Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Re Miller*, 26 Pittsb. L. J. N. S. 428; *McCullough's Will*, 35 Pittsb. L. J. 169; *Webb* v. *State*, 9 Tex. App. 490; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 346.

But refusal to permit all the testimony given in a case to be read as a hypothetical question put to a medical expert in a criminal prosecution is not error, where counsel was told that he might assume certain facts, and put the usual hypothetical questions, which was finally done. *People* v. *Goldenson*, 76 Cal. 328, 19 Pac. 161; *Choice* v. *State*, 31 Ga. 424.

[37]*State* v. *Baber*, 74 Mo. 292, 41 Am. Rep. 314; *People* v. *Hill*, 116 Cal. 562, 48 Pac. 711; *Goodwin* v. *State*, 96 Ind. 550; *Re Norman*, 72 Iowa, 84, 33 N. W. 374; *Kirsher* v. *Kirsher* (Iowa) 94 N. W. 846; *Sharkey* v. *State*, 4 Ohio C. C. 101, 2 Ohio C. D. 443; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Williams* v. *State* (Tex. Crim. App.) 53 S. W. 859.

Nor need it embrace all the elements of the law of insanity. *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.

But it may cover a long period of time, both before and after the time of the act in question, when long-standing, progressive mental disease is involved. *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717.

[38]*Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Kirsher* v. *Kirsher* (Iowa) 94 N. W. 846; *Re Fenton*, 97 Iowa, 192, 66 N. W. 99; *Manatt* v. *Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Kelly* v. *Perrault*, 5 Idaho, 221, 48 Pac. 45; *Medill* v. *Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962; *State* v. *Privitt*, 175 Mo. 207, 75 S. W. 457.

Contestants of a will cannot introduce contradictory evidence upon a given point and then base hypothetical questions to experts upon the theory that some of the witnesses are correct and some of them mistaken. *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637.

And all the evidence upon both sides, upon the issue of insanity, should not

facts in accordance with his theory of them,[39] though they cannot be entirely without the support of evidence, or based upon mere conjecture.[40] The hypothesis upon which experts are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence.[41] And the question must be founded on a given state of the facts, embracing all the facts relied upon to show the theory claimed.[42]

be incorporated in one question asked an expert witness, where the facts on one side conflict with the facts on the other side; in such case attention should be called to their opposing tendencies, and if his skill or knowledge as an expert can furnish any explanation which harmonizes them, he may state it. *Fairchild* v. *Bascomb*, 35 Vt. 398.

[39]*Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Goodwin* v. *State*, 96 Ind. 550; *State* v. *Privitt*, 175 Mo. 207, 75 S. W. 457; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493. And see *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *State* v. *Dunn* (Mo.) 77 S. W. 848; *Williams* v. *State* (Tex. Crim. App.) 53 S. W. 859.

And if the other party is not satisfied, he has the privilege of submitting his case, embracing any or all of the testimony introduced on the trial. *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344.

The attention of an expert witness may be called to such acts as are claimed by a party to show sanity, and his opinion asked as to whether such acts, together with the acts and facts claimed to have been proved by the other party, are inconsistent with the claim of insanity. *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153. And see *Reg.* v. *Frances*, 4 Cox C. C. 57.

[40]*Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101; *Kelly* v. *Perrault*, 5 Idaho, 221, 48 Pac. 45; *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Bomgardner* v. *Andrews*, 55 Iowa, 638, 8 N. W. 481; *Hovey* v. *Chase*, 52 Me. 305, 83 Am. Dec. 514; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *State* v. *Hanley*, 34 Minn. 430, 26 N. W. 397; *State* v. *Scott*, 41 Minn. 365, 43 N. W. 62; *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651; *State* v. *Dunn* (Mo.) 77 S. W. 848; *Re Lyddy*, 24 N. Y. S. R. 607, 5 N. Y. Supp. 636; *Cornwell* v. *Riker*, 2 Dem. 354; *People* v. *Smiler*, 125 N. Y. 717, 26 N. E. 312; *Ballard* v. *State*, 19 Neb. 610, 28 N. W. 271; *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543; *Lowe* v. *State* (Wis.) 96 N. W. 417. And see *Horton* v. *United States*, 15 App. D. C. 310.

Whenever a hypothetical question supposes facts not given in evidence, it should be disregarded. *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931.

And so, if the facts are given a wrong coloring. *The Berry Will Case*, 93 Md. 560, 49 Atl. 401.

And while a question put to an expert witness on the question of another's mental condition, about which he had no personal knowledge, may not be improper because it includes only a part of the facts in evidence, it would be so if, by reason of the omission, it manifestly failed to present facts which were in evidence, in their just and true relation. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

[41]*People* v. *Augsbury*, 97 N. Y. 501; *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434; *Barber's Appeal*, 63 Conn. 396, 22 L. R. A. 90, 27 Atl. 973; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Berry* v. *Safe Deposit & T. Co.* 96 Md. 45, 53 Atl. 720.

It is not a question as to the weight of the evidence, but whether there was any evidence tending to prove the facts stated in the hypothesis. *Re Norman*, 72 Iowa, 84, 33 N. W. 374.

And a physician may give his opinion as to the sanity or insanity of a person on trial for homicide upon the basis of a hypothetical case, together with what he has learned from an examination of him. *State* v. *Wright*, 134 Mo. 410, 35 S. W. 1145; *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

[42]*Lake* v. *People*, 1 Park. Crim. Rep. 495; *McCullough's Will*, 35 Pittsb. L. J. 169; *Webb* v. *State*, 9 Tex. App. 490.

To permit or require an answer by an

And it must be limited to facts which, if true, are indicative of mental unsoundness.[43] Nor is the jury to take it for granted that the statement contained in the hypothetical question is true; it must carefully scrutinize the evidence, and from that determine what, if any part of it, is true;[44] whether the facts assumed in a hypothetical case have been proved or not being a question for the jury.[45]

Questions put to medical experts on the issue of insanity should be so framed as to require them to state the measure of capacity in their own language, and by such ordinary terms and forms of expression as will best convey their ideas to the jury.[46] And the opinion and hypothesis must be clearly stated, so that the jury may know with

expert on a hypothetical question as to sanity embracing only the evidence of one party is not reversible error, if both parties subsequently submit and obtain answers to questions containing all the evidence. *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344. Or, where no other application was made, after the state had put in its rebutting proof, to examine the medical experts with the additional evidence of the other party before the jury. *Dove* v. *State*, 3 Heisk. 348.

But an expert witness in a prosecution for homicide, who has stated, on a hypothetical case, that, in his opinion, the defendant was insane, cannot be subsequently asked to state his opinion as to the condition of the defendant's mind at the time of the homicide, judging from a personal examination which he had since made, and the hypothetical case, upon which he had already expressed his opinion. *State* v. *Welsor*, 117 Mo. 570, 21 S. W. 443.

[43]*Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

Facts are not rendered objectionable as a basis for a hypothetical question in a criminal case, by the fact that they were testified to by the defendant himself. *State* v. *Dunn* (Mo.) 77 S. W. 848.

[44]*Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99.

Where, at the close of the testimony, it is found that a hypothetical question with reference to mental unsoundness assumed the existence of facts with no testimony to support them, counsel should move to have the answer stricken out. *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

[45]*State* v. *Baber*, 74 Mo. 292, 41 Am. Rep. 314; *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931; *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Lake* v. *People*, 1 Park. Crim. Rep. 495.

And while a hypothetical question should conform with reasonable strictness to the facts proved or indicated by the testimony, no prejudice results from the allowance of a question which does not do so, where the jury were instructed that if the hypothetical statement of facts was, in any material and important particular, incorrect or untrue, no weight should be attached to answers founded upon it. *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 909.

And if it is feared that questions contain statements of alleged facts which were not proved, and that the jury might be led to accept them simply because they were incorporated in the hypothesis, the adverse party should ask for an instruction that the facts be not taken for granted, but that the jury should carefully scrutinize the evidence, and determine what, if any, of the averments are true. *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

[46]*Fairchild* v. *Bascomb*, 35 Vt. 398; *Hall* v. *Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 33 Atl. 160; *Rush* v. *Megee*, 36 Ind. 69.

The fact that a hypothetical question is so framed as to apply to the party by name instead of a supposititious person does not render it objectionable, when it must have been understood by the jury to have reference to him, and it cannot be seen that the adverse party was prejudiced thereby. *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

certainty upon precisely what state of assumed facts the expert bases his opinion;[47] and must be so framed as to fairly reflect the facts admitted or proved by the witnesses.[48] Where such questions are founded upon the testimony of witnesses personally examined, they must be so shaped as to give the expert no occasion to draw his conclusion from the evidence, and from such conclusion express his opinion, or to decide as to the weight of evidence or the credibility of the witnesses, and his answers must be such as not to involve such a conclusion or such an opinion,[49] such a determination operating as

[47] *McMechen* v. *McMechen*, 17 W. Va. 683. 40 Am. Rep. 682; *State* v. *Scott*, 41 Minn. 365, 43 N. W. 62; *Horton* v. *United States*, 15 App. D. C. 310. And see *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882.

But where a medical witness is subjected to a long and minute examination with respect to the sanity of another, and his opinion is elicited upon groups of assumed facts which the evidence indicates, and carefully formed hypothetical questions are put without repeating such facts, but referring to them as a basis for an additional inquiry, and a long, critical examination is had, following the same method,—a question on re-examination which does not include the hypothesis should be treated and considered as resting upon the hypothesis assumed in the cross-examination. *McGinnis* v. *Kempsey*, 27 Mich. 363.

[48] *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701; *Ballard* v. *State*, 19 Neb. 610, 28 N. W. 271. And see *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

A proper question to a medical expert on the subject of insanity in a criminal prosecution is: "Assuming the facts to be true which you have heard testified to, what is your opinion as to the prisoner's sanity or otherwise?" *People* v. *Kleim*, 1 Edm. Sel. Cas. 13.

And an expert witness on the subject of insanity may be asked if the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of their truth, whether, in his opinion, the party was insane, and what were the nature and character of the insanity, what state of mind they indicated, and what he would expect would be the conduct of such a person under any supposed circumstances. *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458.

And a question asked an expert witness in an action involving the validity of a gift, whether the mind of the donor was in such a condition that he could understandingly dispose of $5,000 worth of government bonds, is objectionable only as being leading. *Melendy* v. *Spaulding*, 54 Vt. 517.

But it is improper after enumerating a great number of facts as the basis for a hypothetical question to an expert on the question of sanity or insanity, to incorporate the entire testimony of the witnesses, without stating that it is to be considered in connection with other facts and propositions named. *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973.

[49] *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Smith* v. *Hickenbottom*, 57 Iowa, 733, 11 N. W. 664; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Ballard* v. *State*, 19 Neb. 610, 28 N. W. 271; *Lake* v. *People*, 1 Park. Crim. Rep. 495; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73.

And a medical witness in a criminal prosecution cannot give an opinion as to the sanity or insanity of the defendant, based upon the facts and circumstances stated by other witnesses, and upon the defendant's conduct at the trial. *State* v. *Felter*, 25 Iowa, 67.

And it is not competent to predicate a hypothetical question put to an expert upon the question of the insanity of a person upon all the evidence in the case, whether he has heard it or not, upon the assumption that he recollects it, since it would then be impossible for the jury to determine the facts upon which the witness based his opinion, and whether such facts were proved or not. *People* v. *McElvaine*, 121 N. Y. 250, 18 Am. St. Rep. 820, 24 N. E. 465; *Flanagan* v. *State*, 106 Ga. 109, 32 S. E. 80.

an encroachment upon the functions and province of the jury.[50] The proper mode of examining an expert, however, has been held to be to ask what are the symptoms of insanity, and take particular facts, assuming them to be true, and ask whether or not they indicate insanity upon the part of the person whose sanity is in question.[51]

343. Qualifications of experts.—A general knowledge as a medical man, or a scientific training upon the subject, at least, is required to enable one to testify as an expert on questions pertaining to insanity.[52] But physicians who have been for some time in general practice are generally regarded as competent witnesses on such questions.[53] And it is not necessary that they should have made the particular disease involved a specialty, to render their testimony admissible as that of an expert,[54] the extent of the experience and learning of a witness

[50] *Kempsey* v. *McGinniss*, 21 Mich. 123; *State* v. *Felter*, 25 Iowa, 67.

[51] *Reg.* v. *Francis*, 4 Cox C. C. 57, Overruling *M'Naghten's Case*, 1 Car. & K. 130. note, 8 Scott N. R. 595, 10 Clark & F. 200; *McCann* v. *People*, 3 Park. Crim. Rep. 272.

[52] *State* v. *Crisp*, 126 Mo. 607, 29 S. W. 699; *Com.* v. *Brayman*, 136 Mass. 438; *People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196.

A minister of the gospel, though he had read authorities on moral and intellectual science, but nothing on insanity or medical jurisprudence, is not qualified as an expert to give an opinion in a criminal prosecution as to the sanity or insanity of the accused. *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344.

But a Catholic priest, regularly educated, who had officiated as such for ten years, and part of whose preparatory education was to become competent to pass upon the mental condition of communicants in his church, to the end that the rites of the church administered to invalids or dying persons might be administered to persons ascertained to be in a proper state of reason, and who was daily required to exercise and pass his judgment upon the mental condition of such, is an expert, who may give his opinion in evidence as to the sanity or insanity of a testator in a will contest. *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83.

[53] *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *Wheelock* v. *Godfrey*, 100 Cal. 578, 35 Pac. 317; *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *State* v. *Reddick*, 7 Kan. 143; *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *Baxter* v. *Abbott*, 7 Gray, 71; *Hastings* v. *Rider*, 99 Mass. 624; *State* v. *Larkins*, 5 Idaho, 200, 47 Pac. 945; *Flynt* v. *Bodenhamer*, 80 N. C. 205; *Fairchild* v. *Bascomb*, 35 Vt. 398; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336; *State* v. *Boyce*, 24 Wash. 514, 64 Pac. 719.

The opinion of an expert witness in a will contest as to the testator's sanity is not rendered incompetent by the fact that he had testified that he was ignorant of the effect of a certain disease included in the facts assumed in questioning him. *Nash* v. *Hunt*, 116 Mass. 237.

[54] *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336; *Lewis* v. *Mason*, 109 Mass. 169; *Lowe* v. *State* (Wis.) 96 N. W. 417. And see *White* v. *McPherson*, 183 Mass. 533, 67 N. E. 643; *Martin* v. *Johnston*, 1 Fost. & F. 122.

Physicians who knew the defendant in a criminal prosecution, personally, and had observed him in jail since the commission of the offense, may be permitted to give opinions as to his mental condition, where, in the course of their practice, they had a fair proportion of cases of mental diseases under treatment, though they did not profess to be experts in such diseases. *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470.

And proof that a witness in a will contest had been a nurse in an insane asylum, and had had extended experience in nursing the insane in private houses and institutions, and that she had conversed with the testatrix for an

going to his credibility, and not to his competency.[55] The rule has been extensively acted upon, however, that to render an opinion as to sanity or insanity admissible in evidence, it is essential that the witness should be an expert on the general subject under consideration, and that no acquaintance with cognate subjects will suffice, unless the matter inquired into is common to both.[56] And the extent of a witness's acquaintance with the subject upon which he testifies as an expert may always be inquired into to enable the jury to weigh his evidence.[57] Whether an expert witness on the question of mental soundness is competent to testify as an expert is a question for the court.[58] And it is not affected by the witness's own opinion as to his qualification or competency.[59] And its decision is usually final, though it may be reviewed in extreme cases, where a serious mistake has been committed.[60]

hour or two at a time on three different occasions, is sufficient to lay a foundation for her opinion as to her sanity or insanity. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

But the mere fact that a physician had had some experience with persons suffering from excessive smoking or drinking does not qualify him as an expert on insanity from smoking or drinking. *Bishop* v. *Com.* 109 Ky. 558, 60 S. W. 190.

[55]*Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475.

Statutes prescribing the qualifications of commissioners of lunacy do not apply to the question of the qualifications of expert witnesses on the subject of insanity. *Lowe* v. *State* (Wis.) 96 N. W. 417.

[56]*Russell* v. *State*, 53 Miss. 367; *Reed* v. *State*, 62 Miss. 405; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *Hutchins* v. *Ford*, 82 Me. 363, 19 Atl. 832; *State* v. *Crisp*, 126 Mo. 605, 29 S. W. 699. And see *Fairchild* v. *Bascomb*, 35 Vt. 398; *Lorts* v. *Wash*, 175 Mo. 487, 75 S. W. 95; *McLeod* v. *State*, 31 Tex. Crim. Rep. 331, 20 S. W. 749.

The asking of hypothetical questions upon an assumed state of facts, for the purpose of eliciting an opinion of a witness upon the issue of sanity or insanity, may be justified only upon the theory that the witness is so familiar with the general characteristics of the subject under consideration as to be able to form opinions worthy of consideration, though wholly ignorant of the particular transaction in controversy. *Russell* v. *State*, 53 Miss. 367.

And a physician who had not made a special study of insanity, and had considered the matter only so far as to determine whether a patient was in such a condition as to require treatment for insanity, and, if so, to call in the services of a specialist, or recommend the removal of the patient to a hospital for the insane, cannot be interrogated as an expert concerning sanity or insanity. *Com.* v. *Rich*, 14 Gray, 335.

So, the rule that skilful and reputable physicians may testify to the mental condition of their patients, where they had adequate opportunity for observing and judging of their mental qualities, does not apply to one who was not an attending physician, and had made but a single examination *pendente lite*, in order to inform himself as a witness. *Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741.

[57]*Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Fairchild* v. *Bascomb*, 35 Vt. 398.

[58]*Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Eggers* v. *Eggers*, 57 Ind. 461; *Raub* v. *Carpenter*, 17 App. D. C. 505; *Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Boardman* v. *Woodman*, 47 N. H. 120; *Flynt* v. *Bodenhamer*, 80 N. C. 205.

And it has been held to rest within its discretion. *Green* v. *State*, 64 Ark 523, 43 S. W. 973.

[59]*Boardman* v. *Woodman*, 47 N. H. 120; *Horton* v. *United States*, 15 App. D. C. 310; *State* v. *Boyce*, 24 Wash. 514, 64 Pac. 719.

[60]*Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *People* v. *Goldsworthy*.

344. Basis of facts or reasons for the opinions.— The jury should know upon what basis of facts or reasons the opinion of an expert as to mental capacity is founded, since its pertinence depends upon whether they find the truth of the facts upon which it rests.[61] An opinion is not evidence unless the jury find the facts proved upon which it is based; and when such facts are found, the opinion is a fact for the jury to consider in connection with the other evidence.[62] So, a question asked an expert witness is incompetent, where it refers to facts which, either standing alone or in connection with other things, have no tendency to show insanity or incompetency at any time.[63] The facts must form a sufficient foundation upon which to base a hypothetical question.[64] And an opinion based upon incom-

130 Cal. 600, 62 Pac. 1074; *Raub* v. *Carpenter*, 17 App. D. C. 505; *Davis* v. *State* (Fla.) 32 So. 822. And see *Re McArthur*, 36 N. Y. S. R. 292, 12 N. Y. Supp. 822.

One who gave testimony in a court of law as an expert upon the question of soundness of mind will be presumed, on appeal, to have been properly qualified, where nothing appears to the contrary. *Melendy* v. *Spaulding*, 54 Vt. 517.

[61] *Wetherbee* v. *Wetherbee*, 38 Vt. 454; *Prentis* v. *Bates*, 93 Mich. 234, 19 L. R. A. 494, 53 N. W. 153; *Coyle* v. *Com.* 104 Pa. 117.

An expert witness on the question of sanity or insanity may be asked by either party for the reasons on which his opinion is based, or he may, with leave of the court, give such explanation on his own account. *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

[62] *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141.

The better practice is first to introduce all the evidence in support of the facts assumed by a hypothetical question with reference to mental unsoundness. *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

But a medical expert upon the question of insanity need not give all the details upon which his opinion is based, since the opinion sometimes depends upon looks and gestures connected with acts, conduct, or conversation, which would be difficult, if not impossible, for the witness to intelligently describe. *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241.

And a question asked an expert witness, calling for his opinion on the question of the soundness of mind of a person, based on conversations had with him, and their character, and his actions at that time, is not subject to the objection that it should have included all his observations during the entire period of his acquaintance, where counsel did not attempt to modify the evidence by cross-examination. *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328.

[63] *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Thornton* v. *Thornton*, 39 Vt. 122.

The particular facts stated by each of several expert witnesses upon the question of the sanity or insanity of a person must be taken alone as the basis of the proposed opinion of that witness, and if they are found in themselves inconclusive in their nature, or of such a neutral character as to be consistent either with soundness or unsoundness, they cannot be assumed as the basis of an opinion. *First Nat. Bank* v. *Wirebach*, 106 Pa. 37.

[64] *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Bomgardner* v. *Andrews*, 55 Iowa, 638, 8 N. W. 481.

Testimony as to the effect of hypnotism upon persons subject to such influence is not admissible in a criminal prosecution where there was no evidence tending to show that the defendant was subject to hypnotism, merely showing that she was told to kill a person, and that she did it, not establishing hypnotism. *People* v. *Worthington*, 105 Cal. 166, 38 Pac. 689.

But answers to hypothetical questions put to medical experts on the question of sanity or insanity are not objectionable because they include considerations

petent evidence is inadmissible.[65] And this is the rule where the evidence as to sanity was hearsay,[66] though it consisted of a narration or declaration of the person himself whose sanity was in question.[67] But the jury are entitled to the facts upon which the expert bases his opinion, even though these facts are the result of his own interview with the patient.[68] And an opinion of an expert is not rendered inadmissible by the fact that the hypothesis was based upon a state of facts describing the patient's physical condition, as testified to by the medical expert himself.[69]

345. Scope generally.—A mere doubt of an expert as to sanity is not admissible.[70] And one expert cannot give an opinion involving a question as to the value of the opinion of another.[71] And to be admissible, the opinion of an expert must be a medical one, based upon professional knowledge.[72] Nor can an expert be asked to state facts tending to show the state of another's mind as to soundness; he

not referred to in the questions as constituting the basis of the opinion given, where they are such as the testimony tends to prove, and as might have been properly included in the questions. *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336.

[65]*Heald* v. *Thing*, 45 Me. 392; *People* v. *Hawkins*, 109 N. Y. 408, 17 N. E. 371.

But an expert opinion as to insanity is not less competent because the acts observed upon which it is based were those accompanying, as well as those immediately preceding, the act in question. *People* v. *Krist*, 168 N. Y. 19, 60 N. E. 1057.

And facts assumed in propounding a hypothetical question to an expert witness in a will contest upon the ground of insanity, which are a part of the testator's history, and which, taken in connection with other circumstances, are proper to be considered, as showing his condition of mind, are not subject to objection that they are irrelevant and immaterial, and have no tendency to show unsoundness of mind. *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072.

[66]*Conely* v. *McDonald*, 40 Mich. 150; *Wetherbee* v. *Wetherbee*, 38 Vt. 454; *United States* v. *Faulkner*, 35 Fed. 730. And see *Townsend* v. *Pepperell*, 99 Mass. 40.

The superintendent of an insane asylum, called as a witness in a will contest, cannot give an opinion as to what must have been the condition of the patient in the asylum, from the time of her admission to her death, where he had never seen her, and knew nothing except what the records of the asylum showed, and he based his answers upon the absence from the record of things which he said would undoubtedly have been noted if they had existed. *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637.

[67]*People* v. *Strait*, 148 N. Y. 566, 42 N. E. 1045; *People* v. *Hawkins*, 109 N. Y. 408, 17 N. E. 371; *Wood* v. *Sawyer*, 61 N. C. (Phill. L.) 251; *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007.

[68]*People* v. *Nino*, 149 N. Y. 317, 43 N. E. 853. And see *Spivey* v. *State* (Tex. Crim. App.) 77 S. W. 444.

The language of a person, whether written or spoken, may afford some basis for an opinion concerning his sanity or insanity. *Wheeler* v. *State*, 158 Ind. 687, 63 N. E. 975.

[69]*Re Flint*, 100 Cal. 391, 34 Pac. 863.

So, a question asked an expert witness in a will contest, as to whether, in his opinion, the testatrix might have recovered her sanity, assuming her condition to have been as stated by another expert, calls for his opinion upon the facts stated by the other expert, and not upon such facts combined with his opinion, and is therefore competent. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[70]*Sanchez* v. *People*, 22 N. Y. 147.

[71]*People* v. *Webster*, 59 Hun, 398, 13 N. Y. Supp. 414; *People* v. *Holmes*, 111 Mich. 364, 69 N. W. 501.

[72]*Higbee* v. *Guardian Mut. L. Ins. Co.* 66 Barb. 463.

can only be permitted to state how he appeared with respect thereto.[73] And an expert cannot testify as to what causes are sufficient to produce insanity, the issue being whether the person in question was insane, and not what would be sufficient to produce insanity.[74] Nor is it proper to show a mere affliction upon the part of a person, and the effect it had upon his mind, by way of comparison.[75] So, experts may not testify as to whether their theory is supported by authorities, the works themselves being the best evidence as to what they teach, though the rule would be different upon cross-examination;[76] and an expert witness should not be asked to define words having a fixed and well known signification.[77] Nor are the theories of experts admissible where they are directly opposed to the established legal rule upon the question.[78]

[73] *Wyman* v. *Gould*, 47 Me. 159.

An expert witness in a criminal prosecution cannot give an opinion that the accused was capable of deliberating like a sane person, where he never had had an opportunity to examine him. *State* v. *Palmer*, 161 Mo. 152, 61 S. W. 651.

Nor can he testify as to what would be the likelihood of one with a heredity like that of the defendant being injured by the excessive use of liquor, over that of one with an ordinary heredity. *Wright* v. *Com.* 24 Ky. L. Rep. 1838, 72 S. W. 340.

[74] *Carter* v. *State*, 56 Ga. 466; *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 169; *Landis* v. *Landis*, 1 Grant Cas. 248.

And a medical expert who had been asked whether the headaches of a person were neuralgia or proceeded from a disordered stomach, and declined to give any medical opinion thereon, cannot be asked what impression was made on his mind by interviews had by him with such person. *Higbee* v. *Guardian Mut. L. Ins. Co.* 66 Barb. 466.

So, in *Anderson* v. *State*, 42 Ga. 9, refusal of the trial court to allow a physician called as a witness to explain to the jury the structure of the brain, what changes were produced upon it by habitual disease, and how its irritation and inflammation were calculated to present to the mind unreal images from which a person might be induced to act as though the imaginary impressions really existed, was upheld on appeal.

[75] *People* v. *Holmes*, 111 Mich. 364, 69 N. W. 501; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

And an expert witness in a criminal prosecution cannot be asked, on cross-examination or otherwise, for an opinion as to the sanity of other persons than the accused, who had committed crimes somewhat similar in their nature. *Lowe* v. *State* (Wis.) 96 N. W. 417.

But a hypothetical question calling for the opinion of an expert as to the mental capacity of the testator is not objectionable because of the inclusion of the question of his power to comprehend his moral obligations to others, where it plainly appears that the obligations referred to were those which a parent owes to his children. *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

[76] *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475; *State* v. *Coleman*, 20 S. C. 441; *Carlisle* v. *State* (Tex. Crim. App.) 56 S. W. 365.

[77] *Goodwin* v. *State*, 96 Ind. 550.

[78] *French* v. *State*, 93 Wis. 325, 67 N. W. 706; *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398.

But the testimony of a witness in the abstract, as to a certain phase or kind of insanity, not addressed to the mental condition of the person whose sanity is in question, will not be rejected on the ground that it contradicts the rule of insanity established by the supreme court of the state. *Marceau* v. *Travelers' L. Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

And the admission in evidence in a will contest of a statement by a medical expert that the fact that a testatrix told those around her she wanted to get someone to make a will would be evi-

A medical expert, however, may testify as to what are the symptoms of insanity,[79] and whether certain symptoms indicate insanity;[80] or whether certain acts are consistent with sanity or indicate insanity.[81] And he may state whether a trait claimed to be an indication of insanity is a vice or a disease.[82] And the extent and in what manner the mind of a person was affected by disease is a question of fact upon which it is competent for professional witnesses to express their opinions.[83] And they may also testify as to the probability of an inherited predisposition to insanity developing through subsequent causes,[84] as well as to whether or not the person whose sanity is in question is shamming, a personal examination having been

dence of delirium is harmless error, since it is common knowledge that the condition referred to is not evidence of delirium, but of its absence. *McHugh* v. *Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

[79]*Lake* v. *People*, 1 Park. Crim. Rep. 495; *McCann* v. *People*, 3 Park. Crim. Rep. 272.

A witness testifying as an expert may state what insanity is, or what causes insanity, but must assume hypothetical facts when he tells the jury his conclusions. *Price* v. *Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732.

And an expert witness in a prosecution for homicide in which epileptic insanity is alleged may give an opinion, where he had seen the accused within an hour after the offense, as to whether there were any indications in his appearance of a recent epileptic attack. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

[80]*Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *United States* v. *McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Sills* v. *Brown*, 9 Car. & P. 601; *Spear* v. *Richardson*, 37 N. H. 23; *Fairchild* v. *Bascomb*, 35 Vt. 398; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 335; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Com.* v. *Rich*, 14 Gray, 335; *Hoard* v. *Peck*, 56 Barb. 202; *Harnett* v. *Garvey*, 66 N. Y. 641; *Jerry* v. *Townshend*, 9 Md. 145; *Choice* v. *State*, 31 Ga. 424; *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Bishop* v. *Spining*, 38 Ind. 143; *Wright* v. *Hardy*, 22 Wis. 348; *Wilkinson* v. *Moseley*, 30 Ala. 562; and cases cited in Wharton on Ev. § 452.

[81]*People* v. *Krist*, 168 N. Y. 19, 60 N. E. 1057.

[82]*United States* v. *Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247.

So, it is not improper to ask an expert witness in a criminal prosecution if he had discovered anything that led him to think the accused was insane, though it is not claimed that his insanity was of a type which is manifested in paroxysms of frenzy. *Pannell* v. *Com.* 86 Pa. 260.

But questions asked an expert witness as to whether certain specified symptoms in connection with testimony not specified indicate unsoundness of mind are improper. *Re Storer*, 28 Minn. 9, 8 N. W. 827.

[83]*Kempsey* v. *McGinniss*, 21 Mich. 123; *Koenig* v. *Globe Mut. L. Ins. Co.* 10 Hun, 558.

An expert witness in a prosecution for homicide, who had stated that the facts assumed in a hypothetical question indicate mental unsoundness, may be asked in regard to the state and degree of mental unsoundness indicated, and how far it would disqualify the person for business, or render him unconscious of the nature of his conduct; and he should be inquired of as to whether the facts are explainable in any other mode than upon the theory of insanity, and with what degree of certainty they indicate the inference drawn. *Reed* v. *State*, 62 Miss. 405.

And evidence in a prosecution for homicide, that loss of sleep and other causes which produce nervous depression or mental anxiety may produce a state of unconsciousness between sleeping and waking, and evidence that the children of the accused had been sick, and that he had in consequence lost much sleep, is admissible in evidence where the accused killed a person who suddenly woke him from a sound sleep. *Fain* v. *Com.* 78 Ky. 183, 39 Am. Rep. 213.

[84]*Dejarnette* v. *Com.* 75 Va. 867.

made.[85] So, the effect of a deprivation of an accustomed supply of liquors or drugs upon the mental condition of the subject is a proper subject for expert opinion.[86] And the mind of a person with reference to the act in question may be properly compared with that of a child of designated age.[87] The scope and limitation of hypothetical questions should be left largely to the discretion of the trial court.[88]

346. Scope as to time.— The opinions of expert witnesses as to sanity or insanity of a person are not confined to the exact time of the occurrence of the act in question, and the testimony of a medical expert, founded upon the appearance of a person whose sanity is questioned, at the time of the trial, is admissible.[89] And where a physician was acquainted with a person and with his mental condition at a prior period of his life, he may state his opinion as to sanity or insanity at that time as bearing upon his mental condition at the time of the act in question.[90] But after the lapse of many years, with opportunity at all times to urge the question, the door will not be opened to mere speculative opinion as to a person's mental condition.[91]

347. Cross-examination of experts.— After expert witnesses have given their opinions as to sanity or insanity, upon direct examina-

[85] *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730.

[86] *Rogers* v. *State*, 33 Ind. 543.

[87] *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82.

And an expert witness, called to give his opinion as to the effect of epilepsy upon the memory, may give, as an illustration of a sound memory, an opinion as to the epileptic's power of memory from the nature and accuracy of his narrative on the witness stand. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

[88] *Horton* v. *United States*, 15 App. D. C. 310.

[89] *McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *People* v. *Hoch*, 150 N. Y. 291, 44 N. E. 976. And see *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398.

If a medical expert in a criminal prosecution is able, from a physical examination of the accused subsequent to the criminal act, to determine satisfactorily the condition of the brain of the accused, and can state from that examination that there was a disease of such long standing affecting it that it must have existed when the crime was committed, the accused is entitled to such evidence. *People* v. *Wood*, 126 N. Y. 251, 27 N. E. 362.

And a medical witness may testify in a prosecution for a criminal act in which insanity is alleged, from an examination made in July, as to whether the accused was insane on the preceding March. *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

And physicians who had attended a testator on his deathbed may be permitted to give their opinions as to his mental condition immediately before and after the execution of his will, made during such sickness. *Hastings* v. *Rider*, 99 Mass. 624.

[90] *State* v. *Felter*, 25 Iowa, 67; *Doe ex dem. Pritchard* v. *Roe*, 3 Penn. (Del.) 128, 50 Atl. 217.

But the opinions of medical men who gave certificates adjudging a party to a contract to be insane at or about the time of making it are evidence only upon the question of his insanity at the time they were given. *Lovatt* v. *Tribe*, 3 Fost. & F. 9.

[91] *Chase* v. *Winans*, 59 Md. 475.

A physician who attended a person a week after he had a stroke of paralysis cannot be asked, on application to set aside the probate of his will, whether he considered him possessed of testamentary capacity between the time of his shock and the time of his death. *Re Arnold*, 14 Hun, 525.

tion, inquiries may be put to them upon cross-examination, tending to test their skill and capacity, and the correctness of their conclusions.[92] And where an opinion has been expressed, based upon facts assumed to have been proved, or upon a hypothetical case, the witness may be cross-examined by taking his opinion based on any other state of facts assumed by the cross-examiner, or upon a hypothetical case.[93] And the cross-examiner is not confined to the use of the same hypothetical questions used on direct examination.[94] The witnesses may be cross-examined on purely imaginary and abstract questions, assuming facts and theories which have or have not foundation in the evidence, the allowance of such questions resting within the sound discretion of the court.[95] An expert witness, however, cannot be

[92]*People* v. *Lake*, 12 N. Y. 358, Affirmed in 1 Park. Crim. Rep. 495; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *State* v. *Reddick*, 7 Kan. 143; *Horton* v. *United States*, 15 App. D. C. 310. And see *Berry* v. *Safe Deposit & T. Co.* 96 Md. 45, 53 Atl. 720; *Davis* v. *United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360.

And where it appears in a prosecution in a proceeding in the nature of a had examined the defendant for the people while he was in jail, awaiting trial upon a previous charge, and evidence of the former trial and conviction were introduced into, and made a part of, the hypothetical question asked, it is not incompetent to elicit, upon his cross-examination, the facts about such previous examination. *People* v. *Hoch*, 150 N. Y. 291, 44 N. E. 976.

And it is proper, upon cross-examination in a proceeding in the nature of a writ *de lunatico inquirendo*, to show that an expert witness testifying against the alleged lunatic, in order to qualify himself as a witness, obtained admission to her house by fraudulent means, without the consent, and against the will, of those present, and in the absence of her attending physician. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

[93]*Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Williams* v. *State* (Fla.) 34 So. 279; *People* v. *Lake*, 12 N. Y. 358; *People* v. *Sutton*, 73 Cal. 243, 15 Pac. 86. And see *McGinnis* v. *Kempsey*, 27 Mich. 363.

Error in refusing to permit the defense in a criminal prosecution to examine an expert witness on the question of sanity or insanity, introduced by the prosecution, and who had given an opinion based upon facts assumed by the party introducing him, by taking his opinion based on another set of facts assumed by the defense, however, is cured where the defense calls the same witness in its behalf and examines him fully as to matters which would have been elicited by the questions put in cross-examination. *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725.

[94]*Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Prentis* v. *Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

Opposing counsel may, on cross-examination, add to hypothetical questions such facts as they deem the evidence to have established, or subtract from them such facts as they suppose to have been disproved, or not to have been proved. *Goodwin* v. *State*, 96 Ind. 550; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725.

But requiring the accused in a criminal prosecution to submit his hypothetical case to medical experts before the state's rebutting evidence on the question of sanity is given is not error, since he is entitled, upon application to the court, after the state has finished, to reexamine them upon the additional evidence. *Dove* v. *State*, 3 Heisk. 348.

And an expert witness whose testimony on direct examination was confined to a contradiction of the theory of another expert witness called by the other side cannot be asked, on cross-examination, a hypothetical question in all respects similar to the questions propounded by the cross-examiner to his own witnesses. *Gridley* v. *Boggs*, 62 Cal. 190.

[95]*Schieffelin* v. *Schieffelin*, 127 Ala. 14, 28 So. 687; *Horton* v. *United States*, 15 App. D. C. 310; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *People* v.

asked hypothetical questions upon cross-examination upon the question of sanity or insanity, where the hypothesis is wholly unsupported by the evidence.[96] And it is improper to select a few facts and ask the expert whether they changed his opinion; all the facts bearing upon the question should be included.[97] And an expert who had made an examination cannot be asked, on cross-examination, why and for what purpose he made it.[98] Nor can a medical book, stated by an expert witness to be an authority, be read in evidence for the purpose of contradicting his evidence given upon cross-examination.[99] But objection to hypothetical questions on cross-examination is waived if not taken at the time.[100] And the opinion of an expert witness that, from facts adduced, the accused was sane, produced by the people in rebuttal, does not constitute new matter which will entitle the other party to the privilege of calling experts for the purpose of procuring contrary opinions.[1]

Augsbury, 97 N. Y. 501; *West Chicago Street R. Co.* v. *Fishman*, 169 Ill. 196, 48 N. E. 447, Affirming 68 Ill. App. 445. And see *Lord* v. *Beard*, 79 N. C. 5; *Snell* v. *United States*, 16 App. D. C. 501.

But refusal to permit an expert witness who had declared his opinion that the person whose sanity was in question was suffering from recurrent insanity to state whether he could give an illustration of recurrent insanity which had come within his own personal experience is not reversible error. *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

[96]*Kearney* v. *State*, 68 Miss. 233, 8 So. 292; *State* v. *Hanley*, 34 Minn. 430, 26 N. W. 397. And see *People* v. *Youngs*, 151 N. Y. 210, 45 N. E. 460.

In *Wheeler* v. *State*, 158 Ind. 687, 63 N. E. 975, however, it was held that an expert witness may be asked, on cross-examination in a criminal case, as to the insanity of a notorious assassin at the time of the commission of a murder by him, for the purpose of ascertaining whether his views were peculiar and extreme.

[97]*Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637.

[98]*Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 169.

[99]*Macfarland's Trial*, 8 Abb. Pr. N. S. 57.

So, one who has testified as a medical expert, who has stated all that he had seen or heard, and given his own opinion thereon concerning the sanity of a person, need not be permitted to be asked what medical science teaches on the subject. *Davis* v. *United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360.

And a statement of his opinion, made by a medical expert in a criminal prosecution, as to the mental condition of the accused, at the instance of the attorney general, which is placed in the hands of the prisoner's counsel by the attorney general, for use in framing questions on cross-examination, will not be permitted to be put in evidence, against the objection of the attorney general, especially where the counsel for the accused acquiesces in, and avails himself of, the offer of the attorney general, by using it in cross-examination. *Com.* v. *Pomeroy*, 117 Mass. 143.

[100]*Wheelock* v. *Godfrey*, 100 Cal. 578, 35 Pac. 317.

[1]*People* v. *Hill*, 116 Cal. 562, 48 Pac. 711.

So, evidence of a qualified expert as to whether alcohol taken internally acts upon the brain and is a direct brain poison and a cause of insanity, offered by the defense in a criminal prosecution on redirect examination, is not objectionable as a reopening of the case, where the prosecution had introduced evidence tending to show, and the opinions of witnesses to the effect that, all the conduct and conditions shown by the defense to establish insanity might be attributed to intoxication, the purpose being to disprove the theory of the prosecution. *People* v. *Strait*, 154 N. Y. 165, 47 N. E. 1090.

348. Weight generally.— Expert opinion is not necessarily required to establish insanity.[2] And opinions of medical men as to sanity or insanity are not conclusive, but are to be weighed as other testimony,[3] though they are all on one side.[4] The opinions of professional men on the question of sanity or insanity, however, are frequently entitled to great weight;[5] particularly where they have had special opportunities for observation;[6] though where there is considerable conflict between the opinions of expert witnesses, their opinions are entitled to but little, if any, weight.[7] Expert opinions as to insanity, however, are to be received with caution, and subjected to intelligent investigation.[8] And where mental condition is thoroughly established by other evidence, the speculations of experts on the subject should receive but little consideration.[9]

[2]*Reg.* v. *Dart*, 14 Cox C. C. 143; *People* v. *Finley*, 38 Mich. 482; *Beaubien* v. *Cicotte*, 12 Mich. 459.

[3]*McAllister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180; *Williams* v. *State*, 50 Ark. 511, 9 S. W. 5; *Choice* v. *State*, 31 Ga. 428; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Eggers* v. *Eggers*, 57 Ind. 461; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Franeke* v. *His Wife*, 29 La. Ann. 302; *Re Kiedaisch*, 2 Connoly, 438, 13 N. Y. Supp. 255; *Lovatt* v. *Tribe*, 3 Fost. & F. 9.

And a witness giving his opinion that another was sane at a designated time may be contradicted, after laying the proper foundation, by showing that subsequently he had expressed a contrary opinion. *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475.

[4]*Williams* v. *State*, 50 Ark. 511, 9 S. W. 5.

[5]*Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Pannell* v. *Com.* 86 Pa. 260; *Choice* v. *State*, 31 Ga. 481; *Nicholas* v. *Kershner*, 20 W. Va. 251.

And the court, in a habeas corpus proceeding to discharge a person from an asylum, will not reject as erroneous the uncontradicted opinions of unprejudiced experts of high standing that the party is insane, simply because of its inability to itself discover the existence of mental disorder. *Re Sherman*, 17 R. I. 356, 22 Atl. 276.

[6]*Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Montague* v. *Allan*, 78 Va. 592, 49 Am. Rep. 384; *State* v. *Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703; *Thayer* v. *Thayer*, 9 R. I. 377; *Richardson* v. *Moore*, 30 Wash. 406, 71 Pac. 18; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Farnsworth* v. *Noffsinger*, 46 W. Va. 410, 33 S. E. 246. And see *Sponable* v. *Hanson*, 87 Mich. 204, 49 N. W. 644.

And evidence that a person was subject to insane delusions, and, in the opinion of several competent and expert medical witnesses who had excellent opportunities for observing him, was so insane as to be unfit to manage his affairs, is sufficient to justify the setting aside of the return to a commission of lunacy that he was not of unsound mind to such a degree as to incapacitate him for the management of himself and his estate. *Re Fitzgerald*, 30 N. J. Eq. 59.

[7]*Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Burgo* v. *State*, 26 Neb. 639, 42 N. W. 701; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207.

But an instruction in a will contest upon the ground of mental incapacity of a testator, that no medical experts have testified and that the finding as to testamentary capacity must be based upon the testimony of neighbors and intimate friends, is erroneous where physicians did testify as to testator's mental condition, though their opinions were conflicting. *Vanvalkenberg* v. *Vanvalkenberg*, 90 Ind. 433.

[8]*Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *People* v. *Lake*, 12 N. Y. 358.

And evidence of a medical expert called by the defendant in a criminal prosecution will not justify a verdict of insanity, where he gives his opinion that the defendant was in a measure able to distinguish right from wrong. *State* v. *Kaib*, 2 Ohio Legal News, 364.

[9]*Rankin* v. *Rankin*, 61 Mo. 295; *Bur-*

349. As affected by facts, opportunity to observe, character, etc.— The reliance to be placed upon the opinions of expert witnesses on a question of sanity or insanity depends upon their means of judging of the true mental condition of the person, and the facts upon which the opinions are based.[10] The opinion of an expert is of little or no value where the facts upon which it is predicated are not established, or the hypothesis is incorrect.[11] Nor will much weight be given the opinion of an expert as to mental capacity where it is founded upon reasons which are absurd or not well founded;[12] or where the witnesses had had limited opportunities for observing the patient.[13] The weight of opinion of an expert also depends upon the experience, study, scientific eminence, and professional character and understanding of the witness.[14] And the judge should consider whether the

ley v. *McGough*, 115 Ill. 11, 3 N. E. 738; *State* v. *Thomas*, Houst. Crim. Rep. (Del.) 511; *Dobie* v. *Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801.

Letters of a testator, written at or about the time he made his will, evidencing a sound, discriminating mind, are more reliable in a will contest than speculations and opinions of witnesses, expert or nonexpert, as to testamentary incapacity. *Harper* v. *Harper*, 1 Thomp. & C. 354.

So, in *Russell* v. *State*, 53 Miss. 367, it was said that, medicine not being an exact science, the testimony of a medical witness on the question of sanity or insanity of another is, at best, of an exceedingly unsatisfactory character, and is often as much calculated to mislead as to guide to a correct conclusion.

[10]*People* v. *Lake*, 2 Park. Crim. Rep. 215; *State* v. *Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703; *Ward* v. *Brown* (W. Va.) 44 S. E. 488; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Prinsep* v. *Dyce Sombre*, 10 Moore P. C. C. 232. And see *Kirsher* v. *Kirsher* (Iowa) 94 N. W. 846.

The extent of an expert witness's acquaintance with the subject of insanity may always be inquired into to enable the jury to estimate the weight of the opinion given by him on that question. *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760.

[11]*First Nat. Bank* v. *Wirebach*, 106 Pa. 37; *Palmer's Estate*, 5 W. N. C. 542; *Richmond's Estate*, 206 Pa. 219, 55 Atl. 970; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Kirsher* v. *Kirsher* (Iowa) 94 N. W. 846; *Stackhouse* v. *Horton*, 15 N. J. Eq. 202; *Re Andrews*, 33 N. J. Eq. 514; *Bristed* v. *Weeks*, 5 Redf. 529; *Hagan* v. *Sone*, 68 App. Div. 60, 74 N. Y. Supp. 109; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *Sharkey* v. *State*, 4 Ohio C. C. 101, 2 Ohio C. D. 443. And see *Reg.* v. *Southey*, 4 Fost & F. 864; *Re Connor*, 29 Misc. 391, 61 N. Y. Supp. 910.

[12]*Crockett* v. *Davis*, 81 Md. 134, 31 Atl. 710; *State* v. *Hockett*, 70 Iowa, 442, 30 N. W. 742.

The opinion of an expert in a proceeding to set aside a will that the testator was insane, founded upon the fact that he was in a dying condition, the expert judging his mental condition from his physical condition, is entitled to but little weight, as against proof of facts tending to show mental capacity. *Burley* v. *McGough*, 115 Ill. 11, 3 N. E. 738.

And the conflicting opinions of experts as to the sanity of the testator in answer to hypothetical questions embracing assumed and isolated facts covering a long lifetime, and separated from each other by years, are weak and unreliable, and do not present a question of fact for the jury, as against evidence of excellent business ability, and that his will was written by himself, and carried out previously existing plans. *Dobie* v. *Armstrong*, 27 App. Div. 520, 50 N. Y. Supp. 801.

[13]*State* v. *Kalb*, 2 Ohio Leg. News, 364; *Watson's Interdiction*, 31 La. Ann. 757; *Slais* v. *Slais*, 9 Mo. App. 96; *Crolius* v. *Stark*, 64 Barb. 112; *Tomkins* v. *Tomkins*, 1 Bail. L. 92, 19 Am. Dec. 656.

[14]*Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Steele* v. *Helm*, 2 Marv. (Del.)

testimony of the expert witness is partisan in its character, or biased by any leanings for or against any of the parties.[15] So, an expert witness who states precise facts in science as ascertained and settled, or states the necessary or inevitable conclusion which results from the facts stated, is entitled to greater weight than one who only gives probable inferences, or whose opinion is speculative or theoretical.[16]

350. As compared with other opinions.— The opinion of a physician who attended a testator or other person during his last illness is entitled to more weight on the question of testamentary capacity or competency than the opinions of physicians who had not a like advantage,[17] though the evidence of experts who have had opportunity to

237, 43 Atl. 153; *Clark* v. *Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *People* v. *Lake*, 2 Park. Crim. Rep. 215; *People* v. *Kemmler*, 119 N. Y. 580, 24 N. E. 9; *State* v. *Miller*, 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282. And see *Van Horn* v. *Keenan*, 28 Ill. 448; *State* v. *Bradford*, 156 Mo. 91, 56 S. W. 898.

So far as medical opinions bear upon the degree of cerebral disease indicated by epilepsy, paralysis, loss of sleep, conversations, and other physical symptoms, they are to be regarded as the opinions of experts; but so far as they rest upon evidence going to show a want of intellect directly, and not merely as a result of the disease of the brain, they derive little if any additional force from the professional education of the witness. *Delafield* v. *Parish*, 25 N. Y. 115.

[15]*Rush* v. *Megee*, 36 Ind. 69.

The opinions of experts who are employed for the purpose of giving them, and paid for their services, and who are brought to testify as witnesses for their employers, are to be closely scanned, and due effect is to be given to the means by which such opinions are procured. *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

But, the fact that the chief beneficiary under a will procured two alienists as witnesses to the testator's will, with a view to producing their testimony upon an anticipated contest thereof, is not a suspicious circumstance, or one which affects the weight of their testimony that the testator's mind and memory were sound. *Re Journeay*, 15 App. Div. 567, 44 N. Y. Supp. 548, Affirmed in 162 N. Y. 611, 57 N. E. 1113.

[16]*Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *People* v. *Barberi*, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.

The fact that a person is unable to discriminate between right and wrong is best ascertained, not by any medical theory, but by the acts of the person himself. *United States* v. *Shults*, 6 McLean, 121, Fed. Cas. No. 16,286.

And acts and conduct of a person accused of crime, showing conclusively that he had sufficient reason to contemplate the act and its consequences, are of more value as evidence on the question of capacity than the opinions of witnesses, however learned or experienced. *State* v. *Thomas*, Houst. Crim. Rep. (Del.) 511.

[17]*Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Re Blakely*, 48 Wis. 294, 4 N. W. 337; *Whelpley* v. *Loder*, 1 Dem. 368; *Re Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496; *Re Kearney*, 69 App. Div. 481, 74 N. Y. Supp. 1045.

A statement by the judge in a will contest, that he relied with more confidence upon the opinion of an intelligent attending physician than he did upon the subsequent opinion of four physicians who had not seen the testator during his illness, and who based their opinions as to his sanity upon the nature of the disease, is not reversible error. *Kirkwood* v. *Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418.

And evidence, in a criminal prosecution, of insanity in the family of the defendant, and testimony of his family physician and persons who had known him for years, tending to show insanity, preponderate over evidence given by a person who had known him but a short time, and whose opinion was not substantiated by reason, and the opinions of experts who were not specially qual-

observe cannot be said to be entitled to greater weight, as matter of law, than that of experts who found their opinions upon hypothetical questions.[18] And as a general rule, proof made by expert witnesses who have devoted their time and attention to cases of mental derangement is of much greater value than that of persons who have no scientific or experimental knowledge of the subject, and who only speak from observation of outward signs and appearances.[19] But it is the duty of the jury to weigh the whole evidence, and decide according to their convictions, though the medical witnesses were of a different opinion.[20] And jurors are not bound to give more weight to the testimony of medical experts on the question of insanity than to that of nonexpert witnesses who state facts within their own knowledge; it is not for the court to pronounce, as matter of law, which of the two classes should receive greater weight.[21] And opinions of neighbors of good common sense, who had opportunity to observe, are sometimes regarded as of more weight than those of experts,[22] especially where the opinions of the experts are not well supported by facts and reasons.[23]

ified as such. *McLeod* v. *State*, 31 Tex. Crim. Rep. 331, 20 S. W. 749.

[18]*Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072.

[19]*State* v. *Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *Watson* v. *Anderson*, 13 Ala. 203; *Hendrix* v. *Money*, 1 Bush, 306; *Com. ex rel. Helmbold* v. *Kirkbride*, 11 Phila. 427; *Ward* v. *Brown* (W. Va.) 44 S. E. 488; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Kerr* v. *Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493; *Nicholas* v. *Kershner*, 20 W. Va. 255. And see *Forman* v. *Smith*, 7 Lans. 443.

An instruction in a will contest that the testimony of medical men of large experience on the question of insanity, as a general rule is entitled to more weight than that of nonprofessional men, but that the question of the weight is for the jury, is not erroneous, where the medical men testifying were not mere experts whose testimony was founded upon facts testified to by other witnesses, but they had made a personal examination of the decedent for the very purpose of ascertaining his mental capacity.' *Blake* v. *Rourke*, 74 Iowa, 519, 38 N. W. 392; *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

[20]*Watson* v. *Anderson*, 13 Ala. 202.

[21]*Sanders* v. *State*, 94 Ind. 147; *Carpenter* v. *Calvert*, 83 Ill. 62; *Brock* v. *Luckett*, 4 How. (Miss.) 459; *Re Kiedaisch*, 2 Connoly, 438, 13 N. Y. Supp. 255; *People* v. *Ferraro*, 161 N. Y. 365, 55 N. E. 931.

And an instruction in a criminal prosecution that the opinions of medical experts are to be considered in connection with all the other evidence in the case, and that the jury are not bound to act upon them to the exclusion of other evidence, and that they are to determine the question on the whole evidence, is not subject to objection that it informs the jury that the testimony of the experts is not entitled to greater weight than that of nonexpert witnesses. *Goodwin* v. *State*, 96 Ind. 550.

[22]See *Rutherford* v. *Morris*, 77 Ill. 397; *Kelly* v. *Perrault*, 5 Idaho, 221, 48 Pac. 45; *Maynard* v. *Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; *Kane's Estate*, 206 Pa. 204, 55 Atl. 917; *Re Smith*, 22 Pa. Co. Ct. 487.

Probate will not be refused a will on the opinion of a medical expert against testamentary capacity, where, in order to do so, it would be necessary to find as a fact that each of the subscribing witnesses had committed wilful perjury. *Re Lyddy*, 17 N. Y. S. R. 2, 4 N. Y. Supp. 468.

[23]*Re Lawrence*, 27 Misc. 473, 59 N. Y. Supp. 174; *Buchanan* v. *Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *Brooks* v. *Pratt*, 55 C. C. A. 515, 118 Fed. 725.

Affirmative evidence of persons well

351. A question for the jury.— The matter of the weight of expert opinion, though one with reference to which the court is usually permitted to make suggestions, is one for the jury, the opinion of an expert witness as to sanity or insanity being a fact bearing upon that question, the proper weight of which falls within the province of the jury to determine,[24] though the court must decide whether a witness called to give his opinion has the necessary experience to enable him to testify as an expert.[25] And a charge that the opinions of one class of witnesses should be given either greater or less weight than the opinions of another class is improper, as an invasion of the province of the jury.[26] An instruction that the law attaches peculiar importance to the opinions of medical men who have had opportunity to observe, upon the question of mental capacity, however, is not objectionable as an expression of opinion on the weight of evidence.[27]

acquainted with one alleged to be insane is entitled to more weight than testimony of persons who had interviews with him near the time in question, merely to the effect that they saw no indications of insanity. *Emery* v. *Hoyt*, 46 Ill. 258.

And an instruction in a will contest that the testator's manner of conducting himself is of more weight than the mere opinions of witnesses as to his sanity or insanity is not objectionable as characterizing opinion evidence as of the lowest order. *Howe* v. *Richards*, 112 Iowa, 220, 83 N. W. 909.

[24]*Kempsey* v. *McGinniss*, 21 Mich. 123; *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Davis* v. *State*, 35 Ind. 496, 9 Am. Rep. 760; *Goodwin* v. *State*, 96 Ind. 550; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282; *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Re Redfield*, 116 Cal. 637, 48 Pac. 794; *State* v. *Del Bello*, 8 Ohio S. & C. P. Dec. 455.

It is within the province of the jury, in an action involving the question of sanity or insanity, to reject each and every opinion uttered by experts. *People* v. *Barberi*, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.

[25]*Flynt* v. *Bodenhamer*, 80 N. C. 205.

[26]*Goodwin* v. *State*, 96 Ind. 550; *Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *Carpenter* v. *Calvert*, 83 Ill. 62; *Brown* v. *Riggin*, 94 Ill. 560; *Eggers* v. *Eggers*, 57 Ind. 461; *Sanders* v. *State*, 94 Ind. 147; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Rivard* v. *Rivard*, 109 Mich. 98, 66 Am. St. Rep. 566, 66 N. W. 681; *Pannell* v. *Com.* 86 Pa. 260; *Ward* v. *Brown* (W. Va.) 44 S. E. 488.

So, an instruction that the opinions of expert witnesses on the question of insanity are entitled to great weight, and so are those of persons who associated and lived with the person whose sanity is in question, is erroneous, it being safer and better to leave these matters to be weighed by the jury. *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

And an instruction that the testimony and opinions of medical witnesses on the question of insanity should be received with caution, and are entitled to but little weight unless sustained by reasons and facts that admit of no misconstruction, and that they are not binding upon the jury, is objectionable, as a comment upon the sufficiency and weight of the evidence, under a statute prohibiting such comment. *State* v. *Hundley*, 46 Mo. 414.

And a remark by the judge in charging the jury as to insanity in a criminal prosecution, that, in his experience and observation, doctors can be gotten to swear on both sides of any question, is objectionable, as adding the testimony derived from the experience of the judge, and as a statement of convictions and conclusions created by listening to the testimony of this class of transactions in other cases. *People* v. *Webster*, 50 Hun, 398, 13 N. Y. Supp. 414.

[27]*Flynt* v. *Bodenhamer*, 80 N. C. 205.

And an instruction, in an action to

Likewise, whether the facts upon which the opinion of a medical expert on the question of mental capacity is based are established or not is a question for the consideration of the jury.[28] And where the opinion of a medical expert has been admitted, and the facts hypothetically stated vary somewhat from the facts proved, a charge that his opinion is entitled to but little weight is properly refused.[29] The jury should be left at liberty to apply the same rules to the testimony of experts that are applicable to the testimony of other witnesses, when estimating its value.[30] They are to be assisted, but their functions are not to be superseded, by the expert.[31]

2. *Nonexperts.*

352. Admissibility generally.— The unsupported opinions of witnesses other than experts and subscribing witnesses to an instrument, as to the capacity of a person, considered merely as opinions, are not admissible in evidence.[32] A witness who is not an expert cannot tes-

contest the validity of a will upon the ground of testamentary incapacity, that the evidence of an expert was of little value, is not reversible error, as against the plaintiff, where he was called by, and testified strongly in favor of, the defendants. *Bundy* v. *McKnight*, 48 Ind. 502.

[28]*First Nat. Bank* v. *Wirebach*, 106 Pa. 37; *Guetig* v. *State*, 66 Ind. 94, 32 Am. Rep. 99; *Lake* v. *People*, 1 Park. Crim. Rep. 495.

And a refusal to instruct the jury in a will contest upon the ground of insanity, that no weight is to be given to the evidence of experts when some of the facts upon which the hypothetical questions are based are not found to be true, will not be regarded as prejudicial error, where the court had instructed that the weight of such opinions was for the jury to consider, in view of all the other testimony in the case. *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072.

[29]*Gunter* v. *State*, 83 Ala. 96, 3 So. 600. And see *Guiteau's Case*, 10 Fed. 161.

But an instruction in a will contest upon the ground that the testator was afflicted with senile dementia, that the jury ought to consider and weigh all the evidence, including the evidence of experts tending to show the condition of the testator's mind, is not subject to objection that it directs the jury that they might give more weight to the opinions of experts, though some of the assumed facts stated in the hypothetical questions might have been found to be untrue. *Bever* v. *Spangler*, 93 Iowa, 576, 61 N. W. 1072.

[30]*Cuneo* v. *Bessoni*, 63 Ind. 524; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

A verdict will not be disturbed on appeal, though against the validity of a will which was rational in its provisions, and was written and attested by a physician without interest in the matter, who testified in favor of testamentary capacity, where the other attesting witnesses testified that the testator was not competent by reason of his physical and mental condition, and that he signed the will to avoid offending the physician, and other witnesses, including another attending physician, testified against testamentary capacity. *Snyder* v. *Cunningham*, 13 Ky. L. Rep. 24, 16 S. W. 130.

[31]*Re Redfield*, 116 Cal. 637, 48 Pac. 794.

[32] This rule, in the above broad and general form, is supported by many cases, among which are: *Ragland* v. *State*, 125 Ala. 12, 27 So. 983; *McDaniel* v. *Crosby*, 19 Ark. 533; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Doe ex dem. Pritchard* v. *Roe*, 3 Penn. (Del.) 128, 50 Atl. 217; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Stacer* v. *Hogan*, 120 Ind. 207, 21

tify as to his opinion with reference to the mental capacity of another, without stating the facts or reasons upon which his opinion is based.[33] Opinions must be founded on facts, which must be given to the jury, that they may determine the weight to be given to the opinions.[34] An exception exists, however, to the general rule of evidence that witnesses can only speak as to facts, and cannot be permitted to state their opinions, where the issue is as to sanity or insanity; and the rule generally laid down is that opinions of nonexpert witnesses on the question of sanity or insanity are admissible in evidence, where they state the facts and circumstances upon which the opinions expressed

N. E. 911, 22 N. E. 990; *State* v. *Geddis*, 42 Iowa, 268; *Godden* v. *Burke*, 35 La. Ann. 160; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Crowson* v. *Crowson*, 172 Mo. 691, 72 S. E. 1065; *Hyer* v. *Little*, 20 N. J. Eq. 443; *Crowell* v. *Kirk*, 14 N. C. (3 Dev. L.) 355; *Puryear* v. *Reese*, 6 Coldw. 21; *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351.

A statement by a witness that a wife treated her husband as a parent would treat a child is inadmissible to prove the insanity of the husband, being ambiguous, and a mere expression of opinion. *Waters* v. *Waters*, 35 Md. 531.

[33] This is merely a more particularized statement of the general rule above given. In this form it is also supported by numerous cases, among which are: *Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Jarvis* v. *State*, 70 Ark. 613, 67 S. W. 76; *Grant* v. *Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Horton* v. *United States*, 15 App. D. C. 310; *Bowden* v. *Achor*, 95 Ga. 243, 22 S. E. 254; *Doe ex dem. Sutton* v. *Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Rarick* v. *Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Alvord* v. *Alvord*, 109 Iowa, 113, 80 N. W. 306; *Moors* v. *Sanford*, 2 Kan. App. 243, 41 Pac. 1064; *Shirley* v. *Taylor*, 5 B. Mon. 99; *Eloi* v. *Eloi*, 36 La. Ann. 563; *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620; *Hathorn* v. *King*, 8 Mass. 371, 5 Am. Dec. 106; *Re Hogmire*, 108 Mich. 410, 66 N. W. 327; *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *State* v. *Williamson*, 106 Mo. 162, 17 S. W. 172; *Snider* v. *State*, 56 Neb. 309, 76 N. W. 574; *Re Vanauken*, 10 N. J. Eq. 190; *People* v. *O'Donnell*, 51 App. Div. 115, 64 N. Y. Supp. 256; *Roush* v. *Wensel*, 15 Ohio C. C. 133, 8 Ohio D. C. 146; *State* v. *Abrams*, 11 Or. 169, 8 Pac. 327; *Doran* v. *McConlogue*, 150 Pa. 98, 24 Atl. 357; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Yanke* v. *State*, 51 Wis. 464, 5 N. W. 276.

Merely showing that the witness had opportunity to observe is not sufficient. *Hurst* v. *State* (Tex. Crim. App.) 40 S. W. 264.

But an objection to the admission of the opinion of witnesses as to the sanity of the accused in a criminal prosecution, on the ground that the reasons upon which they were based were not given, cannot be first taken on appeal, where it was not made on the trial, and witnesses were not required to give their reasons, and their refusal made a specific ground of objection. *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

[34] Among the cases holding the rule in this form are: *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679; *Goodwin* v. *State*, 96 Ind. 550; *Goldthorp* v. *Goldthorp*, 106 Iowa, 722, 77 N. W. 471; *Godden* v. *Burke*, 35 La. Ann. 160; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *State* v. *Crisp*, 126 Mo. 605, 29 S. W. 699; *Hoover* v. *State*, 48 Neb. 184, 66 N. W. 1117; *DeWitt* v. *Barly*, 17 N. Y. 340; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Anderson* v. *Cranmer*, 11 W. Va. 562.

An affidavit on an application for a continuance in a criminal case, stating that the witnesses named will testify that the defendant was of unsound mind, is insufficient where they are not expert witnesses, and it does not state specific facts indicating insanity, upon which their opinions are based. *Warner* v.

by them are predicated;[35] and that nonprofessional witnesses should be allowed to state their opinions as to the sanity of a person accused of crime, derived from their acquaintance with him, and observation of his conduct and appearance, described by them.[36] This

State, 114 Ind. 137, 16 N. E. 189; *Harrison* v. *State* (Tex. Crim. App.) 69 S. W. 500.

A mere objection that such evidence is incompetent, however, is insufficient to raise the point on appeal. *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

[35] The exception is as well supported as the broad general rule. Among the many cases supporting it are: *Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Green* v. *State*, 64 Ark. 523, 43 S. W. 973; *People* v. *Sanford*, 43 Cal. 29; *Shapter* v. *Pillar*, 28 Colo. 209, 63 Pac. 302; *Dunham's Appeal*, 27 Conn. 192; *Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Armstrong* v. *State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *Hutchinson* v. *Hutchinson*, 50 Ill. App. 87; *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129; *Kostelecky* v. *Scherhart*, 99 Iowa, 120, 68 N. W. 591; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *Godden* v. *Burke*, 35 La. Ann. 160; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Cannady* v. *Lynch*, 27 Minn. 435, 8 N. W. 164; *Wood* v. *State*, 58 Miss. 741; *Sharp* v. *Kansas City Cable R. Co.* 114 Mo. 94, 20 S. W. 93; *Clarke* v. *Irwin*, 63 Neb. 539, 88 N. W. 783; *De Witt* v. *Barly*, 17 N. Y. 340; *State* v. *Ketchey*, 70 N. C. 621; *Queenan* v. *Territory*, 11 Okla. 261, 61 L. R. A. 324, 71 Pac. 218; *Com.* v. *Gearhardt*, 205 Pa. 387, 54 Atl. 1029; *Scarborough* v. *Baskin*, 65 S. C. 558, 44 S. E. 63; *Gibson* v. *Gibson*, 9 Yerg. 329; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Re Van Alstine* (Utah) 72 Pac. 942; *Sargent* v. *Burton*, 74 Vt. 24, 52 Atl. 72; *Higgins* v. *Nethery*, 30 Wash. 239, 70 Pac. 489; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 602.

There is no difference between the rule permitting an expert, and that permitting a nonexpert, to give his opinion as to mental capacity, except that the former is able to give his opinion upon facts testified to by other witnesses, and which are assumed to be true, while the latter is limited to his opinion based upon the facts to which he has himself deposed. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

And the absence of several nonexpert witnesses, intimately acquainted with the accused from childhood, who would swear to his insanity, setting forth in detail the facts upon which their testimony is based, is a sufficient ground for a continuance in a prosecution for murder. *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

And the acts and conduct of a person in jail under arrest may be given as a basis for the opinion of a witness upon the prosecution as to his insanity, though the accused was not warned that his acts and expressions would be used against him. *Adams* v. *State*, 34 Tex. Crim. Rep. 470, 31 S. W. 372.

[36] Among the many cases stating the rule in substantially this form are: *Florey* v. *Florey*, 24 Ala. 241; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *State* v. *Cross*, 72 Conn. 722, 46 Atl. 148; *Choice* v. *State*, 31 Ga. 424; *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689; *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470; *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *People* v. *Casey*, 124 Mich. 279, 82 N. W. 883; *State* v. *Erb*, 74 Mo. 199; *Territory* v. *Hart*, 7 Mont. 489, 17 Pac. 718; *Genz* v. *State*, 58 N. J. L. 482, 34 Atl. 816; *Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Price* v. *Richmond & D. R. Co.* 38 S. C. 199, 17 S. E. 732; *State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3; *Dove* v. *State*, 3 Heisk. 348; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991.

The absence of witnesses in a criminal prosecution in which insanity is alleged as a defense, who would give their opinions as to the sanity of the accused,

rule applies to opinions of such witnesses as to capacity of a party to make a contract;[37] and the opinions of witnesses as to the sanity of a grantor may be given in evidence on the question of the validity of his deed; but the facts upon which they are founded must also be given.[38]

Likewise, nonexpert witnesses in a will contest may give their opinions as to testamentary capacity, where the facts and circumstances upon which they are founded are disclosed.[39] And the same rule applies to nonexpert opinions on an inquisition of lunacy,[40] and also to such evidence as to insanity at the time of committing suicide, in an action upon an insurance policy.[41] And nonexpert witnesses who

gathered from their association with him and their observation of his conduct, language, and appearance for some time prior to and including the day of the criminal act, is a sufficient ground for a continuance. *Webb* v. *State*, 5 Tex. App. 596.

And that the opinion of a nonexpert witness on the question of insanity would be cumulative only is not a sufficient reason for its exclusion, and is not a good ground for overruling an application for continuance, otherwise sufficient, for the purpose of procuring such evidence. *Harris* v. *State*, 18 Tex. App. 287.

[37]*Cram* v. *Cram*, 33 Vt. 15; *Beller* v. *Jones*, 22 Ark. 92; *Stewart* v. *Spedden*, 5 Md. 433; *Whitaker* v. *Hamilton*, 126 N. C. 465, 35 S. E. 815; *Bricker* v. *Lightner*, 40 Pa. 199; *Kilgore* v. *Cross*, 1 Fed. 578.

So, the opinion of a nonexpert witness as to the mental capacity of a person signing a release, who had stated the opportunities he had had for judging, and detailed his conversations with her for a period of about three years with reference to the matter in question, is admissible in evidence on a question involving the validity of the release, when confined to the question of mental capacity. *Chickering* v. *Brooks*, 61 Vt. 554, 18 Atl. 144.

[38]*Doe ex dem. Sutton* v. *Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Frizzell* v. *Reed*, 77 Ga. 724; *Stumph* v. *Miller*, 142 Ind. 442, 41 N. E. 812; *Woodcock* v. *Johnson*, 36 Minn. 217, 30 N. W. 894; *Culver* v. *Haslam*, 7 Barb. 314; *De Witt* v. *Barley*, 13 Barb. 550; *Brand* v. *Brand*, 39 How. Pr. 193; *Barker* v. *Pope*, 91 N. C. 165; *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Doe ex dem. McDougald* v. *McLean*, 60 N. C. (1 Winst. L.) 120; *Parkhurst* v. *Hosford*, 10 Sawy. 401, 21 Fed. 829.

So, a nonexpert witness is competent to express an opinion as to the mental capacity of a grantor whose deed is sought to be set aside for undue influence and fraud, founded upon association with the grantor. *Smith* v. *Smith*, 117 N. C. 326, 23 S. E. 270.

[39]This is asserted by many cases, among which are: *Abraham* v. *Wilkins*, 17 Ark. 292; *Brooke's Estate*, 54 Cal. 451; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126; *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771; *Re Norman*, 72 Iowa, 84, 33 N. W. 374; *Wise* v. *Foote*, 81 Ky. 10; *Williams* v. *Lee*, 47 Md. 321; *Carpenter* v. *Hatch*, 64 N. H. 573, 15 Atl. 219; *Bost* v. *Bost*, 87 N. C. 477; *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Puryear* v. *Reese*, 6 Coldw. 21; *Brown* v. *Mitchell*, 75 Tex. 9, 12 S. W. 606; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Whitelaw* v. *Sims*, 90 Va. 588, 19 S. E. 113; *Tatham* v. *Wright*, 2 Russ. & M. 1; *Wright* v. *Tatham*, 5 Clark & F. 692, 6 Scott, 58, 4 Bing. N. C. 489.

The right to give opinions as to the capacity of a testator is not confined to subscribing witnesses to a will, though execution thereof is required to be proved by them. *Martin* v. *Perkins*, 56 Miss. 204; *Morton* v. *Heidorn*, 135 Mo. 608, 37 S. W. 504.

[40]*Re Vanauken*, 10 N. J. Eq. 190.

[41]*Connecticut Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533; *Mutual L. Ins. Co.* v. *Leubrie*, 18 C. C. A. 332, 38 U. S. App. 37, 71 Fed. 843; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433.

have stated their observations may be permitted to state their conclusions or opinions based upon such observations by making a comparison of the mental condition of a person suffering a personal injury alleged to have affected his mind, both before and after the injury.[42] And it has been held that it is not material whether the witness details the describable facts upon which his conclusions are founded before or after the expression of his opinion.[43] But the rule as stated generally is that such opinions are admissible after the witness has stated the facts and reasons upon which they are based.[44] And there are numerous direct decisions that a nonexpert witness will not be permitted to give an opinion as to the mental condition of another, without first stating the facts upon which the opinion is based.[45] The admissibility of the opinions of nonexpert witnesses is a question for the court.[46]

353. Grounds of admissibility.— The grounds upon which the opinions of nonexpert witnesses on an issue of insanity are admitted are

[42]*New York, C. & St. L. R. Co.* v. *Luebeck*, 157 Ill. 595, 41 N. E. 897; *West Chicago Street R. Co.* v. *Fishman*, 169 Ill. 196, 48 N. E. 447.

[43]*Garrison* v. *Blanton*, 48 Tex. 299; *Jones* v. *Galbraith* (Tenn. Ch. App.) 59 S. W. 350.

[44]*People* v. *Wreden*, 59 Cal. 392; *American Bible Soc.* v. *Price*, 115 Ill. 623, 5 N. E. 126; *Re Norman*, 72 Iowa, 84, 33 N. W. 374; *State* v. *Stickley*, 41 Iowa, 232; *Parsons* v. *Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *Baughman* v. *Baughman*, 32 Kan. 538, 4 Pac. 1003; *Territory* v. *Hart*, 7 Mont. 489, 17 Pac. 718; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *Wood* v. *State*, 58 Miss. 743; *Hay* v. *Miller*, 48 Neb. 156, 66 N. W. 1115; *State* v. *Lechman*, 2 S. D. 171, 49 N. W. 3; *Dove* v. *State*, 3 Heisk. 348; *Cockrill* v. *Cox*, 65 Tex. 669; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 336.

[45]*Pennsylvania Co.* v. *Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Rarick* v. *Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Grubb* v. *State*, 117 Ind. 277, 20 N. E. 257, 725; *Roberts* v. *Trawick*, 13 Ala. 68; *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679; *State* v. *Pennyman*, 68 Iowa, 216, 26 N. W. 82; *Sheehan* v. *Kearney* (Miss.) 35 L. R. A. 102, 21 So. 41; *State* v. *Abrams*, 11 Or. 169, 8 Pac. 327; *Dickinson* v. *Dickinson*, 61 Pa. 401; *First Nat. Bank* v. *Wirebach*, 106 Pa. 37, Affirming 12 W. N. C. 150; *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Adams* v. *State*, 34 Tex. Crim. Rep. 470, 31 S. W. 372; *Re Gorkow*, 20 Wash. 563, 56 Pac. 385; *Yanke* v. *State*, 51 Wis. 464, 5 N. W. 276; *Crawford* v. *Christian*, 102 Wis. 51, 78 N. W. 406.

But the opinion of nonexpert witnesses in a criminal prosecution, that the accused was not insane after a conflict with a designated person, is not rendered incompetent by the fact that they had not, before expressing their opinions, detailed the facts and circumstances upon which they were formed, where they testified that they had been well acquainted with him before the conflict, and had observed his manner and conduct, and had seen him frequently after that, and observed his manner, conduct, and conversations, and had observed nothing different in his conduct, the theory sought to be established being that he became insane after the conflict. *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475.

In *Berry* v. *State*, 10 Ga. 512, however, it was questioned whether it is best to draw a line of demarcation, and to state distinctly in what class of cases the opinions of the witnesses may be embraced, and when they must be excluded.

[46]*Commonwealth Title Ins. & T. Co.* v. *Gray*, 150 Pa. 255, 24 Atl. 640; *Colee* v. *State*, 75 Ind. 513.

that, from the nature of the subject to be investigated, it cannot be so described in language as to enable persons not eye witnesses to form a correct judgment in regard to it.[47] The opinions are received in evidence because the observation of the witnesses must convey to them little, indefinable, and almost imperceptible actions and perceptions which language cannot adequately describe.[48] And they are admissible when based upon facts and circumstances which, from their nature and number, it would be impossible to bring before the jury,[49] or when, from the nature of the subject under investigation, no better evidence can be obtained.[50] But such opinions are competent only upon the theory that it is necessary to admit them to get before the jury impressions of the witnesses, derived from observation such as would form the basis of a belief in the mind of a juror if he had the same opportunity the witness had.[51] The testimony of a nonexpert witness as to how the person whose sanity is in question conducted himself, however, does not call for an opinion as to his sanity, but for a statement of fact as to his conduct and appearance,[52] which is a subject of inquiry by either party.[53] And the character and

[47]*De Witt* v. *Barly*, 17 N. Y. 340; *Culver* v. *Haslam*, 7 Barb. 314.

A nonexpert witness may state facts on the issue of insanity, including the looks and actions of the person whose sanity is in question, and it is frequently necessary that he should be permitted to tell what they indicate; or, in other words, be permitted to express an opinion, since he cannot otherwise convey to the mind distinctly the condition which such acts and looks betray. *Re Vanauken*, 10 N. J. Eq. 190.

[48]*Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Powell* v. *State*, 25 Ala. 21.

The opinion of an intelligent nonexpert witness having adequate opportunity of observing and judging as to the mental condition of another is the best testimony which can be adduced; for no mere description of the acts, or of words, of tone of voice, of glance of the eye, or general expression of the face, or manner, or bearing of the person, can convey to the jury the same impression or indications of insanity or mental debility which they will create in the mind of a competent observer. *Appleby* v. *Brock*, 76 Mo. 314.

[49]*Pelamourges* v. *Clark*, 9 Iowa, 1; *West Chicago Street R. Co.* v. *Fishman*, 169 Ill. 196, 48 N. E. 447, Affirming 68 Ill. App. 445; *Whitaker* v. *Hamilton*, 126 N. C. 465, 35 S. E. 815; *Meyers* v. *State*, 37 Tex. Crim. Rep. 208, 39 S. W. 111.

[50]*Brown* v. *Com.* 14 Bush, 400.

[51]*Smith* v. *Smith*, 117 N. C. 326, 23 S. E. 270.

[52]*Re Wax*, 106 Cal. 343, 39 Pac. 624; *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *Parsons* v. *Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *Nash* v. *Hunt*, 116 Mass. 237; *Townshend* v. *Townshend*, 7 Gill, 10; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687.

[53]*Wilkinson* v. *Pearson*, 23 Pa. 117; *Poole* v. *Richardson*, 3 Mass. 330; *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541; *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689; *Hogan* v. *Roche*, 179 Mass. 510, 61 N. E. 57.

And so as to his health and physical condition. *State* v. *Wright*, 112 Iowa, 436, 84 N. W. 541.

These are matters of fact, not of opinion. *Hogan* v. *Roche*, 179 Mass. 510, 61 N. E. 57.

But vague and indefinite expressions of a nonexpert witness that a person looked and acted like an insane person are not admissible upon the issue of insanity. *Gehrke* v. *State*, 13 Tex. 568.

And a witness who is not a medical man cannot state what kind of fits a

quality of a person's mind, as to whether it was weak or strong, is a material fact, to which a witness may testify;[54] and so is the question whether there was an apparent change in a man's intelligence or understanding.[55] Nor is the right to testify as to whether a person appeared to be rational or irrational confined to expert witnesses and immediate acquaintances, as this does not constitute giving an opinion as to his mental sanity, but is the statement of an open, patent fact, indicated to all alike.[56]

354. Effect of rules as to privilege of witnesses.— Statutes prohibiting certain persons from testifying against a deceased person apply to cases where a claim is asserted against a decedent's estate, or where a claim asserted by a representative of the decedent is resisted.[57] But they do not prohibit heirs from testifying, in a suit to set aside a will, as to the mental capacity of the testator, though his executor is a party to the action.[58] And the contestant of a will, or a legatee thereunder, is not incompetent to testify as to the mental capacity of the testator, as a party to the issue.[59] And neither of the litigants in a will contest can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and

person claimed to be insane was affected with. *McLean* v. *State*, 16 Ala. 672.

And refusal to permit a nonexpert witness who had stated how the accused acted and talked, especially on the day of the homicide, to state whether or not he talked like a sane or insane man during the night, is not a violation of the rule that nonexpert witnesses may give their opinions as to the sanity of an individual after having first testified to his actions, declarations, general demeanor, and peculiarities. *Blanton* v. *State*, 1 Wash. 265, 24 Pac. 439.

[54]*People* v. *Worthington*, 105 Cal. 166, 38 Pac. 689. And see *O'Brien* v. *Chicago, M. & St. P. R. Co.* 89 Iowa, 644, 57 N. W. 425; *Higbee* v. *Guardian Mut. L. Ins. Co.* 66 Barb. 466.

And a question in a will contest in which insanity is alleged, as to whether or not the testator was an eccentric man, is not objectionable, as calling for a conclusion instead of a fact. *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882.

[55]*Barker* v. *Comins*, 110 Mass. 477; *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689.

And evidence as to the feeling manifested by a testator toward his brother is evidence of a fact rather than an opinion, and is admissible in a will contest as bearing upon the question of the testator's insanity. *Pelamourges* v. *Clark*, 9 Iowa, 1.

[56]*Holland* v. *Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; *People* v. *Lavelle*, 71 Cal. 351, 12 Pac. 226; *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730.

[57]*Lamb* v. *Lamb*, 105 Ind. 456, 5 N. E. 171. And see *Anderson* v. *Cranmer*, 11 W. Va. 562.

[58]*Lamb* v. *Lamb*, 105 Ind. 456, 5 N. E. 171; *Davis* v. *Tarver*, 65 Ala. 98.

And an administrator who had been the family physician of a testator for many years may testify, as a witness for himself on the trial of an application to sell lands for the payment of debts, in which the issue was the validity of a promissory note signed by the intestate, as to the general insanity of the deceased, stating the facts upon which his opinion is founded; but under Alabama Code, § 3058, forbidding testimony as to any transactions with, or statement by, the deceased, he cannot state what was the condition of his mind at the time the note was given. *Davis* v. *Tarver*, 65 Ala. 98.

[59]*Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118; *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N.

important evidence by a witness who had been the attorney for the testator, where such evidence is necessary as a basis for his opinion as to the testator's mental condition.[60] So, though the rule were deemed to apply, a request by a testator to his attorney to sign his will as a subscribing witness is a waiver of objection to his competency, which leaves him free to perform the duties of a witness, and he can testify with reference to matters of which he acquired knowledge by virtue of his professional relation, including the testator's mental condition.[61] And the executor may waive such privilege.[62] So, such evidence is competent where it does not involve a personal transaction with the deceased.[63]

W. 845; *Ducker* v. *Whitson*, 112 N. C. 44, 16 S. E. 854.

And a witness in an action to set aside a deed, who has testified to the grantor's want of capacity to make a deed, and that her opinion was formed from conversations and communications between them, is not rendered incompetent to prove such conversations and communications in order that the jury might see whether the opinion was well founded, by a statutory provision forbidding a witness who has a legal or equitable interest which may be affected by the event, to be examined in regard to any transaction or communication between himself and a person since deceased, insane, or lunatic, since such conversations are offered, not to prove any facts stated or implied, but the mental condition of the party; and the declarations are not received to show the truth of the things declared, but as evidence of disordered intellect. *McLeary* v. *Normont*, 84 N. C. 235.

But the daughters of a testator are not competent witnesses in their own behalf to prove the insanity of their father at and prior to the time he executed his last will, upon a bill in equity to contest its validity, where the purpose of the suit was not merely to adjust the rights of the heirs between themselves, but to take the estate from legatees who were not heirs, and vest it in the heirs. *Brace* v. *Black*, 125 Ill. 33, 17 N. E. 66.

[60] *Re Layman*, 40 Minn. 371, 42 N. W. 286; *Daniel* v. *Daniel*, 39 Pa. 191; *O'Brien* v. *Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. W. 100.

But testimony by attorneys as to conversations had with them by a testator at the time of giving the instructions for the will offered for probate, and another will, previously drawn, is incompetent as in violation of the New York prohibition against disclosing communications made by a client to his attorney under sanction of professional employment. *Re Coleman*, 111 N. Y. 220, 19 N. E. 71.

[61] *McMaster* v. *Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Re Nelson*, 132 Cal. 182, 64 Pac. 294; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Re Coleman*, 11 N. Y. 220, 19 N. E. 71. And see *Re Downing* (Wis.) 95 N. W. 876.

[62] *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

Under the New York statute the privilege of an expert witness cannot be waived by an executor or administrator. *Westover* v. *Ætna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104.

[63] *Kostelecky* v. *Scherhart*, 99 Iowa, 120, 68 N. W. 591.

The observation of a legatee under a will as to the demeanor, gait, expression, or appearance of the testator, is not a personal transaction with him which will render her evidence inadmissible on a contest of his will, under Iowa Code, § 3639, excluding transactions with persons since deceased. *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

And testimony of an attorney that a testatrix talked with him about the settlement of an estate, and wished him to ascertain how much she was likely to receive from it, given with a view of ascertaining her testamentary capacity, does not amount to a disclosure by him of a confidential and privileged communication, even if it is assumed that the relation of attorney and client existed between them. *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

Where evidence of an attorney concerning conversations with a testatrix

355. Who may give.— The general rule is that anyone who had opportunity to know and observe a person whose sanity is impeached may give an opinion as to his mental condition.[64] This rule includes parties to the suit, where parties are permitted to testify.[65] And a legatee under a will is competent in an action to set it aside;[66] and so are the contestants of a will.[67] And the guardian of a testatrix is a competent witness to prove her capacity to make a will;[68] and so is a brother of a testator,[69] or a daughter.[70] And a wife may testify as to the mental condition of her husband.[71] It has been held, however, that one who would inherit a part of a testator's property but for his will is incompetent to give his opinion as to capacity to make it.[72] And a previously expressed opinion of a person killed is not admissible on the question of sanity of the person doing the killing.[73] Nor is a person who suffered a personal injury competent to testify as to the effect it had upon his mind.[74]

356. The acquaintance and observation necessary.— The question whether the opinions of nonexpert witnesses as to the sanity of a person were based on sufficient acquaintance and observation to entitle them to testify is addressed to the sound discretion of the trial court.[75] And its determination as to such question will not be in-

are offered on the question of her testamentary capacity in a will contest, the burden rests upon the party objecting thereto to show that the conversations occurred while the testatrix was consulting the witness professionally as an employed attorney. *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

[64]*Doe ex dem. McDougald* v. *McLean*, 60 N. C. (1 Winst. L.) 120.

[65]*Severin* v. *Zack*, 55 Iowa, 28, 7 N. W. 404.

[66]*Burkhart* v. *Gladish*, 123 Ind. 338, 24 N. E. 118; *Staser* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

[67]*Williams* v. *Williams*, 90 Ky. 28, 13 S. W. 250; *Dennis* v. *Weekes*, 51 Ga. 24.

[68]*Howard* v. *Coke*, 7 B. Mon. 655.

[69]*Weems* v. *Weems*, 19 Md. 334.

[70]*Moore* v. *Moore*, 67 Mo. 192.

[71]*Haney* v. *Clark*, 65 Tex. 93; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Burnham* v. *Mitchell*, 34 Wis. 117; *Re Van Alstine* (Utah) 72 Pac. 942.

The divorced wife of a person accused of crime may testify as to whether, from her association with him, she ever saw anything that would indicate that he was a man of unsound mind, without violating the rule of law which protects the privacy and confidence of the marriage relation. *United States* v. *Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247.

[72]*Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493.

[73]*Lake* v. *People*, 1 Park. Crim. Rep. 495.

[74]*O'Connell* v. *Beecher*, 21 App. Div. 298, 47 N. Y. Supp. 334.

[75]*People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204; *Re Wax*, 106 Cal. 343, 39 Pac. 624; *Wheelock* v. *Godfrey*, 100 Cal. 578, 35 Pac. 317; *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101; *People ex rel. Clough* v. *Levy*, 71 Cal. 618, 12 Pac. 791; *People* v. *Pico*, 62 Cal. 50; *People* v. *Hill*, 116 Cal. 562, 48 Pac. 711; *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Colee* v. *State*, 75 Ind. 513; *Hull* v. *Hull*, 117 Iowa, 738, 89 N. W. 979; *Hite* v. *Com.* 14 Ky. L. Rep. 308, 20 S. W. 217; *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

What is required to establish a sufficient opportunity for judging as to the

terfered with on appeal, where such discretion was not abused.[76] It is impossible to lay down any precise rule as to the length or character of the acquaintance necessary.[77] The general statement of the rule is that nonexpert witnesses may testify as to their opinions upon the question of the sanity or insanity of another, where there has been such a long and intimate acquaintance between them as to enable them to form a correct judgment as to mental condition,[78] and they form their opinions from facts within their own knowledge.[79] And the rule is also laid down that nonexperts having favorable opportunities for ascertaining the facts by observation may testify as to their opinions respecting the sanity or insanity of another.[80]

soundness of mind of another depends upon circumstances, which may properly affect the judicial discretion, the testimony being more or less valuable as the circumstances are more or less convincing. *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328.

A statement by a witness that he did not regard himself as intimately acquainted with a person whose sanity was questioned does not render him incompetent to give an opinion as to his sanity or insanity, since the question of their intimacy is one for the judge, and not for the witness. *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073.

[76]*People ex rel. Clough* v. *Levy*, 71 Cal. 618, 12 Pac. 791; *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *Re Wax*, 106 Cal. 343, 39 Pac. 624; *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204; *People* v. *Lane*, 101 Cal. 513, 36 Pac. 16; *Whelock* v. *Godfrey*, 100 Cal. 578, 35 Pac. 317; *People* v. *Fine*, 77 Cal. 147, 19 Pac. 269; *People* v. *Pico*, 62 Cal. 50; *People* v. *Hill*, 116 Cal. 562, 48 Pac. 711; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

A ruling admitting the opinion of a nonexpert witness as to the sanity or insanity of another will not be reviewed on appeal, where the conclusion reached was one which can be reasonably entertained consistently with the idea that the intimacy must be such that the witness would appreciate the varying moods and temperament of the other, and be able to judge his case with full knowledge of his peculiarities. *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101.

But refusal to allow a witness to give his opinion as to the mental capacity of another where the showing of intimacy is sufficient, is error and ground for reversal. *Re Carpenter*, 79 Cal. 382, 21 Pac. 835.

[77]*Powell* v. *State*, 25 Ala. 21; *Beaubien* v. *Cicotte*, 12 Mich. 459.

[78] The rule so stated is supported by numerous authorities; among them are: *Ragland* v. *State*, 125 Ala. 12, 27 So. 983; *Beller* v. *Jones*, 22 Ark. 92; *Brooks's Estate*, 54 Cal. 471; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *State* v. *Shuff* (Idaho) 72 Pac. 664; *Neely* v. *Shephard*, 190 Ill. 639, 60 N. E. 922, Affirming 92 Ill. App. 422; *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470; *Townshend* v. *Townshend*, 7 Gill, 10; *Wood* v. *State*, 58 Miss. 741; *Territory* v. *Roberts*, 9 Mont. 12, 22 Pac. 132; *Pflueger* v. *State*, 46 Neb. 493, 64 N. W. 1094; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241; *Culver* v. *Haslam*, 7 Barb. 314; *State* v. *Ketchey*, 70 N. C. 621; *Commonwealth Title Ins. & T. Co.* v. *Gray*, 150 Pa. 255, 24 Atl. 640; *Scarborough* v. *Baskin*, 65 S. C. 558, 44 S. E. 63; *Thomas* v. *State*, 40 Tex. 60; *State* v. *Hayden*, 51 Vt. 296; *Fishburne* v. *Ferguson*, 84 Va. 87, 4 S. E. 575; *Higgins* v. *Nethery*, 30 Wash. 239, 70 Pac. 489; *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991; *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596.

The extent to which nonexpert opinions on the question of incompetency may be received depends upon the familiarity of the witnesses with the person whose sanity is in question, the character of the disqualification, the nature and number of the extraordinary circumstances detailed, and their proximity to the act involved in point of time. *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105.

[79]*Polin* v. *State*, 14 Neb. 540, 16 N. W. 898; *Culver* v. *Haslam*, 7 Barb. 314.

[80]*Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *Jamison* v. *People*, 145 Ill.

Nonexpert witnesses, however, cannot give opinions as to sanity or insanity of a person, where they had but a slight or passing acquaintance with him, or had no opportunity for forming an opinion.[81] The opinions of witnesses upon the question, if competent, are admissible only when it appears that they were sufficiently acquainted, and

357, 34 N. E. 486; *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Wise* v. *Foote*, 81 Ky. 10; *Woodcock* v. *Johnson*, 36 Minn. 217, 30 N. W. 894; *State* v. *Bryant*, 93 Mo. 273, 6 S. W. 102; *Clary* v. *Clary*, 24 N. C. (2 Ired. L.) 78; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Bost* v. *Bost*, 87 N. C. 477; *Com.* v. *Gerade*, 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464; *Doe ex dem. McDougald* v. *McLean*, 60 N. C. (1 Winst. L.) 120; *Rambler* v. *Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Commonwealth Title Ins. & T. Co.* v. *Gray*, 150 Pa. 255, 24 Atl. 640; *Reed* v. *State*, 62 Miss. 405.

A jailer or officer having charge of a prisoner for a long time, and having an excellent opportunity, of which he availed himself, to acquire knowledge and form an intelligent judgment as to his mental condition, may give evidence as to such condition though he did not know him previously. *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *State* v. *Fiester*, 32 Or. 254, 50 Pac. 561.

And a stenographer who officiated at the taking of depositions of a testatrix, which consumed two hours, shortly before the time of the execution of her will, and who observed her in the meantime, may be asked, on a contest of the will, to state from his observations of her at that time, and her answers, conduct, and actions, if she was of sound mind. *Re Fenton*, 97 Iowa, 192, 66 N. W. 99.

And the brother of a testator, with whom he had been engaged in conducting a joint business, their intimacy having continued during the whole of the life of the testator, may give an opinion as to his mental capacity, in a will contest, though he had not stated facts upon which he based his opinions. *Weems* v. *Weems*, 19 Md. 334.

And the wife of a party to a settlement of a claim who was suffering from a stroke of paralysis is competent to give her opinion as to whether or not he comprehended the facts concerning it, in an action involving its validity, where she was constantly with him, and had the principal care of him, and was the means of communication between him and the world. *Burnham* v. *Mitchell*, 34 Wis. 117.

So, a witness who had known another from childhood, and been intimate with him, may give his opinion as to the latter's mental status generally, though he saw but little of him during the two or three months immediately preceding the time in question. *Stubbs* v. *Houston*, 33 Ala. 555.

[81] *State* v. *Crisp*, 123 Mo. 605, 29 S. W. 699; *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Holcomb* v. *State*, 41 Tex. 125; *State* v. *Murray*, 11 Or. 413, 5 Pac. 55; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Murphree* v. *Senn*, 107 Ala. 424, 18 So. 264; *Frizzell* v. *Reed*, 77 Ga. 724.

Evidence that a nonexpert witness had known the accused in a criminal prosecution for five or six years, and that he had seen him often on the street, but that he had not worked with him, does not show sufficient information to warrant his opinion as to sanity or insanity. *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679.

And a witness in a will contest who had been away for three years, and had not conversed with the testator for two years before he died, is not competent to give an opinion as to his sanity during the year when he did not see him. *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

And a nonexpert witness who testifies in a prosecution for burglary that he had known the accused for many years, and that he did not think that he could distinguish between right and wrong so as to know that it was wrong to commit burglary, does not show himself competent to give an opinion as to whether he would have sufficient mental power to keep from committing the crime even if he could distinguish between right and wrong. *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679.

In *Shults* v. *State*, 37 Neb. 481, 55 N. W. 1080, it was held that only such intimate acquaintances of a person as had seen him almost daily for several months

had sufficient opportunity to observe, to form correct ones.[82] And witnesses who are not medical experts should be required to show that their acquaintance with the party whose sanity is questioned had been sufficiently intimate to justify the formation of a correct judgment as to his mental status.[83] And the acquaintance must consist of something more than mere occasional brief interviews on general or indifferent subjects: it must be one which will enable the witness to assert, with some confidence, that he has knowledge of the intellectual workings and mental status of the person in question.[84] But the acquaintance need not be extensive, and the showing of intimacy need

preceding the time in question are competent as nonexpert witnesses to testify as to his sanity or insanity.

[82]*O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *Turner* v. *Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12; *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481; *Powell* v. *State*, 25 Ala. 21; *Taylor* v. *United States*, 7 App. D. C. 27; *State* v. *Stickley*, 41 Iowa, 232; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687; *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21.

One year of acquaintance, living in the same house, is sufficient. *Re Keegan*, 139 Cal. 123, 72 Pac. 828.

The term "intimate acquaintances," as used in a statute providing that the opinion of an intimate acquaintance respecting the mental sanity of a person may be given, where the reason for the opinion is given, requires that the witness should be more than a casual and ordinary acquaintance: it requires close friendship and familiarity. *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

And it excludes all evidence of others than intimate acquaintances who are, by unreserved intercourse, familiar with the varying moods and temperament of the person whose soundness is questioned. *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101.

[83]*Moore* v. *Spier*, 80 Ala. 129; *Brown* v. *Com.* 14 Bush, 400; *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687.

Before the opinion of a nonexpert witness on the question of sanity or insanity can be considered, it must appear not only that the witness had the opportunity of learning the facts upon which the opinion is predicated, but that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture. *Welch* v. *Stipe*, 95 Ga. 762, 22 S. E. 670.

And the court may properly require the witness to state all the circumstances upon which his opinion is based, and it would not be a great stretch of discretion to permit cross-examination before allowing the opinion to be given. *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105.

[84]*Re Carmichael*, 36 Ala. 514; *Murphree* v. *Senn*, 107 Ala. 424, 18 So. 264; *McLeod* v. *State*, 31 Tex. Crim. Rep. 331, 20 S. W. 749. And see *Apland* v. *Pott* (S. D.) 92 N. W. 19; *State* v. *Brooks*, 4 Wash. 328, 30 Pac. 147.

An opinion formed from physical condition only is inadmissible. *The Berry Will Case*, 93 Md. 560, 49 Atl. 401.

And a nonexpert witness cannot give his opinion as to the sanity of a person accused of crime, where it is not shown that he knew anything in regard to his condition, except what he learned as foreman of the jury by which such person was previously tried. *State* v. *Klinger*, 46 Mo. 224.

Nor can one give his opinion, formed since the commission of a crime, as to the accused's mental condition at the time the offense was committed, where his only knowledge in respect thereto was derived from his familiarity with the accused as a patron of the latter's barber shop. *Queenan* v. *Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762. But see *Lowe* v. *State* (Wis.) 96 N. W. 417.

The objection that a person called upon for an opinion as to the sanity or insanity of another is not an intimate acquaintance is not avoided by varying the form of the question, and asking the witness how such person appeared mentally. *Carpenter* v. *Bailey*, 94 Cal. 406, 29 Pac. 1101.

not be very strong.[85] And the same degree of intimacy is not necessary to render the opinion of a witness admissible on the question of the mental condition of another in case of general insanity, where there is total incapacity, as in the case of monomania or partial derangement.[86]

357. Facts and reasons as a basis of an opinion.—Facts and circumstances, and not the opinions of nonexpert witnesses, are the primary evidence on which a jury must rely upon the question of mental capacity.[87] And opinions of witnesses as to capacity are not usually regarded as evidence unless the facts upon which they are predicated are stated.[88] Nor can a nonexpert witness be asked whether a person was weak-minded, where the question did not limit the opinion to what he had observed.[89] And it has been held that witnesses cannot give an opinion as to sanity or insanity, based on their own observation and what they had heard, and not confined to facts to which they had testified.[90] It is not necessary, however, where the

[85] *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129; *Goodwin* v. *State*, 96 Ind. 550; *Carpenter* v. *Bailey*, 79 Cal. 382, 21 Pac. 835. And see *State* v. *Fiester*, 32 Or. 254, 50 Pac. 561; *Powell* v. *State*, 25 Ala. 21; *Lowe* v. *State* (Wis.) 96 N. W. 417; *Sage* v. *State*, 91 Ind. 141; *Mull* v. *Carr*, 5 Ind. App. 491, 32 N. E. 591.

Personal acquaintance is unnecessary if there was opportunity to observe. *Com.* v. *Brown*, 193 Pa. 507, 44 Atl. 497.

And a nonexpert witness may give an opinion as to the sanity or insanity of another, based upon observation as to the way others treated him, although he had never seen him transact any business. *Ring* v. *Lawless*, 190 Ill. 520, 60 N. E. 881.

[86] *Powell* v. *State*, 25 Ala. 21; *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

Witnesses in a prosecution for homicide are not competent to express an opinion as to the prisoner's mental condition at the time of the act, when for months they had not seen him, merely because, on some occasions when they had seen him, he gave evidence of mental unsoundness, his mental aberrations being fitful or rare, and in the interval his mind being lucid. *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228.

[87] *Browne* v. *Molliston*, 3 Whart. 129; *McCullough's Will*, 35 Pittsb. L. J. 169; *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90; *Newton* v. *Carbery*, 5 Cranch C. C. 626, Fed. Cas. No. 10,189; *Hunt* v. *Hunt*, 3 B. Mon. 575.

The court, in forming its opinion as to the soundness of mind of a testator, will look to the facts upon which the witnesses based their opinions rather than to the opinions themselves; but will form its opinion from the whole evidence, consisting of facts and opinions. *Newton* v. *Carbery*, 5 Cranch C. C. 626, Fed. Cas. No. 10,189.

[88] *Hunt* v. *Hunt*, 3 B. Mon. 575; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Doe ex dem. Sutton* v. *Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Pennsylvania Co.* v. *Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Welch* v. *Stipe*, 95 Ga. 762, 22 S. E. 670; *State* v. *Coleman*, 27 La. Ann. 691; *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679. And see *supra*, § 349.

[89] *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *Roe* v. *Taylor*, 45 Ill. 485; *Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *Genz* v. *State*, 58 N. J. L. 482, 34 Atl. 816; *De Witt* v. *Barley*, 13 Barb. 550; *Parkhurst* v. *Hosford*, 21 Fed. 829.

[90] *Parsons* v. *Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *State* v. *Robbins*, 109 Iowa, 650, 80 N. W. 1061. And see *Williams* v. *State*, 37 Tex. Crim. Rep. 348, 39 S. W. 687.

Where evidence of a conversation is given for the mere purpose of laying a foundation for the admission of the witness's opinion as to the sanity of a per-

witnesses testify to sanity of a party, that they should accompany their opinions with the facts upon which they are based, since there may be no abnormal facts to be stated.[91] And many of the cases hold that the opinion of a nonexpert witness as to the sanity or insanity of another is admissible, though he does not state the facts upon which he bases it, where he shows acquaintance and the fact of observation,[92] the jury being left to judge as to its value.[93] Nor does the rule that witnesses must state the facts upon which their opinions are based require them to describe what is not susceptible of description, or relate facts enough to enable the jury to form an opinion from them alone; it is sufficient if they describe visible and intelligible appearances and acts.[94] And it has been stated that the opinion of a

son accused of crime, the entire conversation must be given, so far, at least, as it formed a part of the ground upon which the witness's opinion was based. *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486.

But where witnesses had previously given testimony of circumstances showing an opportunity to judge as to the soundness or unsoundness of a person whose sanity is in question, they may properly testify as to their opinion on the question, without repeating the circumstances in connection with the opinion. *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328; *Van Huss* v. *Rainbolt*, 2 Coldw. 139.

[91]*Ford* v. *State*, 71 Ala. 385; *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328; *Lamb* v. *Lippincott*, 115 Mich. 611, 73 N. W. 887; *Hull* v. *Hull*, 117 Iowa, 738, 89 N. W. 979; *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007; *State* v. *Holloway*, 156 Mo. 222, 56 S. W. 734.

That witnesses in a criminal prosecution knew the defendant, and had known him for a considerable length of time, and that he always acted like a sane man, is sufficient to warrant them in forming and giving an opinion as to his sanity. *Taylor* v. *State*, 83 Ga. 647, 10 S. E. 442.

[92]*Stumph* v. *Miller*, 142 Ind. 442, 41 N. E. 812; *Mull* v. *Carr*, 5 Ind. App. 491, 32 N. E. 591; *Cotrell* v. *Com.* 13 Ky. L. Rep. 305, 17 S. W. 149; *Newcomb* v. *Newcomb*, 96 Ky. 120, 27 S. W. 997; *Farley* v. *Parker*, 6 Or. 105, 25 Am. Rep. 104; *Stubbs* v. *Huston*, 33 Ala. 555. And see *Taylor* v. *United States*, 7 App. D. C. 27.

All that is necessary to admit the evidence of a nonexpert witness as to insanity is that he shall describe the conversation, conduct, and manner of the person whose sanity is in question. *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

Proof of insanity by ordinary witnesses is not restricted to proof of facts coming within the knowledge of witnesses, and upon which the jury may draw an inference of sanity or insanity, but may include the belief of such witnesses, founded on opportunities of personal observation, which may be given to the jury to aid them in forming a correct conclusion. *Baldwin* v. *State*, 12 Mo. 231.

And a witness whose attention had been called to the condition of another's mind may be asked whether he saw enough, in his intercourse with him, to warrant him in expressing an opinion as to his sanity or insanity. *Pannell* v. *Com.* 86 Pa. 260.

[93]*Cotrell* v. *Com.* 13 Ky. L. Rep. 305, 17 S. W. 149; *Stubbs* v. *Huston*, 33 Ala. 555.

Where there are any material facts stated by a witness in a trial for homicide, warranting an inference that he has sufficient knowledge to form an opinion as to the sanity of the accused, it is the duty of the court to permit it to go to the jury for whatever it may be worth. *Goodwin* v. *State*, 96 Ind. 550.

[94]*Beaubien* v. *Cicotte*, 12 Mich. 459.

The testimony of witnesses in an action upon a promissory note, in which the insanity of the maker is alleged, will not be stricken out as wholly irrelevant and immaterial to the issue of insanity merely because the facts testified to by each, taken separately, may not prove, or tend to prove, sanity or insanity to a sufficient extent to qualify the witness

witness who had an adequate opportunity to observe is admissible, where he states some of the facts upon which it is based,[95] or where he states such facts as he is able to give;[96] the question being one of weight rather than competency.[97]

What statement of facts would show a sufficient foundation to warrant the giving of an opinion by an expert witness, however, depends upon the circumstances of each case, and it must be left to the trial court to determine, in the exercise of a wise legal discretion, which will not be disturbed except in cases of abuse,[98] though the weight of both fact and opinion is to be determined by the jury.[99] And the rule has been asserted that a witness may express an opinion based solely upon the appearance or countenance of the person claimed to be insane.[100] But to authorize the expression of an opinion, such facts or such circumstances must appear as have some significance upon the question of the mental condition of the person, and the

to express his individual opinion on the question. *First Nat. Bank* v. *Wirebach*, 106 Pa. 37.

[95]*Turner* v. *Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12; *Crowe* v. *Peters*, 63 Mo. 429; *Massic* v. *Com.* 15 Ky. L. Rep. 562, 24 S. W. 611.

Opinions are presumed to be based on observation rather than hearsay, in the absence of evidence to the contrary. *Re McCabe*, 70 Vt. 155, 40 Atl. 52.

[96]*Williams* v. *Lee*, 47 Md. 321; *Beaubien* v. *Cicotte*, 12 Mich. 469; *De Witt* v. *Barly*, 17 N. Y. 340. And see *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328; *People* v. *Sanford*, 43 Cal. 29.

Witnesses called upon to prove the mental capacity of a testator may be asked questions relating to the whole period of their acquaintance with him. *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398.

And one who is competent to give an opinion as to the mental capacity of a testator may state all she knows about him, both before and after it is claimed that his mind failed, together with what he did and said, and the change, if any, in his manner. *Staser* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990. And see *Re Norman*, 72 Iowa, 84, 33 N. W. 374.

[97]*Kettemann* v. *Metzger*, 23 Ohio C. C. 61; *Re Gorkow*, 20 Wash. 563, 56 Pac. 385.

[98]*Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679; *State* v. *Barry* (N. D.) 92 N. W. 809; *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150; *Boorman* v. *Northwestern Mut. Relief Asso.* 90 Wis. 144, 62 N. W. 924; *Re Welch*, 108 Wis. 387, 84 N. W. 550; *Hompton* v. *State*, 111 Wis. 127, 86 N. W. 596.

[99]*Shaeffer* v. *State*, 61 Ark. 241, 32 S. W. 679; *Denning* v. *Butcher*, 91 Iowa, 428, 59 N. W. 69; *Frizzell* v. *Reed*, 77 Ga. 724.

To aid in determining the weight to be given such evidence particular acts and conduct may be asked for on cross-examination. *Petefish* v. *Becker*, 176 Ill. 448, 52 N. E. 71.

[100]See *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150; *Irish* v. *Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648; *Wilkinson* v. *Pearson*, 23 Pa. 117.

But the rule that a witness may express an opinion on the question of sanity or insanity, based upon the countenance alone, is of doubtful application in a case in which the countenance of the person was distorted by paralysis, and does not apply where it is clear that the witnesses did not base their opinions upon the mere appearance of the face. *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150.

And a nonexpert witness cannot give his opinion whether a person was of sound mind from her conversation and looks, and from his knowledge of, and acquaintance with, her, where he described her appearance and manner, but paid little attention to, and did not undertake to detail, what she said. *State* v. *Stickley*, 41 Iowa, 232.

knowledge thereof of the witness,[1] the rule being that such opinions may be given in connection with the facts upon which they are formed, where the facts are of such a nature as to enable the witness to form a knowledge of the person's intellect;[2] and the facts must not be such as to present collateral and immaterial issues.[3]

358. Scope generally.—To render the opinions of nonexpert witnesses admissible on the question of sanity or insanity, they must be

[1]*Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Sutherland* v. *Hankins*, 56 Ind. 343; *Rarick* v. *Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Colee* v. *State*, 75 Ind. 513; *Alvord* v. *Alvord*, 109 Iowa, 113, 80 N. W. 306; *Stewart* v. *Redditt*, 3 Md. 67; *Waters* v. *Waters*, 35 Md. 531; *Dorsey* v. *Warfield*, 7 Md. 65; *Ex parte Schneider*, 21 D. C. 433; *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637; *Lynch* v. *Doran*, 95 Mich. 395, 54 N. W. 882; *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328; *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *State* v. *Williamson*, 106 Mo. 165, 17 S. W. 172; *State* v. *Barry* (N. D.) 92 N. W. 809; *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *First Nat. Bank* v. *Wirebach*, 106 Pa. 37, Affirming 12 W. N. C. 150; *Stokes* v. *Miller*, 10 W. N. C. 241; *State* v. *Leehman*, 2 S. D. 171; *State* v. *Brooks*, 4 Wash. 328, 30 Pac. 147; *Boorman* v. *Northwestern Mut. Relief Asso.* 90 Wis. 144, 62 N. W. 924. And see *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Ramsdell* v. *Ramsdell*, 128 Mich. 110, 87 N. W. 81; *Page* v. *Beach* (Mich.) 10 Det. L. N. 337, 95 N. W. 981.

The particular facts stated by each of several witnesses as to mental capacity of another must be taken alone as the basis of the proposed opinion of that witness, and if they are found by themselves inconclusive in their nature, or of such neutral character as to be consistent either with soundness or unsoundness of mind, they cannot be assumed as a basis of an opinion. *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230.

And a witness in a will contest who testifies that she had known the testatrix for six years before she had made her will, and was quite intimate with her during that time, and had frequent conversations with her about her children, her life, hardships which she had gone through, and other family matters, states no facts or circumstances which justify the court in permitting her to give any opinion as to the mental capacity of the testatrix. *Buys* v. *Buys*, 99 Mich. 354, 58 N. W. 331.

[2]*Stewart* v. *Redditt*, 3 Md. 67; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Dicken* v. *Johnson*, 7 Ga. 484; *Pittard* v. *Foster*, 12 Ill. App. 132; *Gibson* v. *Gibson*, 9 Yerg. 329; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

The evidence required to show sufficient opportunity upon the part of a witness to judge as to the mental capacity of a person alleged to be insane should be such as might properly move judicial discretion by apprising the court that the witness may believe in the competency of the person upon reasonable grounds, in order to justify his opinion that the person in question is sane, the testimony being more or less valuable as the circumstances are more or less convincing. *People* v. *Borgetto*, 99 Mich. 336, 58 N. W. 328; *O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105.

An attempt upon the part of a testator to commit suicide, years before making his will, does not furnish sufficient foundation for the opinion of a witness as to his mental soundness at the time of the execution of the will. *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620.

Opinions of nonexpert witnesses on the question of testamentary capacity, however, are not rendered inadmissible by the fact that the opinions are not shown to be based on any correct understanding of the true criterion of mental capacity to make a will, where no objection was made to the introduction of opinions in evidence, and the witnesses were not required, as they might have been, to state the grounds of their belief. *Appleby* v. *Brock*, 76 Mo. 314.

[3]*Re McCabe*, 70 Vt. 155, 40 Atl. 52.

limited to conclusions drawn from specific acts and facts testified to by them;[4] or they must be founded upon their own observation of acts and conduct of the party whose sanity is in question, which they had witnessed, and to which they had testified.[5] Nonexpert witnesses cannot give their opinions as to sanity, based on evidence which they have heard other witnesses detail.[6] And they cannot give opinions based on experience,[7] or upon the question whether a hypothetical state of facts would or would not, if true, be evidence of insanity,[8] even upon cross-examination.[9] And while nonexpert opinions

[4] *Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93; *Re Ross*, 87 N. Y. 514; *Ex parte Schneider*, 21 D. C. 433; *Re Blood*, 62 Vt. 359, 19 Atl. 770. And see *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *First Nat. Bank* v. *Wireback*, 106 Pa. 37.

And the facts upon which an opinion of a nonexpert witness as to the mental capacity of another are founded must afford a fair foundation for an opinion on the particular point in dispute. *Elcessor* v. *Elcessor*, 146 Pa. 359, 23 Atl. 230; *Battle* v. *State*, 105 Ga. 703, 32 S. E. 160.

That a testator "acted foolish" is a mere conclusion, and not admissible. *Wallace* v. *Whitman*, 201 Ill. 59, 66 N. E. 311.

But the opinions of witnesses as to the mental capacity of a party should not be rejected in a proceeding before a master, because based on facts which, in the opinion of the master, did not indicate mental incapacity, though, if based on conversations only, they might properly be rejected. *Chickering* v. *Brooks*, 61 Vt. 554, 18 Atl. 144.

[5] *Appleby* v. *Brock*, 76 Mo. 314; *Brand* v. *Brand*, 39 How. Pr. 193; *Morse* v. *Crawford*, 17 Vt. 502, 44 Am. Dec. 349.

And a witness in a will contest cannot be asked to contrast the testator's mental condition at a time not fixed or limited with his mental condition as it had been in prior years. *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69.

And a witness in a criminal prosecution cannot be asked whether the accused was considered partially deranged, since such a question does not call for his own opinion. *Yanke* v. *State*, 51 Wis. 464, 5 N. W. 276.

[6] *State* v. *Klinger*, 46 Mo. 224; *Appleby* v. *Brock*, 76 Mo. 314; *State* v. *Brinyea*, 5 Ala. 241; *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Sisson* v. *Conger*, 1 Thomp. & C. 564; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666.

So, witnesses in a will contest who had testified to acts and conduct of the testator, and that their impression was that he was rational, cannot be asked, on cross-examination, if, had they known of certain specified acts on his part, they would have influenced the impression received by them, where none of them testified to such acts, though they appeared in the evidence of other witnesses. *Bell* v. *McMaster*, 29 Hun, 272.

[7] *Com.* v. *Rich*, 14 Gray, 335; *State* v. *Klinger*, 46 Mo. 228; *Caleb* v. *State*, 39 Miss. 722; *Russell* v. *State*, 53 Miss. 368; *Ragland* v. *State*, 125 Ala. 12, 27 So. 983; *Dunham's Appeal*, 27 Conn. 192; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Pittard* v. *Foster*, 12 Ill. App. 132; *Rice* v. *Rice*, 50 Mich. 448, 15 N. W. 545, 53 Mich. 432, 19 N. W. 132; *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268.

And testimony of a witness in a will contest that he would not willingly trust the testator to make an important trade for him is not competent upon the question whether the testator had sufficient mental capacity to make a codicil to his will. *Prather* v. *McClelland*, 76 Tex. 574, 13 S. W. 543.

In *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542, however, it was held that a nonexpert witness having experience and opportunity to observe may testify that feigned insanity is so common among criminals that it, at times, deceives even experts.

[8] *State* v. *Klinger*, 46 Mo. 224; *Appleby* v. *Brock*, 76 Mo. 314; *Dunham's Appeal*, 27 Conn. 192; *Pittard* v. *Foster*, 12 Ill. App. 132; *Smith* v. *Hickenbottom*, 57 Iowa, 733, 11 N. W. 664.

And the opinion of a nonexpert wit-

are admissible in case of such insanity as may be readily determined by nonexperts, and in cases in which opinion is a mere rendering of facts at short-hand, it is otherwise as to occult conditions of rare occurrence, concerning which those versed in the treatment of the insane are best qualified to speak. As to these, inexperienced lay attendants or friends cannot give opinions, but are limited to a statement of such facts as are within their range of observation.[10]

Nor can an opinion of a nonexpert witness as to mental capacity be given where it is founded upon mere hearsay.[11] But well-acquainted persons may testify as to the appearance of the person whose sanity is in question, and describe his condition, and compare it with his condition when in health, and state the impression made upon them by the facts, as to the soundness of his mind.[12] And they may

ness on the question of insanity can neither be sustained nor attacked by his further opinion, based upon a hypothetical question. *Re Hogmire*, 108 Mich. 410, 66 N. W. 327.

[9]*Dunham's Appeal*, 27 Conn. 192.

[10]As limiting nonexperts to a bare statement of facts, see *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Com.* v. *Wilson*, 1 Gray, 337; *Dewitt* v. *Barley*, 9 N. Y. 371; *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Real* v. *People*, 42 N. Y. 270; *Sears* v. *Shafer*, 1 Barb. 408; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Farrell* v. *Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Gehrke* v. *State*, 13 Tex. 568. But see *Hardy* v. *Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

From this limitation, however, subscribing witnesses are excepted. *Ware* v. *Ware*, 8 Me. 42; *Poole* v. *Richardson*, 3 Mass. 330; *Logan* v. *McGinnis*, 12 Pa. 27; *Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Egbert* v. *Egbert*, 78 Pa. 326; *Elder* v. *Ogletree*, 36 Ga. 64. And see *infra*, § 359.

A nonexpert cannot be permitted to testify as to whether insanity was permanent or temporary. *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.

Or as to whether a person was subject to delusions or hallucinations. *Ratigan* v. *Judge*, 181 Mass. 572, 64 N. E. 204.

And it is not error to refuse to permit a nonexpert witness to define the word "mind." *Wheeler* v. *State*, 158 Ind. 687, 63 N. E. 975.

[11]*Appleby* v. *Brock*, 76 Mo. 314; *Wallace* v. *Whitman*, 201 Ill. 59, 66 N. E. 311; *Hutchinson* v. *Hutchinson*, 50 Ill. App. 87; *Staser* v. *Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *State* v. *Gut*, 13 Minn. 343, Gil. 315; *Tatham* v. *Wright*, 2 Russ. & M. 1; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141. And see *Hughes* v. *Hughes*, 31 Ala. 519; *People* v. *Schmitt*, 106 Cal. 48, 39 Pac. 204.

A statute permitting the opinion of an intimate acquaintance to be given in a criminal prosecution, respecting the sanity of the accused, does not authorize the accused, as a matter of right, to call for statements made by him to witnesses, in various conversations had with them. *State* v. *Murray*, 11 Or. 413, 5 Pac. 55.

And evidence as to the contents of a letter upon which a nonexpert witness based his opinion as to the sanity of the accused is not admissible in a criminal prosecution unless the loss or destruction of such letter had been previously shown. *Adams* v. *State*, 34 Tex. Crim. Rep. 470, 31 S. W. 372.

Nor is it competent to prove the effect of the conduct of a person accused of homicide upon the mind of another person on the day before the commission of the act, on the question of sanity, in a prosecution for the homicide. *Lake* v. *People*, 1 Park. Crim. Rep. 495.

[12]*Kenworthy* v. *Williams*, 5 Ind. 375; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82; *Severin* v. *Zack*, 55 Iowa, 28, 7 N. W. 404; *Meeker* v. *Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Manatt* v. *Scott*, 106

be asked if anything occurred at the time in question, or if they observed anything, that indicated insanity.[13] And it is proper to ask such a witness for his opinion as to whether a person accused of crime had sufficient mind to discriminate between right and wrong with reference to his act,[14] or whether a testator had capacity to comprehend his property and make an intelligent disposition thereof,[15] or whether a contractor or grantor was capable of making a contract or deed, or transacting important business.[16] Insanity cannot be shown, however, by evidence of a nonexpert witness comparing the person claimed to be insane with other insane persons known to the witnesses.[17] And evidence as to the mental capacity of a person is not admissible when offered, not for the purpose of proving him *non compos mentis,* but as a measure of his intellectual capacity.[18]

Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Fraser* v. *Jennison,* 42 Mich. 206, 3 N. W. 882; *United States* v. *Guiteau,* 1 Mackey, 498, 47 Am. Rep. 247; *State* v. *Ryan,* cited in Jarman on Wills, p. 122, note; *Irish* v. *Smith,* 8 Serg. & R. 573, 11 Am. Dec. 648.

This does not call for the witness's opinion without detailing the facts to the jury. *Manatt* v. *Scott,* 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 717

And after one accused of murder has offered evidence of his demeanor for the purpose of convincing the jury of his insanity at the time of the trial, for the purpose of raising the presumption of insanity when the crime was committed, a person who is acquainted with him may testify that he is simulating. *Burt* v. *State,* 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 40 S. W. 1000, 43 S. W. 344.

But, while a nonexpert witness upon the question of the soundness of mind of another may describe his conduct and repeat his declarations, the declarations are not themselves evidence against the adverse party, except so far as they constitute a part of the facts upon which the opinion of the witness is founded. *Johnson* v. *Culver,* 116 Ind. 278, 19 N. E. 129.

[13]*Watson* v. *Anderson,* 11 Ala. 43; *Rice* v. *Rice,* 53 Mich. 432, 19 N. W. 132; *State* v. *Maier,* 36 W. Va. 757, 15 S. E. 991; *Kimberley's Appeal,* 68 Conn. 428, 37 L. R. A. 261, 57 Am. St. Rep. 101, 36 Atl. 847.

A witness should be permitted to state in what manner a person's conversation was disconnected, as tending to show his qualifications as a witness, and as bearing upon the question of such person's mental capacity. *Re Goldthorp,* 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

[14]*Smith* v. *State,* 59 Ark. 139, 26 S. W. 712; *Pflueger* v. *State,* 46 Neb. 493, 64 N. W. 1094; *United States* v. *Guiteau,* 1 Mackey, 498, 47 Am. Rep. 247.

And a witness who had arrested a person accused of crime, and taken him to jail, may, after describing the appearance and manner of the accused during that time, and detailing what he said and did, give his opinion as to whether he was being controlled by, or suffering under, an insane delusion with reference to the alleged criminal act. *Bolling* v. *State,* 54 Ark. 588, 16 S. W. 658.

[15]*Shanley's Appeal,* 62 Conn. 325, 25 Atl. 245; *Keithley* v. *Stafford,* 126 Ill. 507, 18 N. E. 740; *Overall* v. *Bland,* 11 Ky. L. Rep. 371, 12 S. W. 273; *Re Pinney,* 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Bost* v. *Bost,* 87 N. C. 477; *Daniel* v. *Daniel,* 39 Pa. 191.

And a nonexpert witness in a will contest, on the question of testamentary capacity, may be asked whether the eyesight of the testator was good enough to have enabled him to recognize him when nearby if his mind had been right. *Irish* v. *Smith,* 8 Serg. & R. 573, 11 Am. Dec. 648.

[16]*Wilkinson* v. *Pearson,* 23 Pa. 117; *Melendy* v. *Spaulding,* 54 Vt. 517. And see *Obear* v. *Gray,* 73 Ga. 455.

[17]*Gehrke* v. *State,* 13 Tex. 568.

[18]*Patterson* v. *People,* 46 Barb. 625; *Gardiner* v. *People,* 6 Park. Crim. Rep. 155.

So, a nonexpert witness cannot give

359. Limitation of scope in particular states.— In Massachusetts, only experts and subscribing witnesses to wills are permitted to give their opinions upon questions of mental condition; and ordinary witnesses, whatever their opportunities for observation, and whether they state the circumstances or not, cannot give such opinions,[19] though they may state whether they had observed any facts which led them to infer derangement of intellect.[20] And the rule is the same in Maine;[21] though nonexperts may state negatively that they did not observe anything peculiar about the mental condition of the person whose sanity is in question.[22] And in New Hampshire the rule formerly was that the opinions of witnesses who were not experts, as to soundness or unsoundness, were not admissible in evidence.[23] But this rule has been changed; nonexpert witnesses, though not the subscribers to a will, now being permitted to give their opinions as to the sanity of the testator, when founded upon their knowledge and

his opinion as to the sanity or insanity of another witness, or as to the value of his testimony. *Territory* v. *Padilla*, 8 N. M. 510, 46 Pac. 346; *Howard* v. *Russell*, 75 Tex. 171, 12 S. W. 525.

[19]*Com.* v. *Brayman*, 136 Mass. 438; *Com.* v. *Wilson*, 1 Gray, 337; *Williams* v. *Spencer*, 150 Mass. 346, 5 L. R. A. 790, 15 Am. St. Rep. 206, 23 N. E. 105; *Cowles* v. *Merchants*, 140 Mass. 377, 5 N. E. 288; *Townsend* v. *Pepperell*, 99 Mass. 40; *Com.* v. *Fairbanks*, 2 Allen, 511; *Poole* v. *Richardson*, 3 Mass. 330; *Needham* v. *Ide*, 5 Pick. 510; *Smith* v. *Smith*, 157 Mass. 389, 32 N. E. 348; *Ellis* v. *Ellis*, 133 Mass. 469.

And an opinion of a witness, given on cross-examination, can be taken into consideration as evidence only so far as it tends to contradict premises seeming to lead to a different conclusion. *Hogan* v. *Roche*, 179 Mass. 510, 61 N. E. 57.

[20]*May* v. *Bradlee*, 127 Mass. 414; *McConnell* v. *Wildes*, 153 Mass. 487, 26 N. E. 1114. And see *Nash* v. *Hunt*, 116 Mass. 237.

And any witness of ordinary intelligence who is familiarly acquainted with another may testify whether, within a given time, he has failed mentally or physically. *Com.* v. *Brayman*, 136 Mass. 438.

And a nonexpert witness may be asked whether he noticed any difference in the mode of doing business of a person whose sanity is in question at that time and at a previous time. *Ibid.*

And error in excluding evidence upon the issue of the sanity of a party at the time of making a promissory note, as to whether he talked coherently, is rendered immaterial where the witness was subsequently allowed to tell how he talked and acted. *Hodges* v. *Scott*, 118 Mass. 530.

And in *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401, it was held that nonexpert witnesses having special opportunity for observing may give their opinions as conclusions of fact if the subject matter upon which their testimony depends cannot be reproduced or described precisely as it appeared to the witnesses, and the facts upon which their opinions are based are such as men in general are capable of comprehending and understanding, and the question was one of sanity or insanity.

[21]*Hewett* v. *Hurley*, 88 Me. 431, 34 Atl. 274; *Wyman* v. *Gould*, 47 Me. 159.

[22]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473.

So, evidence on behalf of the contestants of a will, that the testator, a short time before making the will, was insensible and unconscious of what was going on around him, and that he was prostrated by sickness, and did not appear to know an intimate acquaintance, and that efforts to converse with him proved ineffectual is competent; such evidence not being matter of opinion, but matter of fact, combining many minute particulars. *Halley* v. *Webster*, 21 Me. 461.

[23]*State* v. *Archer*, 54 N. H. 465; *State*

observation of his appearance and conduct.[24] Likewise, in New York, a nonexpert witness cannot be asked for his opinion as to the general soundness or unsoundness of the mind of a person whose sanity is in question,[25] though offered in connection with facts and circumstances relied on to prove the incapacity, and though the witnesses had personal acquaintance and intercourse with the party.[26] The evidence must consist of acts and declarations of the parties evincing a want of capacity; and it is for the court, and not the witness, to form an opinion from the facts.[27] Nonexpert witnesses, however, may testify to facts and declarations, and incidents in relation to the person, tending to show soundness or unsoundness of mind, and to impressions produced upon them thereby, as to whether such acts and declarations testified to impressed them as rational or irrational.[28] But they can only state the acts and conversations of

v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Boardman* v. *Woodman*, 47 N. H. 120; *Hamblett* v. *Hamblett*, 6 N. H. 333.

[23]*Hardy* v. *Merrill*, 56 N. H. 227, 22 Am. Rep. 441, Overruling previous New Hampshire cases on that point.

[25]*Brady* v. *Smith*, 8 Misc. 465, 28 N. Y. Supp. 776; *People* v. *Strait*, 148 N. Y. 566, 42 N. E. 1045; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Johnson* v. *Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283; *White* v. *Davis*, 42 N. Y. S. R. 901, 17 N. Y. Supp. 548; *Bell* v. *McMaster*, 29 Hun, 272; *Hewlett* v. *Wood*, 55 N. Y. 634; *Clapp* v. *Fullerton* 34 N. Y. 190, 90 Am. Dec. 681; *O'Brien* v. *People*, 36 N. Y. 276; *Goodell* v. *Harrington*, 3 Thomp. & C. 345; *Real* v. *People*, 42 N. Y. 270; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *Lawrence* v. *Lawrence*, 4 N. Y. Week. Dig. 299; *Rollwagen* v. *Rollwagen*, 3 Hun, 121; *Re Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801; *People* v. *Fish*, 125 N. Y. 136, 26 N. E. 319; *Wyse* v. *Wyse*, 155 N. Y. 367, 49 N. E. 942, Affirming 13 Misc. 773, 34 N. Y. Supp. 1151; *Johnson* v. *Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283, Affirmed in 159 N. Y. 555, 54 N. E. 1092.

[26]*Dewitt* v. *Barley*, 9 N. Y. 371; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *Real* v. *People*, 42 N. Y. 270; *Sears* v. *Shafer*, 1 Barb. 408; *Paine* v. *Aldrich*, 133 N. Y. 544, 30 N. E. 725; *Re Arnold*, 14 Hun, 525.

[27]*Sears* v. *Shafer*, 1 Barb. 408; *Rollwagen* v. *Rollwagen*, 3 Hun, 121.

And a nonexpert witness in a hearing before a commissioner and a jury, appointed to inquire as to the unsoundness of mind of a party, who had testified that the party's mind was weak, but that he could not call it rational or irrational, cannot be asked to state his impression as to whether such party was failing very fast physically as well as mentally. *Re Klock*, 49 Hun, 450, 3 N. Y. Supp. 478.

In *DeWitt* v. *Barly*, 17 N. Y. 340; *Culver* v. *Haslam*, 7 Barb. 314; *Gardiner* v. *Gardiner*, 34 N. Y. 155, however, nonexpert opinions as to mental ability of another, founded upon personal observation, were held to be admissible, but these cases must be deemed to have been overruled upon that question by the later New York cases.

[28]*People* v. *Strait*, 148 N. Y. 566, 42 N. E. 1045; *Paine* v. *Aldrich*, 133 N. Y. 544, 30 N. E. 725; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *People* v. *Conroy*, 97 N. Y. 62; *Holcomb* v. *Holcomb*, 95 N. Y. 316; *Re Ross*, 87 N. Y. 514; *Rider* v. *Miller*, 86 N. Y. 507; *Hewlett* v. *Wood*, 55 N. Y. 634; *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *O'Brien* v. *People*, 36 N. Y. 276; *Johnson* v. *Cochrane*, 91 Hun, 165; 36 N. Y. Supp. 283; *Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Petrie* v. *Petrie*, 2 Silv. Sup. Ct. 438, 6 N. Y. Supp. 831; *Howell* v. *Taylor*, 11 Hun, 214; *Higbee* v. *Guardian Mut. L. Ins. Co.* 66 Barb. 466; *White* v. *Davis*, 42 N. Y. S. R. 901, 17 N. Y. Supp. 548; *Re Klock*, 49 Hun, 450, 3 N. Y. Supp. 478; *People* v. *Packenham*, 115 N. Y. 200, 21 N. E. 1035; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Wyse* v. *Wyse*, 155 N. Y. 367,

which they have personal knowledge.[29] And the testimony must be limited to the witness's conclusion from the facts testified to by him.[30] Oklahoma seems to have adopted the New York rule.[31]

360. Scope as to time.— Nonexpert witnesses cannot give their opinions that another was insane without designating any particular time when, in their judgment, such insanity existed.[32] And the opinion of a witness as to the sanity of a party must relate to the time of his examination or observation of his conduct and appearance; and he cannot be required to give his opinion as to capacity previous to that time.[33] Nor can nonexpert witnesses give their opinions as

49 N. E. 942, Affirming 13 Misc. 773, 34 N. Y. Supp. 1151; *Johnson* v. *Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283, Affirmed in 159 N. Y. 555, 54 N. E. 1092.

Such testimony relates to the appearance and conduct of the accused, and not to his mental condition. *People* v. *Packenham*, 115 N. Y. 200, 21 N. E. 1035.

And an inquiry addressed to a nonexpert witness on the question of sanity or insanity should be, not whether the person was absolutely rational or otherwise, but as to his opinion or impression, derived from his acts and conversations at the time; though where the witness stated nothing more than opinions and impressions derived from such acts and conversations, error in admitting evidence as to whether such person was absolutely rational or otherwise will not be deemed prejudicial. *People* v. *Youngs*, 151 N. Y. 210, 45 N. E. 460.

[29]*Paine* v. *Aldrich*, 133 N. Y. 544, 30 N. E. 725.

[30]*Re Folts*, 71 Hun, 492, 24 N. Y. Supp. 1052; *Re Ross*, 87 N. Y. 514; *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

[31]See *Queenan* v. *Territory*, 11 Okla. 261, 61 L. R. A. 324, 71 Pac. 218.

So, in Texas and South Dakota, though the courts of those states usually admit nonexpert opinions, a leaning in the direction of the Massachusetts and New York doctrine has appeared to some extent.

Thus, in *Hickman* v. *State*, 38 Tex. 190, it was said that, in the opinion of the court, it would be better practice, as a general rule, to confine nonexpert witnesses to a statement of those demonstrations which indicate insanity, and leave the jury to form their own opinion as to the cause; but in the case in hand facts proved rendered the ruling of the court quite immaterial on that point, since other evidence in the case clearly established the fact of sanity.

So, in *State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3, it was held that refusal to permit a nonexpert witness to state, from facts within his personal knowledge, which he had related upon the witness stand, what was his opinion as to the sanity or insanity of a person whose mental condition was in question, is not error, where he was permitted to state that during the times he had seen him he had always considered him irrational when excited.

[32]*Moors* v. *Sanford*, 2 Kan. App. 243, 41 Pac. 1064; *Denning* v. *Butcher*, 91 Iowa, 425, 59 N. W. 69; *Brashears* v. *Orme*, 93 Md. 442, 49 Atl. 620.

[33]*Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Shults* v. *State*, 37 Neb. 481, 55 N. W. 1080.

And the opinion of a witness as to whether a person accused of crime could distinguish between right and wrong, who had stated that he knew him some years since, will be taken as referring to the period of his acquaintance with him up to the time he last saw him before the offense, and not to the time of trial. *Powell* v. *State*, 25 Ala. 21.

But a question addressed to a nonexpert witness in a will contest, as to whether he ever saw the testator act rationally from a designated date until the last time he saw him, though inadmissible, is not a ground for reversal, where it appears to the appellate court that the result would have been the same if the testimony had been excluded. *Johnson* v. *Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283.

And in forming an opinion on the subject of the insanity, a nonexpert witness may take into consideration any fact or circumstance within his

to the mental condition of a person on a particular day, when they did not see him at that time.[34]. Witnesses may give their opinions, however, as to the state of a person's mind prior to and at the time of the act in question.[35] And the fact that a nonexpert witness had not formed his opinion at the time he saw and observed the facts testified to by him does not render his testimony upon the question of insanity inadmissible.[36]

361. Cross-examination, rebuttal, and impeachment.—It is within the discretion of the court to permit the cross-examination of a nonexpert witness before admitting his opinion as to the mental capacity of a person.[37] And questions may be asked with a view to calling forth contrary statements, declarations, and actions upon the part of the witness by way of impeachment.[38] And the witness may be asked as to any business transaction which he may have had with the person whose sanity is in question at the time he claims to have formed his opinion, and as to the manner in which such person then conducted himself,[39] and as to whether he thought he was of unsound mind at

knowledge or observation which to him appears to afford evidence of mental condition at the time in question, whether it occurred during such time or at a time prior thereto. *Re Norman*, 72 Iowa, 84, 33 N. W. 374.

Though conversations held with the person some time afterward do not qualify a witness to give an opinion as to capacity. *Eckert* v. *Flowry*, 43 Pa. 46.

[34]*Blake* v. *Rourke*, 74 Iowa, 519, 38 N. W. 392.

[35]*Baldwin* v. *State*, 12 Mo. 227.

The opinion of a nonexpert witness may be the result of the observation of a continuous condition or series of facts. *New York, C. & St. L. R. Co.* v. *Luebeck*, 157 Ill. 595, 41 N. E. 897.

And a nonexpert witness in an action involving the validity of a deed, who had testified, without objection, that the mind of the grantor was very weak, and that she did not know what she was about in making the deed, may be permitted to state that she was no more competent to make a deed two weeks after the date of the deed in question than she was before. *Goodman* v. *Sapp*, 102 N. C. 477, 9 S. E. 483.

[36]*Hathaway* v. *National L. Ins. Co.* 48 Vt. 336; *New York, C. & St. L. R. Co.* v. *Luebeck*, 157 Ill. 595, 41 N. E. 897.

[37]*O'Connor* v. *Madison*, 98 Mich. 183, 57 N. W. 105; *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150.

[38]*Staser* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990; *Rush* v. *Megee*, 36 Ind. 69; *Ware* v. *Ware*, 8 Me. 42; *Beaubien* v. *Cicotte*, 12 Mich. 459. And see *Haxton* v. *McClaren*, 132 Ind. 235, 31 N. E. 48; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

And one who bases his opinion as to the insanity of another in part upon the fact that the latter was an old man may be asked, on cross-examination, if it is not his belief that, as a rule, old men are of unsound mind because of failure of memory. *Pence* v. *Waugh*, 135 Ind. 143, 34 N. E. 860.

But the exclusion of declarations of a witness in a will contest that the testator was not competent to make a will cannot be held erroneous on appeal, where the objection was that it was necessarily inconsistent with his testimony in chief, in which he stated that while she resided with him, just after the execution of the will, he had observed no change in her mental condition, and gave several accounts of acts and conversations tending to show soundness of mind. *Williams* v. *Spencer*, 150 Mass. 346, 5 L. R. A. 790, 15 Am. St. Rep. 206, 23 N. E. 105.

[39]*Roe* v. *Taylor*, 45 Ill. 485.

And a nonexpert witness who based his opinion in part upon a contract, in giving evidence as to mental capacity may be asked whether he regarded the contract as reasonable or unreasonable.

that time.[40] These rules apply to criminal prosecutions, and a nonexpert witness may be asked as to his opinion whether the defendant was not competent to know right from wrong.[41] And upon an issue of testamentary capacity, such a witness may be asked whether, from his observation and acquaintance, he thought the testator mentally incapable of transacting ordinary business.[42] And it is competent to ask a witness,upon an inquisition of lunacy, on rebuttal, whether, in his opinion, the subject was not of sound mind.[43] A nonexpert witness who has given an opinion founded on facts known to him, and conduct observed by him, however, cannot be called upon, on cross-examination, to say what his opinion would be under a different state of affairs.[44] Nor can he be called upon for an opinion on a hypo-

Pence v. *Waugh*, 135 Ind. 143, 34 N. E. 860.

[40]*Pence* v. *Waugh*, 135 Ind. 143, 34 N. E. 860.

Witnesses who detailed facts, and expressed opinions upon direct examination touching the mental competency of another witness in the same cause, without objection, may be asked, on cross-examination, whether, from their observation and knowledge of her, as to which they had testified, the character of her mind was such that she had not an accurate knowledge of facts, or fancied the existence of facts which did not exist. *Bricker* v. *Lightner*, 40 Pa. 199.

[41]*State* v. *Porter*, 34 Iowa, 131; *State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3.

And a witness in a criminal case, who was a neighbor of the defendant, and who had testified that he was afflicted with insanity of long standing, may be asked, on cross-examination, if he had ever heard of his being insane previous to the alleged criminal act in question. *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45, S. W. 21.

And evidence of the brother of the accused, in a prosecution for homicide, as to whether he would regard the actions of the accused as irrational if he were nervous and irritable after divorce papers had been served upon him, is admissible as tending to characterize and develop the weight to be given evidence given by him in his direct examination. *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739.

[42]*Gardiner* v. *Gardiner*, 34 N. Y. 155.

But questions asked a witness on cross-examination in a will contest, as to whether he thought the testator had mind sufficient at the time of making his will to give the directions required therefor, are not competent for the purpose of ascertaining the degree of intelligence possessed by the witness, in order to enable the court to determine what reliance should be placed on his evidence. *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578.

So, a nonexpert witness in an action on contract, who has testified to the insanity of defendant, may be asked, on cross-examination, for the purpose of testing his sincerity, whether, at the time he did so, the defendant was capable of making a deed which was shown to have been made at that time. *Dominick* v. *Randolph*, 124 Ala. 557, 27 So. 481.

[43]*Re Vanauken*, 10 N. J. Eq. 190; *Westmore* v. *Sheffield*, 56 Vt. 239.

[44]*Rambler* v. *Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

So, a witness in an action to set aside a will upon the ground that the testator was of unsound mind cannot be asked, on cross-examination, if he would have taken the testator's note during the last years of his life, and if he had heard anybody question his sanity. *Staser* v. *Hogan*, 120 Ind. 227, 21 N. E. 911, 22 N. E. 990.

And where a witness stated, upon cross-examination, that he predicated his opinion as to the capacity of a person upon what he saw and knew of him, and not particularly upon the evidence of another witness, the latter cannot be asked if he had stated, in giving evidence, that the person whose sanity was in question was irrational and

thetical case.[45] And a nonexpert cannot be asked as to the intent of another, where it does not appear that he had any means of judging as to such intent.[46] Nor can a nonexpert be contradicted by showing acts upon his part indicating a person to be of sound mind, where he had given evidence tending to show incompetency on the part of such person, but had not given his opinion.[47] And a nonexpert cannot state, upon redirect examination, his opinion as to whether an irrational man can always know right from wrong, that being a question for an expert.[48]

362. Weight generally.— The weight to be given the opinions of nonexpert witnesses as to sanity or insanity depends upon a consideration of all the circumstances under which they are formed;[49] and upon the extent and character of the impairment of the mind.[50] And when the opinions of the witnesses seem evenly balanced, the court will look to the circumstances concerning the transaction, the history and character of the person, and the probability that one in the possession of his faculties would not perform the act in question.[51] The

wandering in his conversation or otherwise. *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666.

[45]*Re Hogmire*, 108 Mich. 410, 66 N. W. 327; *Dunham's Appeal*, 27 Conn. 192; *Pittard* v. *Foster*, 12 Ill. App. 132.

But a nonexpert witness may be asked, on cross-examination, what he means by insanity, where no effort is made to confuse him. *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.

[46]*State* v. *Garvey*, 11 Minn. 154, Gil. 95.

[47]*Hubbell* v. *Bissell*, 2 Allen, 196.

And inquiries by the proponent of a will, of the contestant's witnesses, examined for the purpose of proving facts concerning the bodily and mental condition of the testator, as to whether or not he appeared or acted rationally, do not fall within the province of mere cross-examination, and are not permissible. *Rollwagen* v. *Rollwagen*, 5 Thomp. & C. 402.

But the opinions of nonexpert witnesses as to mental capacity, when so connected with the *res gestæ* as to be inseparable therefrom, become the subject of contradiction, and may be rebutted by proof of inconsistent statements out of court. *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382.

[48]*State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3.

But a witness for the state, in a criminal prosecution, who was well acquainted with the accused for a long time immediately preceding the commission of the criminal act, may be asked, on rebuttal, whether or not he had ever observed anything about him or in what he said or did that indicated insanity. *State* v. *Maier*, 36 W. Va. 767, 15 S. E. 991.

And evidence of a jailor as to the conduct of a person in jail, and the apparent condition of his mind at the time, is admissible in rebuttal of evidence in behalf of such person tending to show a general and permanent state of dementia and a diseased condition of the mind. *People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073.

[49]*Moore* v. *Moore*, 67 Mo. 192.

[50]*Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685.

Evidence that a person had been confined in an insane hospital as an insane man, and the opinion of witnesses that he was still insane, is not sufficient to establish insanity to such an extent as to deprive him of capacity to distinguish between right and wrong. *Meyer* v. *People*, 156 Ill. 126, 40 N. E. 490.

[51]*Hemphill* v. *Holford*, 88 Mich. 293, 50 N. W. 300. And see *Martinez* v. *Moll*, 46 Fed. 724.

And where there is a great contrariety of evidence as to the feebleness of a grantor's mind, as, for instance,

opinions of persons well acquainted with one whose sanity is in question are entitled to respectful consideration, although they are not medical men.[52] The question of weight and effect, however, is not one of law, for the court, but one of fact, for the jury;[53] to be determined by a consideration of the facts testified to before them, upon which such opinions are based.[54] And the question whether the means of information, or the facts proved, or the conclusions drawn, by a nonexpert witness as to sanity or insanity, are sufficient as a basis for his conclusion, is also one for the consideration of the jury, under proper instructions;[55] and so is the question of the sufficiency of the witness's reasons for his opinion.[56] And it is for the jury to consider the facts, and ascertain if the opinions are sustained by them;[57] the province of the court in such cases being suggestion and explanation, rather than direction.

363. As affected by character, capacity, and opportunity. — The weight of the opinion of a nonexpert witness as to sanity or insanity of a person depends upon his capacity to judge, and his opportunity to observe,[58] and the intelligence and honesty of the witness,[59] and his

twelve witnesses for it and nine against it, an admission on the part of his grantee, who was his general agent, that such grantor was incapable of transacting his own business, corroborates the affirmative of the issue, and is sufficient to control the grantee's answer, denying the fact of mental incapacity. *Brooke* v. *Berry*, 2 Gill, 83.

[52]*Schlencker* v. *State*, 9 Neb. 241, 1 N. W. 857; *Com. ex rel. Helmbold* v. *Kirkbride*, 11 Phila. 427.

And the jury in a will contest should not be told that the opinions of witnesses on the question of insanity who are not experts, though ever so honestly formed, are most unsafe guides for the ascertainment of truth. *Burney* v. *Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685.

But an instruction in a prosecution for homicide in which insanity was interposed as a defense, that the conduct, language, and appearance of the accused should be considered for the double purpose of testing the value of the opinions of witnesses based upon them, and of determining whether the fact of insanity is established independently of such opinions, is not subject to the objection that it tells the jury that if they find the accused insane they must do so from facts independent from opinions, where they are elsewhere told that weight and credit should be given to opinions upon the question of insanity. *State* v. *Jones*, 64 Iowa, 356, 17 N. W. 911, 20 N. W. 470.

And in *Eloi* v. *Eloi*, 36 La. Ann. 563, it was said that little or no weight can be given to opinions of nonexpert witnesses as to the mental condition of the defendant in an action for interdiction.

And in *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433, it was said that the opinions of ordinary witnesses as to the sanity of the insured who committed suicide, are not of great weight, in an action on an insurance policy conditioned against liability in case of death of the insured by his own hand.

[53]*Colee* v. *State*, 75 Ind. 513; *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771; *Newhard* v. *Yundt*, 132 Pa. 324, 19 Atl. 288; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

[54]*State* v. *Hayden*, 51 Vt. 296.

[55]*McClackey* v. *State*, 5 Tex. App. 320.

[56]*Gray* v. *Obear*, 59 Ga. 675.

[57]*Nexsen* v. *Nexsen*, 2 Keyes, 232; *Petrie* v. *Petrie*, 2 Silv. Sup. Ct. 438, 6 N. Y. Supp. 831; *People* v. *Shuff* (Idaho) 72 Pac. 664.

[58]*Burton* v. *Scott*, 3 Rand. (Va.) 399; *Burney* v. *Torrey* 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *Armstrong* v.

freedom from interest and bias,[60] and upon the incidents actually observed.[61] Opinions of nonexpert witnesses as to sanity or insanity are of no value unless it appears that they had adequate means and opportunities for forming a conclusion.[62] And the testimony of witnesses present at the time of the act in question is of greater weight than the opinion of other witnesses not having the same opportunities to observe.[63] And evidence of witnesses who were present at the execution of a will is entitled to particular weight on the question of testamentary capacity, especially where they were attesting witnesses.[64] It cannot be said, as a matter of law, however, that the

State, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Hawley* v. *Griffin* (Iowa) 82 N. W. 905; *Re Merriman*, 108 Mich. 454, 66 N. W. 372; *Wood* v. *State*, 58 Miss. 741; *Sharp* v. *Kansas City Cable R. Co.* 114 Mo. 94, 20 S. W. 93; *Wood* v. *Carpenter*, 166 Mo. 465, 66 S. W. 172; *Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Culver* v. *Haslam*, 7 Barb. 314; *State* v. *Kalb*, 2 Ohio Legal News, 364; *Com.* v. *Cressinger*, 193 Pa. 326, 44 Atl. 433; *Ward* v. *Brown* (W. Va.) 44 S. E. 488; *Knickerbocker L. Ins. Co.* v. *Foley*, 105 U. S. 350, 26 L. ed. 1055.

Next to physicians and persons who were present at the time of the execution of a deed, either as attesting witnesses or otherwise, the evidence of persons whose intimacy in the family had given them an opportunity of seeing the grantor at all times, and watching the operations of his mind, is important upon the question of his capacity to make a deed. *Jarrett* v. *Jarrett*, 11 W. Va. 584.

And a continuance should be granted because of the absence of material witnesses in a criminal prosecution who would testify as to the mental condition of the accused, and give their opinions that he was insane, though there were other witnesses upon the same question, where the absent witnesses were more friendly and intimate with the accused, and had all the means of knowing his condition, and were better able to give an opinion as to his mental condition than any other persons. *Harris* v. *State*, 18 Tex. App. 287; *Ryder* v. *State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

[59]*Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Julke* v. *Adam*, 1 Redf. 454.

[60]*Culver* v. *Haslam*, 7 Barb. 314.

A will will not be set aside on the ground of testamentary incapacity upon the testimony of a number of witnesses, all of whom were related to the testator, as against that of three witnesses to the will who had no interest in the disposition, and were unconnected with his family and were apparently free from prejudice, and had abundant opportunity to form a judgment as to his mental condition, that he was of sound mind. *Sutton* v. *Morgan*, 30 N. J. Eq. 629.

[61]*Sharp* v. *Kansas City Cable R. Co.* 114 Mo. 94, 20 S. W. 93; *Culver* v. *Haslam*, 7 Barb. 314; *Battle* v. *State*, 105 Ga. 703, 32 S. E. 160. And see *Emery* v. *Hoyt*, 46 Ill. 258.

[62]*Beaubien* v. *Cicotte*, 12 Mich. 459.

[63]*Beverley* v. *Walden*, 20 Gratt. 147; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Buckey* v. *Buckey*, 38 W. Va. 168, 18 S. E. 383; *Delaplain* v. *Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; *Hoge* v. *Fisher*, Pet. C. C. 163, Fed. Cas. No. 6,585.

And where there is a conflict in the evidence as to the sanity of a grantor, in an action to set aside his deed, the evidence of witnesses relating to the period of time nearest the date of the execution of the deed is entitled to the most weight. *Exum* v. *Canty*, 34 Miss. 533.

[64]*Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493.

Evidence of neighbors of a party, who were of sound judgment and fair powers of observation, and who had known him long and well, and had occasion to observe and test the vigor of his mental faculties, and could give the facts upon which their impressions and opinions were based, is ordinarily the most reliable on the question of senile dementia. *Hiett* v. *Shull*, 36 W. Va. 563, 15 S. E. 146.

opinions of the witnesses who had less acquaintance with the person whose sanity is in question, and less opportunities, may not be as reliable as those of others, where they have had special training and experience, or habits of closely observing people.[65] The question as to the comparative weight of expert and nonexpert opinions is elsewhere considered.[66]

364. As affected by facts and reasons stated.—The opinions of nonexpert witnesses on the question of mental capacity are to be weighed by the facts upon which they are based,[67] such facts being of more importance than the opinions.[68] Mere opinions of witnesses as to sanity or insanity are entitled to little or no regard unless they are supported by good reasons, founded on facts which will warrant them in the opinion of the jury.[69] And if such reasons are frivolous and inconclusive, the opinions are worth nothing.[70] And opinions as to the absence of capacity are entitled to little weight as against proof of

[65]*Cline* v. *Lindsey*, 110 Ind. 337, 11 N. E. 441; *Durham* v. *Smith*, 120 Ind. 463, 22 N. E. 333; *Fulwider* v. *Ingels*, 87 Ind. 414.

But the testimony of an attorney who drew a will, tending to show that the testator knew what he was about, and comprehended the character of the instrument, cannot be said, as a matter of law, to be controlling, where there is evidence that the testator was eighty years of age, and of many circumstances occurring at, about, and before the time the will was made, indicating an enfeebled mental condition, the force and weight of such circumstances being a question for the determination of the jury. *Petrie* v. *Petrie*, 2 Silv. Sup. Ct. 438, 6 N. Y. Supp. 831.

[66]*Supra*, § 350.

[67]*Fiscus* v. *Turner*, 125 Ind. 46, 24 N. E. 662; *Rush* v. *Meyer*, 36 Ind. 69; *Blume* v. *State*, 154 Ind. 343, 56 N. E. 771; *Baker* v. *Baker*, 202 Ill. 595, 67 N. E. 410; *Hawley* v. *Griffin* (Iowa) 82 N. W. 905; *Ex parte Schneider*, 21 D. C. 433; *Clarke* v. *Sawyer*, 3 Sandf. Ch. 351; *Nexsen* v. *Nexsen*, 2 Keyes, 232; *Wilcox* v. *State*, 94 Tenn. 106, 28 S. W. 312; *Kinleside* v. *Harrison*, 2 Phillim. Eccl. Rep. 449.

[68]*Clarke* v. *Sawyer*, 3 Sandf. Ch. 351; *M'Daniel's Will*, 2 J. J. Marsh. 331.

[69]*Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Darnell* v. *Rowland*, 30 Ind. 342; *M'Daniel's Will*, 2 J. J. Marsh. 331; *Jones* v. *Perkins*, 5 B. Mon. 222; *Chase* v. *Winans*, 59 Md. 475; *Clifton* v. *Clifton*, 47 N. J. Eq. 227, 21 Atl. 333; *Doughty* v. *Doughty*, 7 N. J. Eq. 643; *Sloan* v. *Maxwell*, 3 N. J. Eq. 563; *Lowe* v. *Williamson*, 2 N. J. Eq. 82; *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Doran* v. *McConlogue*, 150 Pa. 98, 24 Atl. 357; *Nexsen* v. *Nexsen*, 2 Keyes, 232; *Young* v. *Barner*, 27 Gratt. 96; *Jarrett* v. *Jarrett*, 11 W. Va. 584; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *Farnsworth* v. *Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Sheafe* v. *Rowe*, 2 Lee Eccl. Rep. 415.

A continuance will not be granted in a criminal prosecution for the purpose of procuring the testimony of a witness who was expected to testify that she believed the defendant to be insane, based upon the facts shown by the evidence, that he was a somnambulist, where it is not probable that the jury would have believed her conclusion and opinion to be correct in the face of other testimony to the effect that somnambulism is not a symptom or evidence of insanity. *Fisher* v. *State*, 30 Tex. App. 502, 18 S. W. 90.

[70]*Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Sloan* v. *Maxwell*, 3 N. J. Eq. 563; *Green's Estate*, 140 Pa. 137, 21 Atl. 250.

But the fact that a nonexpert witness is unable to give conversations with the person whose sanity is in question, and can only state the manner in which he conversed, and that the facts known to him were limited in their character, does

facts evincing capacity.[71] But it is not correct to say that the opinion of a witness as to the mental condition of a person is entitled to consideration only so far as the facts stated by him sustain it, unless the proposition is understood to include, among the facts referred to, the acquaintance of the witness with the subject-matter, and his opportunities for observation.[72]

3. *Subscribing witnesses.*

365. Admissibility generally.— The law places subscribing witnesses to a will around the testator to try, judge, and determine as to his competency to execute it.[73] And they are permitted to testify as to the opinion they formed at the time as to the condition of his mind, whether sound or unsound.[74] An attesting witness to a will may express an opinion as to the capacity of the testator the same as an expert may, without being confined to narratives of the facts and conduct, as other witnesses are.[75] And, as a general rule, they may give

not render his opinion as to mental capacity inadmissible, but should be given to the jury on the question as to what credit and weight should be given his opinion. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[71] *Carpenter* v. *Calvert*, 83 Ill. 62; *Rarick* v. *Ulmer*, 144 Ind. 25, 42 N. E. 1099.

[72] *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245.

[73] *Poole* v. *Richardson*, 3 Mass. 330; *Hastings* v. *Rider*, 99 Mass. 623; *Needham* v. *Ide*, 5 Pick. 510; *McDaniel* v. *Crosby*, 19 Ark. 533; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Kelly* v. *McGuire*, 15 Ark. 600; *Chase* v. *Lincoln*, 3 Mass. 236; *Field's Appeal*, 36 Conn. 277; *Heyward* v. *Hazard*, 1 Bay, 335.

A witness should not subscribe his name to a will as such until he is clearly satisfied that the testator is possessed of a sound and disposing mind and memory, and that in executing it he acts understandingly, with full knowledge of its contents. *Scribner* v. *Crane*, 2 Paige, 147, 21 Am. Dec. 81.

[74] *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Steele* v. *Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Walker* v. *Walker*, 34 Ala. 469; *McDaniel* v. *Crosby*, 19 Ark. 533; *Kelly* v. *McGuire*, 15 Ark. 600; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Entwistle* v. *Meikle*, 180 Ill. 9, 54 N. E. 217; *Call* v. *Byram*, 39 Ind. 499; *Harper's Will*, 4 Bibb, 244; *Poole* v. *Richardson*, 3 Mass. 330; *Hastings* v. *Rider*, 99 Mass. 623; *Needham* v. *Ide*, 5 Pick. 510; *Chase* v. *Lincoln*, 3 Mass. 236; *Martin* v. *Perkins*, 56 Miss. 204; *Hamblett* v. *Hamblett*, 6 N. H. 333, *dictum*; *Castner* v. *Sliker*, 33 N. J. L. 95; *Dewitt* v. *Barley*, 9 N. Y. 371; *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Holcomb* v. *Holcomb*, 95 N. Y. 316, *dictum*; *Re Potter*, 17 App. Div. 267, 45 N. Y. Supp. 563; *Crowell* v. *Kirk*, 14 N. C. (3 Dev. L.) 355; *Gibson* v. *Gibson*, 9 Yerg. 329.

The opinions of attesting witnesses to a will as to the capacity of a testator are admitted because they are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally have not; and they are thus supposed to be more capable of drawing conclusions from the facts, and passing opinions thereon, than the jurors would be. *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578.

[75] *Martin* v. *Perkins*, 56 Miss. 204; *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253; *Young* v. *Barner*, 27 Gratt. 96; *Parsons* v. *Parsons*, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564; *Hertrich* v. *Hertrich*, 114 Iowa, 643, 86 Am. St. Rep. 389, 87 N. W. 689.

And an exception exists to the New York rule that a nonexpert witness can only characterize as rational or ir-

such opinions without giving the facts upon which they are founded;[76] and without assigning cause or reason;[77] and without stating the grounds upon which they are formed.[78] The subscribing witnesses to a will may be examined by either party, however, as to what transpired at the time they witnessed the instrument.[79] And the rule has been laid down in some of the cases that a subscribing witness cannot give an opinion as to sanity or insanity, in the absence of evidence as to facts indicating insanity;[80] and that the opinions of the witnesses as to testamentary capacity or incapacity are competent when the facts and circumstances on which they are founded are disclosed.[81] Likewise, a nonexpert witness who is the subscribing wit-

rational the acts and declarations to which he testifies, and cannot express an opinion on the general question whether the mind of a testator was sound or unsound, in case of attesting witnesses to a will. *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

But if the opinion of a subscribing witness purports to be based upon testimony given by him, it is not competent, where he had not testified to facts tending to prove unsoundness of mind. *Furlong* v. *Carraher*, 108 Iowa, 492, 79 N. W. 277.

[76]*Titlow* v. *Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Logan* v. *McGinnis*, 12 Pa. 27; *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329; *Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Williams* v. *Lee*, 47 Md. 321; *Jones* v. *Collins*, 94 Md. 403, 51 Atl. 398; *Crowell* v. *Kirk*, 14 N. C. (3 Dev. L.) 355; *Van Huss* v. *Rainbolt*, 2 Coldw. 139; *First Nat. Bank* v. *Wirebach*, 12 W. N. C. 150.

The condition of a testator's mind as evidenced by his actions, conduct, and conversations at the time of making his will is a part of the *res gestæ* of the transaction, and witnesses to the will are competent to speak thereof and give opinions in relation thereto without any knowledge other than that derived from his conduct on such occasions. *Re Coleman*, 111 N. Y. 220, 19 N. E. 71.

[77]*Gibson* v. *Gibson*, 9 Yerg. 329; *Puryear* v. *Reese*, 6 Coldw. 21.

[78]*Lodge* v. *Lodge*, 2 Houst. (Del.) 419; *Re D'Avignon*, 12 Colo. App. 489, 55 Pac. 936; *Scott* v. *McKee*, 105 Ga. 256, 31 S. E. 183.

But a refusal to permit a witness to a will who had testified as to what occurred when he witnessed it, and that the conversations and acts of the testator detailed by him impressed him as perfectly rational, to answer a question whether there was anything in his manner or appearance different from what he had seen for the year past, is not erroneous, within the rule that a subscribing witness can give his opinion generally as to soundness of mind of a testator, where the objection was general. If the party asking the question desired the benefit of the exceptional rule applicable to such witnesses, the form of the question should have distinctly indicated it. *Petrie* v. *Petrie*, 2 Silv. Sup. Ct. 438, 6 N. Y. Supp. 931.

[79]*Robinson* v. *Adams*, 62 Me. 369, 16 Am. Rep. 473; *Puryear* v. *Reese*, 6 Coldw. 21.

Permitting the contestants of a will to cross-examine the subscribing witnesses on the question of the soundness of mind of the testator before they have opened their own case, is not a departure from the rule of evidence that a defendant who has not opened his case will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party. *Egbert* v. *Egbert*, 78 Pa. 326.

And a subscribing witness to a will, who testified in chief as to its execution, and the testator's sanity, and the facts connected with its preparation and interviews with the testator concerning it, may be examined anew, on rebuttal, without restriction, upon the points in controversy. *Nash* v. *Hunt*, 116 Mass. 237.

[80]*Dickinson* v. *Dickinson*, 64 Pa. 401.

And in *Kenworthy* v. *Williams*, 5 Ind. 375, it was held that the evidence of a subscribing witness to a will as to the sanity or insanity of the testator is not admissible in a proceeding to contest the will.

[81]*Abraham* v. *Wilkins*, 17 Ark. 292;

ness to a deed or contract may give an opinion as to the sanity or insanity of a party upon the same principle which allows subscribing witnesses to a will to give opinions as to the sanity of a testator.[82] And the opinions of subscribing witnesses to a contract are competent in all cases where the facts or circumstances are disclosed upon which they are founded.[83]

366. Necessity of giving.— The purpose of attesting an instrument being to preserve proof both of its execution and the capacity of the party executing it, a party interested has a right to insist that the testimony of all such witnesses be given to the jury in an action thereon, and they must all be produced, if living and within the jurisdiction of the court.[84] And the subscribing witnesses to a deed must be called in an action thereon, where *non est factum* is pleaded.[85] It is not necessary to the establishment of a will, however, that the subscribing witnesses should have stated their opinions as to the mental capacity of the testator, since such opinions are necessarily mere inferences drawn by them from facts observed.[86] And where there is a failure to prove testamentary capacity of a testator by the subscrib-

Walker v. *Walker*, 14 Ga. 242; *Cilley* v. *Cilley*, 34 Me. 162.

A subscribing witness to a codicil is not a competent witness on the question of the sanity of the testator at the time of making it, where he was a legatee under the original will. *Gass* v. *Gass*, 3 Humph. 278.

[82]*Brand* v. *Brand*, 39 How. Pr. 193; *Dewitt* v. *Barley*, 9 N. Y. 371.

[83]*Kelly* v. *McGuire*, 15 Ark. 555.

In *Dean* v. *Fuller*, 40 Pa. 474, however, it was held that deeds are good without subscribing witnesses, and that the rule allowing subscribing witnesses to wills to testify as to their opinions of the testator's capacity to make a will does not apply to the subscribing witnesses to a deed, who must testify to facts only on the question of sanity or incapacity of the grantor.

[84]*Chase* v. *Lincoln*, 3 Mass. 236; *Field's Appeal*, 36 Conn. 277; *Jauncey* v. *Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper Ch. 136, 15 Revised Rep. 93.

The rule of English courts of chancery is that upon a bill filed to establish a will all the subscribing witnesses, if living and competent to testify, may be called by the party seeking to establish it, and must be examined by him so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator, and the circumstances attending the execution of the will; and the rule is the same upon the trial of an issue *devisavit vel non*, awarded by the court of chancery. *Jauncey* v. *Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 425.

The right of an heir in a will contest, however, to insist upon having the opinions of the attesting witnesses as to the sanity of the testator, may be waived and is waived unless insisted upon at the time. *Field's Appeal*, 36 Conn. 277.

And a will is not rendered inadmissible in evidence by failure to prove execution and testamentary capacity by the subscribing witnesses, where they are called and examined, and testify to the execution of the will by the testator. *Hobart* v. *Cook*, 167 Mass. 55, 39 L. R. A. 715, 44 N. E. 1085.

[85]*Crank* v. *Frith*, 2 Moody & R. 262, 9 Car. & P. 197.

[86]*Cilley* v. *Cilley*, 34 Me. 162; *Mays* v. *Mays*, 114 Mo. 536, 21 S. W. 921.

The inability of a subscribing witness to a will, who had been introduced to the testator for that purpose, to testify to his capacity, does not invalidate the will, but goes only to the credibility of such witness in case he is called upon to testify as to sanity or mental capacity. *Huff* v. *Huff*, 41 Ga. 696.

ing witnesses to a will, the executor or proponent is not precluded from establishing his sanity by other testimony.[87] Wills are established in many jurisdictions upon the theory that subscribing as a witness to a will is an assertion that the testator was of sound mind,[88] and that proof of the signature of a deceased witness prima facie establishes the competency of the testator to make the will.[89] The same general rules apply to deeds and contracts.[90] The opinions of the attesting witnesses as to the sanity of a party, however, are not conclusive.[91] And the contrary rule, that the fact that a person attests a will does not furnish evidence of any opinion on his part as to the sanity of the testator, has been asserted.[92] Proof by both subscribing witnesses is required under statutes requiring the subscribing witnesses to a will to attest not only the act of signing it, but also the sanity of the testator.[93] But the witnesses need not swear positively

[87]*Frear* v. *Williams*, 7 Baxt. 550; *Butler* v. *Benson*, 1 Barb. 526; *Wheeler* v. *Alderson*, 3 Hagg. Eccl. Rep. 574.

While a will is required to be attested by two witnesses, it may be proved by one of them, who testifies to the attestation by the other, and to the competency of the testator, though the other does not testify. *Cheatham* v. *Hatcher*, 30 Gratt. 66, 32 Am. Rep. 650.

[88]*Williams* v. *Lee*, 47 Md. 321; *Egbert* v. *Egbert*, 78 Pa. 326.

Where any of the witnesses of a will are dead or in such a situation that their testimony cannot be obtained, proof of their signatures is received as secondary evidence of the facts to which they have attested by subscribing the will as witnesses. *Jauncey* v. *Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

[89]*Harden* v. *Hays*, 9 Pa. 151.

A will is established where the attesting witnesses, who must necessarily be called to prove its execution if living and within the reach of process, do not impeach the testator's sanity, or, if, being absent or dead, their handwriting is proved, unless proof of insanity is offered by the contestants, the sanity of the testator being sustained by the presumption that every one is sane. *Perkins* v. *Perkins*, 39 N. H. 163.

But failure to examine the scrivener who wrote a will, and the subscribing witnesses thereto, to uphold it in a will contest, is a material and damaging circumstance against the proponent, having much adverse force. *Ulmer's Appeal* (Pa.) 11 Cent. Rep. 403, 12 Atl. 686.

[90]*Pedler* v. *Paige*, 1 Moody & R. 258; *Towart* v. *Sellars*, 5 Dowl. P. C. 231.

[91]*Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Starnes* v. *Marten*, 1 Curt. Eccl. Rep. 294.

[92]*Baxter* v. *Abbott*, 7 Gray, 71; *Boardman* v. *Woodman*, 47 N. H. 120; *Flanders* v. *Davis*, 19 N. H. 139.

[93]*Withinton* v. *Withinton*, 7 Mo. 589; *Bice* v. *Hall*, 120 Ill. 597, 12 N. E. 236; *Andrews* v. *Black*, 43 Ill. 256; *Walker* v. *Walker*, 3 Ill. 291; *Ramsdell* v. *Viele*, 6 Dem. 244; *Swenarton* v. *Hancock*, 9 Abb. N. C. 326.

All that the New York statute requires is that it shall appear from the proof taken before the surrogate that the will was duly executed by the testator, who was competent to make it, and free from restraint; and it is not necessary that each witness thereto should be able to swear that all the requisites of the statute had been complied with. *Jauncey* v. *Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

Other evidence than that of the subscribing witnesses may be heard, under the Illinois statute, where probate of the will has been refused. *Andrews* v. *Black*, 43 Ill. 256.

But testimony of a witness, on an application for probate, that he did not know whether the testator was of sound mind or not, and that he might have been sane or might not, is not sufficient to procure its admission to probate. *Allison* v. *Allison*, 46 Ill. 61, 92 Am. Dec. 237.

And where, at the probate of a will, one subscribing witness testifies that

that the testator was sane: their opinion or belief is all that is required.[94]

367. Scope.— The opinion of a witness in regard to the sanity of another is not rendered competent by the fact that he was a subscribing witness, where the question was not limited to an inquiry as to his opinion in regard to sanity at the time of the execution of the instrument subscribed.[95] The opinion of an attesting witness, formed at another time, before or after the execution of the instrument attested, in respect to the mental capacity of a party, stands like that of any other witness.[96] And the opinion of a subscribing witness is incompetent where the inquiry embraces the whole question in dispute.[97] A witness to a will, however, need not use the statutory formula "sound mind and memory" in stating his belief as to the testamentary capacity of the testator in a proceeding to probate his will: it is sufficient if he states his belief in equivalent words.[98] Nor are the subscribing witnesses to a will debarred by any rule of law from testifying to a testator's insanity, however improper it may be to witness a will believing the testator incapable of making it.[99]

368. Weight.—Opinions of attesting witnesses, and facts stated by them as occurring at the time of the execution of the instrument attested, are entitled to great weight on the question of capacity to make it,[1] if they are persons of intelligence and veracity.[2] But the testi-

the testator was sane at the time of making the will, and the other testifies that he was insane, the evidence of other witnesses is not admissible to establish the will. *Weld* v. *Sweeney*, 85 Ill. 50.

It is not necessary, however, that the subscribing witnesses to a will should be called in an issue out of chancery, in a will contest, on the ground of testamentary incapacity, or that when called they should concur in their testimony; and other witnesses may be examined even to contradict them. *Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419.

[94] *Allison* v. *Allison*, 46 Ill. 61, 92 Am. Dec. 237.

[95] *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578.

[96] *Williams* v. *Spencer*, 150 Mass. 346, 5 L. R. A. 790, 15 Am. St. Rep. 206, 23 N. E. 105; *Gwin* v. *Gwin*, 5 Idaho, 271, 48 Pac. 295.

[97] *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578; *Melancfy* v. *Morrison*, 152 Mass. 473, 26 N. E. 36; *Furlong* v. *Carraher*, 108 Iowa, 492, 79 N. W. 277.

[98] *Bice* v. *Hall*, 120 Ill. 597, 12 N. E. 236.

The answer of a subscribing witness to a will as to his belief in the testator's mental capacity will not be suppressed when his deposition shows that he used the word "belief" as synonymous with opinion. *Hughes* v. *Hughes*, 31 Ala. 519.

[99] *Garrison* v. *Blanton*, 48 Tex. 299; *Williams* v. *Lee*, 47 Md. 321; *Howard* v. *Braithwaite*, 1 Ves. & B. 202. But see *Dickinson* v. *Dickinson*, 61 Pa. 401.

A party calling a subscribing witness to a will who declares his belief that the testator was incompetent at the time he made his will may contradict him by reading his evidence taken on a former trial, and by proof of declarations previously made. *Harden* v. *Hays*, 9 Pa. 151; *Thornton* v. *Thornton*, 39 Vt. 122.

[1] *Whitenack* v. *Stryker*, 2 N. J. Eq. 8; *Turner* v. *Cheesman*, 15 N. J. Eq. 243; *Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Ball* v. *Kane*, 1 Penn. (Del.) 90, 39 Atl. 778; *Kelly* v. *Perrault*, 5 Idaho,

mony of subscribing witnesses is not the only evidence as to mental capacity that can be given;[3] and it is not conclusive.[4] And subscribing witnesses are not necessarily the best to prove the sanity of the person when it is questioned.[5] The mere opinion of a subscribing

221, 48 Pac. 45; *Cornelius* v. *Cornelius*, 52 N. C. (7 Jones L.) 593; *Martin* v. *Thayer*, 37 W. Va. 38, 16 S. E. 489; *Nicholas* v. *Kershner*, 20 W. Va. 251; *Kerr* v. *Lunsford*, 31 W. Va. 680, 2 L. R. A. 668, 8 S. E. 493; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Field's Appeal*, 36 Conn. 277. And see *Buckminster* v. *Perry*, 4 Mass. 593; *Re Lewis*, 51 Wis. 101, 7 N. W. 829; *Brock* v. *Luckett*, 4 How. (Miss.) 459.

The attesting witnesses to a will are called upon to examine into and satisfy themselves as to the capacity of the testator, and their evidence is most to be relied upon; and next after them that of persons who were present at its execution, their opportunities being equal. *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

The incapacity of a testator should be sustained by strong testimony as to facts showing a defect of mind existing in a form that the subscribing witnesses may not have detected to invalidate his will, where its execution was marked by the circumstances of fair dealing, and the subscribing witnesses were above suspicion, and fully aware of their duty, and competent to perform it. *Means* v. *Means*, 5 Strobh. L. 167.

[3]*Jamison* v. *Jamison*, 3 Houst. (Del.) 108; *Kemble* v. *Church*, 3 Hagg. Eccl. Rep. 273.

The opinion of an expert witness has been held to be entitled to little weight as against the evidence of attesting witnesses. *Kelly* v. *Perrault*, 5 Idaho, 221, 48 Pac. 45.

And in *Sutton* v. *Morgan*, 30 N. J. Eq. 629, the evidence of three out of four disinterested subscribing witnesses to a will as to the testamentary capacity of a testator ninety-three years of age was held to outweigh that of ten other witnesses, all of whom were related to the testator either by blood or affinity, where the other subscribing witness was dead, and the testator's attending physician, although subpœnaed and present at the trial, was not examined.

But an inquiry of an attesting witness upon cross-examination in a will contest, as to whether he thought the testator had mind sufficient at the time he is alleged to have executed his last will, to give his attorney specific directions with reference to the disposition of his property, is not competent for the purpose of ascertaining the degree of intelligence possessed by the witness, to enable the court to determine the reliance which should be placed upon his evidence given on direct examination, where he had only stated facts which had come within his own observation, and expressed no opinion as to the soundness of the mind and memory of the testator. *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578.

[3]*Field's Appeal*, 36 Conn. 277; *Martin* v. *Perkins*, 56 Miss. 204; *Morton* v. *Heidorn*, 133 Mo. 6[illegible]3, 37 S. W. 504.

[4]*Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60.

A will may be set aside on the ground of testamentary incapacity, against the testimony of subscribing witnesses to sanity, where there was proof of previous insanity, and the disposition made by the will was not rational or natural, and circumstances of mystery and suspicion attended its execution. *Griffin* v. *Griffin*, R. M. Charlt. (Ga.) 217.

[5]*McTaggart* v. *Thompson*, 14 Pa. 149; *The Berry Will Case*, 93 Md. 560, 49 Atl. 401.

The testimony of a subscribing witness to a will as to the sanity of a testator is not invested by law with any fictitious value as testimony, but is to be weighed with reference to his special opportunity and occasion to observe at the precise moment in question, as well as with reference to his care, skill, judgment, memory, and veracity. *Thornton* v. *Thornton*, 39 Vt. 122.

The opinion of a witness in a will contest who is a stranger to the testator, and who sees or hears nothing except what is necessary to enable him to attest the instrument, should be given less weight than that of a neighbor and familiar acquaintance of the testator, and neither is of any weight except as proved to be correct from facts which justify and warrant it. *Garrison* v. *Garrison*, 15 N. J. Eq. 266.

witness to a will, unsupported by facts, is entitled to no more weight than that of other witnesses; reliance should be placed on the facts proved rather than on the opinions.[6]

A witness to an instrument, by his act of attestation, however, solemnly affirms the sanity of the party executing it, and if he afterwards attempts to impeach its validity, his evidence, though not positively inadmissible, is to be received with most scrupulous jealously, his act detracting largely from its weight,[7] especially where he assigns no satisfactory reasons for his opinion.[8] And wills may be established against the testimony of subscribing witnesses who depose against the testator's capacity, by other evidence;[9] evidence as to men-

[6]*Cilley* v. *Cilley*, 34 Me. 162: *Garrison* v. *Garrison*, 15 N. J. Eq. 266. And see *Foot* v. *Stanton*, 1 Deane & S. 19.

But an instruction in a will contest that ordinarily those witnesses whose testimony comes nearest to the very time of making the will would be the most valuable if they seemed worthy of credit, and that therefore the testimony of the subscribing witnesses is to be carefully considered and scrutinized, is not objectionable as telling the jury that the testimony of an attesting witness is entitled to greater weight than that of other witnesses having the same means of knowledge. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

[7]*Gwin* v. *Gwin*, 5 Idaho, 271, 48 Pac. 295; *Re Storey*, 20 Ill. App. 183; *Stevens* v. *Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27; *Southworth* v. *Southworth*, 173 Mo. 59, 73 S. W. 129; *Hoerth* v. *Zable*, 92 Ky. 202, 17 S. W. 360; *McMeekin* v. *McMeekin*, 2 Bush, 79; *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Garrison* v. *Garrison*, 15 N. J. Eq. 266; *Cook's Estate*, 16 Phila. 322; *Young* v. *Barner*, 27 Gratt. 96; *Lambert* v. *Cooper*, 29 Gratt. 61; *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Ward* v. *Brown* (W. Va.) 44 S. E. 488; *Harrison* v. *Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141: *Den ex dem. Stevens* v. *Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412; *Bootle* v. *Blundell*, 19 Ves. Jr. 494, Cooper Ch. 136, 15 Revised Rep. 93; *Howard* v. *Braithwaite*, 1 Ves. & B. 202; *Jones* v. *Goodrich*, 5 Moore P. C. C. 16. And see *Maupin* v. *Wools*, 1 Duv. 223; *Digges' Case*, cited in Powell on Devises, 710; *Lowe* v. *Joliffe*, 1 W. Bl. 365; *Davis* v. *Denny*, 94 Md. 390, 50 Atl. 1037; *Pilkington* v. *Gray*, 68 L. J. P. C. 63 [1899] A. C. 401.

And refusal to instruct that certain testimony against the sanity of a testator creates a strong presumption against the validity of his will is not error on a contest thereof, where the testimony was that of an attesting witness, who was also the attending physician of the testator. *Thornton* v. *Thornton*, 39 Vt. 122.

But where a subscribing witness to a will swore at the trial of a contest thereof that, in his opinion, the testatrix was of sound and disposing mind at the time of the execution of the will, and denied that he had ever made any inconsistent statements, proof of such inconsistent statements, though admissible as discrediting the subscribing witnesses, is not admissible as primary evidence, since it would be mere hearsay. *Stirling* v. *Stirling*, 64 Md. 138, 21 Atl. 273.

[8]*Jones* v. *Goodrich*, 5 Moore P. C. C. 16.

And evidence of one of the attesting witnesses to a will that the testator was not competent does not affect the validity of the will, as against testimony of the other in favor of capacity, where it was directly at variance with previous statements, made shortly after the will was executed. *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

A subscribing witness to a will, who contradicts his own attestation by statements that the testator was incompetent, and not in his right senses, however, may be a good witness to support another subscribing witness with reference to other circumstances. *Broome* v. *Ellis*, 2 Lee Eccl. Rep. 528.

[9]*Rigg* v. *Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Sechrest* v. *Edwards*, 4 Met. (Ky.) 163; *Jones* v.

tal capacity contradicting that of attesting witnesses, including contrary declarations and admissions, being admissible.[10] And where the subscribing witnesses do not agree in opinion as to the capacity of a party, or as to the facts upon which they found their opinions, either side may show, either by collateral circumstances or by direct proof, that one is more credible than the other, or that one of them is mistaken.[11] The rule has been adopted by some of the cases, however, that declarations of a deceased subscribing witness, tending to show that he thought the party to the instrument subscribed to be insane, are not admissible in evidence to defeat the instrument,[12] and that a witness should not be permitted to give evidence against an instrument which he had attested as a subscribing witness.[13]

4. *Opinions covering the issue.*

369. General and prevailing rule.— The general and prevailing

Evans, 7 Dana, 96; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Martin* v. *Perkins*, 56 Miss. 204; *Cheatham* v. *Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Jenkins' Will*, 43 Wis. 610; *Le Breton* v. *Fletcher*, 2 Hagg. Eccl. Rep. 558; *Boofle* v. *Blundell*, 19 Ves. Jr. 494, Cooper Ch. 136, 15 Revised Rep. 93; *Abbot* v. *Plumbe*, 1 Dougl. 216; *Lowe* v. *Joliffe*, 1 W. Bl. 365; *Hudson's Case*, Skinner, 79; *Perkins* v. *Perkins*, 39 N. H. 163, citing *Le Breton* v. *Fletcher*, 2 Hagg. Eccl. Rep. 558; *Austin* v. *Willes*, Bull. N. P. 264; *Pike* v. *Badmering*, cited in 2 Strange, 1096; 1 Wms. Exrs. 290, note; Phillipps' Ev. Cowen & Hill's notes, 392.

[10]*Spencer* v. *Moore*, 4 Call (Va.) 423; *Townshend* v. *Townshend*, 9 Gill, 506; *Colvin* v. *Warford*, 20 Md. 357; *Harden* v. *Hays*, 9 Pa. 151; *Thornton* v. *Thornton*, 39 Vt. 122.

But the declarations of one of three subscribing witnesses to a will, that the testator was insane when it was executed, are not admissible to defeat the will, where he was absent from the state, and no proof as to his handwriting had been given, and the will had been proved by the other two witnesses. *Fox* v. *Evans*, 3 Yeates, 506.

And it is not competent to ask a subscribing witness to a will whether he would have attested it had he known of the dispositions contained in it, for the purpose of establishing fraud or imbecility. *Spence* v. *Spence*, 4 Watts, 165.

[11]*Bell* v. *Clark*, 31 N. C. (9 Ired. L.) 239.

Where the subscribing witness to a will concurred in the facts which go to make up the execution, but differ as to the degree of intoxication of the testator, and its effect on his mind and memory, the weight due to their respective opinions may depend upon their intelligence and the opportunity they had of knowing how far the party's faculties were ordinarily overcome by intoxication, and the actual effect at the time of the execution of the instrument. *Bell* v. *Clark*, 31 N. C. (9 Ired. L.) 239.

But in such cases it is improper to tell the jury that the evidence of persons present is entitled to great weight. *Ward* v. *Brown* (W. Va.) 44 S. E. 488.

And a verdict against a will will not be disturbed though the will was natural and was attested by a disinterested physician, who testified in favor of testamentary capacity, where the other attesting witnesses testified that the testator was incompetent, and that they signed to avoid giving offense; and other witnesses, including another attending physician, testified against capacity. *Sydner* v. *Cunningham*, 13 Ky. L. Rep. 24, 16 S. W. 130.

[12]*Boardman* v. *Woodman*, 47 N. H. 120; *Sellars* v. *Sellars*, 2 Heisk. 430; *Baxter* v. *Abbott*, 7 Gray, 71; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

[13]*Goodtitle ex dem. Alexander* v. *Clayton*, 4 Burr. 2225; *Stephenson* v. *Stephenson*, 62 Iowa, 163, 17 N. W. 456; *Sewall* v. *Robbins*, 139 Mass. 164, 29 N. E. 650; *Colvin* v. *Warford*, 20 Md. 357.

rule is that, to render the opinions of witnesses admissible on the question of sanity or insanity, they must be limited to conclusions drawn from specific acts or facts testified to by them.[14] And they must be confined to facts alone, and not embrace any matter of law.[15] And they cannot be asked to state opinions upon the whole case, since that necessarily requires them to determine what are the facts; which can only be done by the jury,[16] especially where the evidence is conflicting.[17] Inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinions of wit-

[14]*Jamison* v. *People*, 145 Ill. 357, 34 N. E. 486; *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93; *Re Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

Questions, in a prosecution for homicide, asked a medical expert, extending over an almost unlimited field of inquiry, involving a discussion of the law of insanity in all its complicated phases, are also objectionable as consuming the time of the court, and tending to confuse and mislead the minds of the jury. *Dejarnett* v. *Com.* 75 Va. 867.

[15]*De Witt* v. *Barly*, 17 N. Y. 340; *Purnell* v. *Gandy*, 46 Tex. 190; *Re Blood*, 62 Vt. 359, 19 Atl. 770.

But the admission of evidence in an action upon an insurance policy, in which liability is sought to be avoided because the insured was killed by another, which killing was claimed to be accidental because of the insanity of the murderer, giving an inexorable test as to insanity, not addressed to the mental condition of the murderer, but to principles touching a certain branch of insanity generally, is harmless error, and affords no ground for complaint, since it is for the court to furnish the rule by which the murderer's mental condition is to be measured. *Marceau* v. *Travelers' Ins. Co.* 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

[16]*Stuckey* v. *Bellah*, 41 Ala. 700; *Shapter* v. *Pillar*, 28 Colo. 209, 63 Pac. 302; *Choice* v. *State*, 31 Ga. 424; *Bishop* v. *Spining*, 38 Ind. 143; *Pelamourges* v. *Clark*, 9 Iowa, 1; *Phillips* v. *Starr*, 26 Iowa, 349; *Butler* v. *St. Louis L. Ins. Co.* 45 Iowa, 93; *State* v. *Medlicott*, 9 Kan. 257; *Woodbury* v. *Obear*, 7 Gray, 467; *Miller* v. *Smith*, 112 Mass. 475; *Draper* v. *Saxton*, 118 Mass. 431; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Willey* v. *Portsmouth*, 35 N. H. 303; *Perkins* v. *Concord R. Co.* 44 N. H. 223; *State* v. *Powell*, 7 N. J. L. 244; *Brill* v. *Flagler*, 23 Wend. 354; *People* v. *McCann*, 3 Park. Crim. Rep. 272; *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578; *Reynolds* v. *Robinson*, 64 N. Y. 589, *Yardley* v. *Cuthbertson*, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; *McMechen* v. *McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Dexter* v. *Hall*, 15 Wall. 9, 21 L. ed. 73; *Reg.* v. *Higginson*, 1 Car. & K. 129; *Sills* v. *Brown*, 9 Car. & P. 604; *Reg.* v. *Frances*, 4 Cox C. C. 57; *Reg.* v. *Richards*, 1 Fost. & F. 87. But see *Getchell* v. *Hill*, 21 Minn. 464.

A witness cannot be asked to pass upon the precise question at issue before the jury. *Re Blood*, 62 Vt. 359, 19 Atl. 770.

And a statement by a nonexpert witness, in answer to a question as to how the person whose mental condition was questioned acted, that his acts were insanity, is neither a statement of fact as to such person's conduct, nor the expression of an opinion that he was authorized to make, and its exclusion is not error. *State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3.

[17]*Fairchild* v. *Bascomb*, 35 Vt. 398; *Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Coyle* v. *Com.* 104 Pa. 117; *Bennett* v. *State*, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912.

But the giving of an opinion by an expert witness in a will contest, who had heard all the evidence as to the habits, conduct, etc., of the testator, as to whether the testator was of sound mind, from a consideration of all the evidence in the case, is not an assumption of the province of the jury, where there does not appear to have been any substantial dispute as to the facts upon which the testimony was predicated. *Hutchinson* v. *Hutchinson*, 50 Ill. App. 87.

nesses.[18] Nor should hypothetical questions be asked on the question of insanity, based upon facts in relation to which there is contradictory testimony, virtually requiring the witness to assume the province of the jury, and weigh the testimony.[19] Witnesses acquainted with a person whose sanity is questioned, however, are given wide latitude in the expression of their opinions, short of declaring their judgment upon the point directly in issue.[20] And they may give opinions as to the mental condition of a person as a matter of fact, as distinguished from opinions as to legal capacity for the performance of specified acts.[21]

370. Application to particular classes of cases.— The rules above given apply to criminal prosecutions, and under them a witness should give his opinion as to the state of mind of the accused, and not as to his responsibility, that being a question for the jury.[22] And a

[18]*People* v. *Barber*, 115 N. Y. 475, 22 N. E. 182; *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215; *Jerry* v. *Townshend*, 9 Md. 145; *Morrison* v. *Maciline*, 24 Scotch Sess. Cas. 626.

And the admission of evidence of a physician in a will contest, that it is the duty of a physician, when called upon to treat a patient, to examine into his mental condition, is erroneous, the material question being what examination was in fact made; and it being for the jury to determine the weight to be given to the testimony of the physician. *Maynard* v. *Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401.

But questions asked witnesses in a will contest, competent to give opinions, as to the testator's appearance, and whether they thought he knew them, and as to whether his mind was simply weakened or was impaired in some of its faculties, and whether he got worse or better, and whether he could hold an extended conversation, are not objectionable as calling for opinions upon questions of which the jury was equally qualified to judge if possessed of the same facts as the witnesses. *Meeker* v. *Mecker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

[19]*Smith* v. *Hickenbottom*, 57 Iowa, 733, 11 N. W. 664; *Deshon* v. *Merchants' Bank*, 8 Bosw. 461.

In putting hypothetical questions to expert witnesses in a will contest upon the issue of insanity, the facts should be excluded which the jury can interpret as well as the expert. *Prentis* v. *Bates*, 88 Mich. 567, 50 N. W. 637.

[20]*Fayette* v. *Chesterville*, 77 Me. 28, 52 Am. Rep. 741. And see *Koenig* v. *Globe Mut. L. Ins. Co.* 10 Hun, 558.

An expression of opinion by a medical expert which will aid the jury on the question of soundness of mind necessarily involves the consideration of questions which are similar to that in issue; but that alone does not render the evidence incompetent if the witness is not permitted to express opinions upon the evidence, and if the questions are so framed as to confine him to a statement of his conclusions, and not to submit to him the precise issue which is presented to the jury. *Poole* v. *Dean*, 152 Mass. 589, 26 N. E. 406.

[21]*Hayes* v. *Candee*, 75 Conn. 131, 52 Atl. 826.

While an expert witness cannot be asked his opinion as to the condition of a person's mind, based upon the evidence submitted to the jury, he may be asked for his opinion on a similar case, hypothetically stated. *Jerry* v. *Townshend*, 9 Md. 145; *Gunter* v. *State*, 83 Ala. 96, 3 So. 600; *Coyle* v. *Com.* 104 Pa. 117.

And an opinion as to the mental capacity of a party to make a deed, or a will, or a contract, offered in an action for fraud in procuring a conveyance, is admissible, where that is simply the witness's way of stating the mental condition of the party as a matter of fact. *Hayes* v. *Candee*, 75 Conn. 131, 52 Atl. 826.

[22]*Reg.* v. *Richards*, 1 Fost. & F. 89; *People* v. *Thurston*, 2 Park. Crim. Rep. 49.

A question asked an expert witness in

witness cannot give his opinion as to whether the accused was sane or insane.[23] Nor should he be asked his opinion as to whether the accused was capable of distinguishing right from wrong.[24] And an opinion as to the sanity of the accused, formed from his conduct at the trial and the testimony in the case, should not be given, as this would practically put a witness in the place of the jury.[25] Nor can a witness testify as to the mere existence of an insane delusion.[26] So, a witness will not be permitted to give his opinion as to the capacity of another to make a contract or deed, when such opinion assumes the shape of one upon the legal capacity of the party in question, or permits the witness to determine what the facts are, and give his opinion upon them.[27] And in proceedings in the nature of a writ *de lunatico inquirendo,* while opinions as to soundness or unsoundness, or what capacity is, are admissible, opinions as to what is legal capacity, as a question of law or mixed law and fact, or as to capacity to conduct the ordinary affairs of life, are not admissible, since that is

a criminal prosecution, "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity," is objectionable as substituting the witness in place of the court and jury, and making him the judge of the weight and effect of the testimony. *State* v. *Klinger,* 46 Mo. 224.

[23]*Reg.* v. *Burton,* 3 Fost. & F. 772; *Reed* v. *State,* 62 Miss. 405; *Com.* v. *Rich,* 14 Gray, 335. But see *Powell* v. *State,* 25 Ala. 21.

[24]*Reg.* v. *Layton,* 4 Cox C. C. 149; *Shults* v. *State,* 37 Neb. 481, 55 N. W. 1080.

But the opinion of an expert witness as to whether the person whose sanity is in question knew moral good from evil, and right from wrong, is not objectionable as calling for the opinion of a witness as to the moral insanity of such person. *State* v. *Lechman,* 2 S. D. 171, 49 N. W. 3.

[25]*State* v. *Felter,* 25 Iowa, 67; *Reed* v. *State,* 62 Miss. 405.

Instead, he should be asked his opinion upon the assumption that the symptoms and indications testified to by the other witnesses are proved to the satisfaction of the jury. *Reed* v. *State,* 62 Miss. 405.

But a medical expert may properly be asked, in a prosecution for homicide in which insanity is pleaded as a defense, if there is any known form of insanity where the mind comes and goes, leaving a blank, since it calls for a fact, and is not of a nature which makes hypothesis necessary. *People* v. *Osmond,* 138 N. Y. 80, 33 N. E. 739.

[26]*Powell* v. *State,* 25 Ala. 21; *State* v. *Scott,* 41 Minn. 365, 43 N. W. 62; *Patterson* v. *State,* 86 Ga. 70, 12 S. E. 174; *M'Naghten's Case,* 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

Nor can an expert witness testify whether particular conduct, not of itself irrational, was prompted by an insane delusion. *State* v. *Scott,* 41 Minn. 365, 43 N. W. 62.

Or that a person committing a crime was impelled by an irresistible impulse. *Patterson* v. *State,* 86 Ga. 70, 12 S. E. 174.

[27]*Schneider* v. *Manning,* 121 Ill. 376, 12 N. E. 267; *Poole* v. *Dean,* 152 Mass. 589, 26 N. E. 406; *Smith* v. *Smith.* 117 N. C. 326, 23 S. E. 270; *Mills* v. *Cook* (Tex. Civ. App.) 57 S. W. 81; *Dexter* v. *Hall,* 15 Wall. 9, 21 L. ed. 73. And see *Wyse* v. *Wyse,* 155 N. Y. 367, 49 N. E. 942. Affirming 13 Misc. 773, 34 N. Y. Supp. 1151.

And opinions of witnesses that a person was incapable of understanding a release when he executed it are inadmissible to prove his incompetency to execute it, since the question of competency would be made to depend upon the degree of intelligence which each witness might think necessary to sus-

the point which it is the duty of the jury to determine.[28] Nor is capacity to make a will a simple question of fact: it is a conclusion which the law draws from certain facts; and a witness in a will contest cannot state his opinion with reference to it, that being the precise question at issue.[29] A witness may state whether or not a testator was of sound mind, but he cannot give his opinion as to whether he was of disposing memory.[30] And he cannot be asked whether the

tain such an instrument. *Aiman* v. *Stout*, 42 Pa. 114.

[28]*Hamrick* v. *State*, 134 Ind. 324, 34 N. E. 3; *Re Rush*, 53 N. Y. Supp. 581.

In *Chickering* v. *Brooks*, 61 Vt. 554, 18 Atl. 144, it was held that a witness could not be asked as to a party's capacity to transact business intelligently and understandingly; but that he might express the extent of his incapacity, or an inquiry as to his capacity to manage his estate, by saying that he had not sufficient mental capacity to transact business, when, from the connection in which the words were used, they must have been understood properly.

So, a witness in an action involving the question of the mental capacity of a party to acquire a settlement may be asked whether he considered him *non compos mentis*. *Westmore* v. *Sheffield*, 56 Vt. 239.

[29]*Walker* v. *Walker*, 34 Ala. 469; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Schneider* v. *Manning*, 121 Ill. 376, 12 N. E. 267; *Pelamourges* v. *Clark*, 9 Iowa, 1; *Marshall* v. *Hanby*, 115 Iowa, 318, 88 N. W. 801; *Re Taylor*, 92 Cal. 564, 28 Pac. 603; *May* v. *Bradlee*, 127 Mass. 414; *Kempsey* v. *McGinniss*, 21 Mich. 123; *White* v. *Bailey*, 10 Mich. 155; *Page* v. *Beach* (Mich.) 95 N. W. 981; *Farrell* v. *Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Hewlett* v. *Wood*, 55 N. Y. 634; *Crowell* v. *Kirk*, 14 N. C. (3 Dev. L.) 355; *Horah* v. *Knox*, 87 N. C. 490; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Hopkins* v. *Wheeler*, 21 R. I. 533, 79 Am. St. Rep. 819, 45 Atl. 551; *Brown* v. *Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621.

A witness in a will contest, whether he be a subscribing witness, an expert, or a nonexpert, cannot state his opinion of the capacity of the testator to make a will, when such opinion assumes the shape, and has the effect, of being an opinion upon the legal capacity of the party in question. *Brown* v. *Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621.

But a competent witness may give an opinion as to the mental condition of the testator. *Ibid.*

And evidence of a nonexpert witness in a will contest, who had seen the testatrix on the evening of the day the will was executed, that she seemed to be competent at the time, and her mind seemed to be clear, will not be construed into an opinion as to her competency to make a will, and held inadmissible, but will be regarded only as a statement as to her condition at that time. *McHugh* v. *Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

So, an expert witness in an action involving capacity to make a gift may give his opinion as to the donor's capacity to dispose of and manage property to the value of several hundred dollars in one transaction. *Melendy* v. *Spaulding*, 54 Vt. 517.

[30]*Wisener* v. *Maupin*, 2 Baxt. 342; *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740; *Kempsey* v. *McGinniss*, 21 Mich. 123.

Expert witnesses in a will contest should be asked questions calling for an opinion as to the real state of the testator's mind, how much intelligence he possessed, how far he was capable of understanding the nature and situation of his property, his relations to others, and the reasons for giving or withholding his bounty as to any of them, as distinguished from questions as to whether he had a disposing mind and memory, or whether he was capable of making a will. *Kempsey* v. *McGinniss*, 21 Mich. 123.

And they should not be asked if the testator had mind enough to give the specific directions given with reference to the disposition of the property. *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578.

Nor should a nonexpert witness be asked whether the testator had capacity

testator was subject to a delusion affecting the provisions of his will.[31] And the question whether a change in a testator's lifelong purpose, occurring without apparent motive or reason, and unexplained, indicates a change in his mental powers, is not one for the opinion of experts.[32]

371. The contrary rule.— The contrary rule, that the right to express an opinion as to the sanity or insanity of another includes the right to give it as to the degree or extent of the mental infirmity, and to apply it to the particular matter in controversy, and that the witness may do so, notwithstanding the fact that his answer embraces the full issue on trial, has been adopted to some extent.[33] And it has been held that the opinions of witnesses that a person is insane, or incapable of doing one thing or another, are not objectionable as usurping the office of the jury.[34] So, questions calling for an opinion as to the capacity of a person accused of crime to distinguish between right and wrong, or between right and wrong with reference to the particular act, have been frequently sustained;[35] and so have ques-

to transact business or make a will. *Fairchild* v. *Bascomb*, 35 Vt. 398. *Contra, Horah* v. *Knox*, 87 N. C. 483.

But a nonexpert witness is competent to testify in a will contest as to the testator's capacity to transact ordinary business. *Keithley* v. *Stafford*, 126 Ill. 507, 18 N. E. 740.

[31]*Rush* v. *Megee*, 36 Ind. 69; *Taylor* v. *Trich*, 165 Pa. 586, 44 Am. St. Rep. 679, 30 Atl. 1053.

A medical expert in a will contest should be asked whether a given state of facts tends to prove delusion or insanity. *Rush* v. *Megee*, 36 Ind. 69.

But the testimony of an attending physician, that the fact that a testator had judiciously managed his property prior to his last illness and the making of his will tends to show that he was subject to no delusion while making it, is competent. *Coryell* v. *Stone*, 62 Ind. 307.

[32]*Re Nelson*, 39 Minn. 204, 39 N. W. 143.

The admission in evidence in a will contest of the opinions of witnesses on the general question of testamentary capacity, however, though erroneous, does not require a reversal, where the facts established by legal and competent evidence are plainly sufficient to uphold the determination. *Clapp* v. *Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

And the allowance of questions calling for the opinions of witnesses in regard to the sanity or insanity of a testatrix does not furnish ground for reversal upon appeal, as calling upon them to take the place of the jury, and determine the issue, where the objection was general, and did not call attention to the form of the questions. *Foster* v. *Dickerson*, 64 Vt. 233, 24 Atl. 253.

And a question asked a medical expert, whether a testator was capable of making an intelligent will, or competent to make a reasonable disposition of his property, or to transact any business, though objectionable, is not ground for reversal, where the answer gave facts on which the witness's conclusion was based. *Vance* v. *Upson*, 66 Tex. 476, 1 S. W. 179.

[33]*Scalf* v. *Collin County*, 80 Tex. 514, 16 S. W. 314; *Rivard* v. *Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Re Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Bost* v. *Bost*, 87 N. C. 477.

[34]*Beaubien* v. *Cicotte*, 12 Mich. 469.

So, in *St. George* v. *Biddeford*, 76 Me. 593, it was held that an expert may give his opinion in an action involving the validity of a marriage, in which imbecility of the husband is alleged, that the alleged imbecile was not capable of understanding his duties toward his wife, arising out of the matrimonial union.

[35]*Powell* v. *State*, 25 Ala. 21; *Smith* v. *State*, 55 Ark. 259, 18 S. W. 237;

tions calling for opinions as to the capacity of a party to make a contract or deed.[36] And the right to ask questions calling for an opinion as to testamentary capacity, or capacity to make a will, or the will in question, has also been sustained.[37] And so have questions calling for an opinion as to the capacity of a party to manage his estate, in a proceeding in the nature of a writ *de lunatico inquirendo*.[38] But it is to be observed that in all these cases the rulings were made on other grounds, and the objection that the question involved the issue does not seem to have been made.

b. With reference to drunkenness.

372. Who may give; nature of.— Whether a person was drunk or sober is a fact patent to the observation of all, requiring no special skill or learning to discern it, and may be testified to by anyone knowing the fact;[39] the belief of the witness, when material to the issue, being admissible, from necessity, as a fact based upon his own judgment and observation, and not as an opinion, since the witness can sel-

Bolling v. *State*, 54 Ark. 588, 16 S. W. 658; *State* v. *Porter*, 34 Iowa, 131; *Pflueger* v. *State*, 46 Neb. 493, 64 N. W. 1094; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *United States* v. *Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247; *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130, note.

[36] *Beller* v. *Jones*, 22 Ark. 92; *Stewart* v. *Spedden*, 5 Md. 433; *Townshend* v. *Townshend*, 7 Gill, 10; *Wilkinson* v. *Pearson*, 23 Pa. 117; *Doe ex dem. McDougald* v. *McLean*, 60 N. C. (Winst. L.) 120; *Cram* v. *Cram*, 33 Vt. 15; *Kilgore* v. *Cross*, 1 Fed. 578; and overruled in *Smith* v. *Smith*, 157 Mass. 389, 32 N. E. 348, and *Hyer* v. *Little*, 20 N. J. Eq. 443.

[37] *Roberts* v. *Trawick*, 13 Ala. 68; *Stuckey* v. *Bellah*, 41 Ala. 700; *Ethridge* v. *Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Coryell* v. *Stone*, 62 Ind. 307; *Overall* v. *Bland*, 11 Ky. L. Rep. 371, 12 S. W. 273; *Chandler* v. *Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Waters* v. *Waters*, 35 Md. 531; *Dorsey* v. *Warfield*, 7 Md. 65; *Hastings* v. *Rider*, 99 Mass. 624; *Rice* v. *Rice*, 53 Mich. 432; 19 N. W. 132; *Porter* v. *Throop*, 47 Mich. 313, 11 N. W. 174; *Kempsey* v. *McGinniss*, 21 Mich. 123; *McGinnis* v. *Kempsey*, 27 Mich. 363; *McHugh* v. *Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Appleby* v. *Brock*, 76 Mo. 314; *Garrison* v. *Garrison*, 15 N. J. Eq. 266; *Wogan* v. *Small*, 11 Serg. & R. 141; *Bitner* v. *Bitner*, 65 Pa. 347; *Daniel* v. *Daniel*, 39 Pa. 191; *Commonwealth Title Ins. & T. Co.* v. *Gray*, 150 Pa. 255, 24 Atl. 640; *Shaver* v. *McCarthy*, 110 Pa. 339, 5 Atl. 614; *Doe ex dem. McDougald* v. *McLean*, 60 N. C. (Winst. L.) 120; *Brown* v. *Mitchell*, 87 Tex. 140, 26 S. W. 1059; *Cockrill* v. *Cox*, 65 Tex. 676; *Garrison* v. *Blanton*, 48 Tex. 299.

[38] *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434; *Obear* v. *Gray*, 73 Ga. 455.

[39] *Dimick* v. *Downs*, 82 Ill. 570; *Parker* v. *Parker*, 52 Ill. App. 333; *Campbell* v. *Fidelity & C. Co.* 109 Ky. 661, 60 S. W. 492; *Gahagan* v. *Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Castner* v. *Sliker*, 33 N. J. L. 95; *People ex rel. Flood* v. *Martin*, 15 Misc. 6, 36 N. Y. Supp. 437; *People* v. *Gaynor*, 33 App. Div. 98, 53 N. Y. Supp. 86; *Marshall* v. *Riley*, 38 Misc. 770, 78 N. Y. Supp. 827; *Re Van Alstine* (Utah) 72 Pac. 942.

The effect of intoxication upon the capacity of a person to make a will is not a scientific question, to be determined by experts, but one within common observation, depending upon the facts of each case, and to be determined from such facts. *Pierce* v. *Pierce*, 38 Mich. 412.

And opinions as to intoxication of a

dom give in detail all the points going to make up his belief.[40] And anyone who has witnessed a person's acts, appearance, and speech, may express an opinion, when material to the issue, as to whether or not he was intoxicated,[41] or as to the extent of the intoxication.[42] So, after describing the appearance and conduct of a party, a witness may give his opinion, based upon his conduct and deportment, as to whether or not he was intoxicated,[43] or as to whether or not he was rational or irrational, the question simply relating to his appearance and conduct, and not to his mental condition.[44] The rule has been laid down, however, that the means of judging correctly, possessed by a witness testifying as to the intoxication of another, must be submit-

person are admissible in evidence without a statement of the conduct and demeanor of the party inquired about. *State* v. *Huxford*, 47 Iowa, 16; *Castner* v. *Sliker*, 33 N. J. L. 95.

And a practising physician may testify to an injury or depression of the skull of a person accused of crime, and as to what effect, in his judgment, the use of intoxicating liquors would have upon him while in that condition, though he is not shown to have been experienced in the treatment or care of insane persons, or to have been connected with any asylum for the insane. *Territory* v. *Davis* (Ariz.) 10 Pac. 359.

[40]*Stacy* v. *Portland Pub. Co.* 68 Me. 279; *Edwards* v. *Worcester*, 172 Mass. 104, 51 N. E. 447.

[41]*McKillop* v. *Duluth Street R. Co.* 53 Minn. 532, 55 N. W. 739; *People* v. *Monteith*, 73 Cal. 7, 14 Pac. 373; *Choice* v. *State*, 31 Ga. 424; *Parker* v. *Parker*, 52 Ill. App. 333; *State* v. *Huxford*, 47 Iowa, 16.

And where a confession of a criminal act is made, and there is evidence tending to prove that the person making it was laboring under delirium tremens, or was otherwise insane at the time, the opinion of an expert may be properly taken as to his mental condition, indicated by the proved facts. *State* v. *Feltes*, 51 Iowa, 495, 1 N. W. 755.

But an officer in charge of a person, to whom such person makes a confession, cannot be asked, on an offer to put the confession in evidence, if he was familiar with the effect of liquor upon those who drank it to excess, for the purpose of showing that the person was intoxicated at the time of making the confession. *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664.

[42]*State* v. *Cather* (Iowa) 96 N. W. 722.

And this may be done without stating the facts upon which the opinion was based. *Ibid.*

But the rejection of the opinion of a thirteen-year-old girl as to the extent of her father's intoxication is not error in a prosecution against the father for the killing of his wife, in which he defended on the ground that he was helplessly drunk. *Collins* v. *People*, 194 Ill. 506, 62 N. E. 902.

[43]*Pierce* v. *State*, 53 Ga. 365; *White* v. *State*, 103 Ala. 72, 16 So. 63; *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664; *Eastwood* v. *People*, 3 Park Crim. Rep. 25, Affirmed in 14 N. Y. 562.

So, one who has seen a person many times in a certain condition, resulting from the use of a drug, may give his opinion, when he finds the same condition existing, that it was caused by the same drug, whether he is an expert or not. *Burt* v. *Burt*, 168 Mass. 204, 46 N. E. 622.

[44]*People* v. *Packenham*, 115 N. Y. 200, 21 N. E. 1035; *Chicago City R. Co.* v. *Wall*, 93 Ill. App. 411.

But refusal to permit an expert witness in a criminal case, who had examined the accused two days before the crime, and testified that he was then deranged, and that he thought delirium tremens was the cause of the derangement, to state whether, in his opinion, founded on such examination, the same state of mind existed at the time of the act, is not error, where the witness was permitted to state how long he thought the accused had been in such a state. *People* v. *McCann*, 3 Park. Crim. Rep. 272.

And where a witness states that he

ted to the jury.[45] And the opinions of witnesses in a criminal prosecution in which intoxication is alleged as a defense are not admissible on behalf of the accused on the question of his mental condition at the time of the act, where they did not see him at the time.[46] And whether, at the time of the commission of the criminal act, the accused was so intoxicated as to be incapable of forming a design or intent, is a conclusion to be drawn by the jury from facts before them, and not a question of fact, to which witnesses can testify.[47] Nor can a nonexpert witness in a criminal prosecution in which insanity is interposed as a defense be asked whether the accused could control his appetite for intoxicating liquor.[48] And the opinion of a witness as to the effect of habits of intemperance upon the health of another is inadmissible on the question of a breach of warranty against intemperate habits.[49]

IV. Books.

373. Admissibility generally.— The doctrine has been asserted that standard medical books on insanity, and scientific works on medical jurisprudence, are admissible in evidence, and may be read to the jury by counsel, upon the question of sanity or insanity;[50] and that counsel may read to the jury a case from the regular law reports in which the question of insanity is discussed, and are not confined to the opinion of the court, but may also read the facts of the case, and comment thereon.[51] But scientific works on medical jurisprudence have

had no knowledge whether or not a person was intoxicated at a designated time, the exclusion of a question asking his opinion as to such intoxication, which is not confined to the personal appearance or conduct of such person, is not error. *Aurora* v. *Hillman*, 90 Ill. 61.

[45]*Castner* v. *Sliker*, 33 N. J. L. 95.

[46]*Nevling* v. *Com.* 98 Pa. 323.

[47]*Armor* v. *State*, 63 Ala. 176.

Nor can a witness be permitted to testify in a criminal case that the accused was so drunk that he did not know what he was doing. *White* v. *State*, 103 Ala. 72, 16 So. 63.

[48]*Goodwin* v. *State*, 96 Ind. 550.

And a question in a criminal case as to whether the accused, by reason of his drunkenness, knew the witness or any one else, is objectionable as assuming the fact of drunkenness, and as leading. *McCarty* v. *State*, 4 Tex. App. 461.

And a witness in a criminal case cannot be permitted to testify to an impression as to whether or not the accused was intoxicated at the particular time, when it might have been produced by what he heard persons other than the accused say. *People* v. *Wreden*, 59 Cal. 392.

[49]*Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 501, 30 L. ed. 1100, 7 Sup. Ct. Rep. 1221.

But a witness in an action upon an insurance policy containing a warranty that the insured was not a person of intemperate habits may be asked whether he had ever seen the insured drunk. *United Brethren Mut. Aid Soc.* v. *O'Hara*, 120 Pa. 256, 13 Atl. 932.

[50]*State* v. *Hoyt*, 46 Conn. 330; *State* v. *West*, Houst. Crim. Rep. (Del.) 371; *State* v. *Coleman*, 20 S. C. 441.

[51]*State* v. *Hoyt*, 46 Conn. 330. *Contra*, *Cannon* v. *State*, 41 Tex. Crim. Rep. 467, 56 S. W. 351.

But extracts from the opinion of another case involving the question of insanity should not be permitted to be read to the jury, in a criminal prosecution defended upon the ground of in-

not the weight of legal authorities except so far as the views expressed in them have been recognized and sustained by judicial ruling.[52] And the prevailing rule would seem to be that books on the subject of insanity, written by physicians or lawyers, though of special reputation, are not admissible in evidence, and cannot be read to the jury.[53] And counsel have no right, in addressing the jury, to quote the opinions of medical men, as given in their works.[54] But counsel may use such books and statements to assist in framing questions for the witness as to his own opinion.[55] And the attention of expert witnesses may be called to them on cross-examination, with a view to show that their opinions differ from admitted authority.[56]

sanity, where they were such as might mislead the jury. *Lowe* v. *State* (Wis.) 96 N. W. 417.

So, in *Baldwin's Appeal*, 44 Conn. 37, it was held that cases decided in other states, or in England, should not be allowed to be read to the jury from books, for the purpose of showing that the facts set forth in such cases are not inconsistent with soundness of mind necessary to the performance of the act in question.

[52]*State* v. *West*, Houst. Crim. Rep. (Del.) 371.

[53]*Com.* v. *Wilson*, 1 Gray, 339; *Davis* v. *State*, 38 Md. 15; *Fraser* v. *Jennison*, 42 Mich. 206, 3 N. W. 882; *Huffman* v. *Click*, 77 N. C. 55; *Hall* v. *Com.* (Pa.) 11 Cent. Rep. 183, 12 Atl. 163; *Collier* v. *Simpson*, 5 Car. & P. 74; *Cocks* v. *Purday*, 2 Car. & K. 270.

Medical writers possess no power to prescribe the rule which limits the extent of human responsibility for crime. *Com.* v. *Haggerty*, 4 Clark (Pa.) 187.

And evidence of a medical expert as to whether delusions or transitory mania is a condition recognized by medical authorities, offered for the purpose of proving that the theory in question is taught by the authorities, is not admissible, since the works themselves would be the only competent evidence of what they teach, but perhaps would be admissible on cross-examination, to test the accuracy of his judgment. *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475.

In Missouri it is within the discretion of the court to permit, or refuse to permit such writings to be read to the jury. *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007.

[54]*Queen* v. *Crouch*, 1 Cox C. C. 94; *Burt* v. *State*, 38 Tex. Crim. Rep. 397, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344.

So, statistics of the increase of insanity, as stated by the court or counsel in another state, cannot be read as evidence in a criminal case. *Com.* v. *Wilson*, 1 Gray, 339.

[55]*State* v. *Coleman*, 20 S. C. 441.

[56]*Egan* v. *Dry Dock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 188.

But expert witnesses called for the defense in a criminal prosecution in which insanity is alleged cannot be asked to name the circumstances of a case they have read in which violence accompanied hysterical mania, since such an examination, if allowed, would be, in effect, the introduction of the medical work containing such case, in evidence. *People* v. *Goldenson*, 76 Cal. 328, 19 Pac. 161.

And refusal to permit a witness who had given his opinion as to the insanity of another to answer the question whether he had read an article in a journal on insanity in which designated statements were made, and whether the same concurs and agrees with his knowledge and experience on the subject, is not an abuse of discretion, unless the answer would necessarily be but a reiteration in another form of the opinion he had already expressed. *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475.

BOOK II.

INSANITY—ITS VARIOUS FORMS AND ITS MEDICO-LEGAL ASPECTS.

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BOOK II.

INSANITY—ITS VARIOUS FORMS AND ITS MEDICO-LEGAL ASPECTS.

CHAPTER XXI.

INTRODUCTION.

374. The subject is scientific.
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374. The subject is scientific.—The medical jurisprudence of insanity is, at bottom, a scientific subject; hence it should be discussed chiefly from the clinical standpoint. The first aim of the medical expert is to make a diagnosis; his function in court is practically the same as in the hospital. Le Grand du Saulle[1] has well said: "Whatever may be the point of view in which one places himself in order to study mental alienation, whether in its nature or in its consequences, it is no longer allowable to-day to see in an insane man anything but a patient in an exceptional situation. The philosopher, the jurist, the physician, can no longer consider insanity as an error or disorder of the soul, as the result of the fury or the anger of the Deity, as a punishment for sin or as the excess of passion. These opinions pertain now only to history."

375. Insanity is to be studied in the hospitals.—Some legal writers, like Wharton, do not so much discuss insanity as they discuss the opinions of the courts. Hence, for them, the subject becomes largely academic. But we must not go to the courts to study insanity: we

[1] Traité de Médecine Légale, deuxième ed., Paris, 1886, p. 688.

must go to the hospitals. There is no judge-made science, in the sense that there is judge-made law. Neither a court nor a legislature can decree a principle of pathology, any more than it can decree a principle of astronomy. The science of insanity, in any of its relations, can never be established by appealing to antiquated opinions either in law or in medicine. It must take its chances, like the other sciences, in the broad light of our modern day. It can be advanced only by a candid study of the insane themselves, and not of what some learned men have said *a priori* about them. There is nothing *a priori* about insanity. This disease, or assemblage of diseases, is a fact, or collection of facts; and these facts are among the most stubborn and incontrovertible in nature.

376. It is a disease.—Insanity is a disease; and it is to be studied for what it is, not for what it ought to be. It is not a thing to be estimated by preconceived rules, either of law or of philosophy. Insanity is not a metaphysical affair, neither is it a matter of legal definition. Insanity is a fact; but it is not a fact that is, as yet, thoroughly understood. If those who have studied it most are the most ready to acknowledge that insanity, in all its phases, is not yet fully understood, it surely does not become those who have studied it little or not at all to try to hedge it in with a lot of definitions.[1½]

377. Insanity is not a crime.—According to Dr. Holmes[2] it may be a duty sometimes to go insane—but certainly it is never a crime. And yet the insane are often on trial in our courts as though their disease were a crime. This is inevitable, because, doubtless, there is a close kinship between criminality and insanity. All the insane are not criminals, nor are all criminals insane; yet a certain percentage of persons comes within both classes. It is part of the heavy burden which insanity carries along with it, that it may impose upon its victim the stigma of blood-guiltiness.

Moreover, criminality does not exhaust the jurisprudence of insanity. The law is properly jealous of the civil rights of the insane, as well as attentive to their civil responsibilities. In the olden time it would not hear to it that a man should stultify himself by pleading his own insanity in civil matters. Blackstone[3] says that the maxim that a man should not stultify himself had been handed down as settled law from a lot of "loose authorities," dating back to Edward III.; but later opinion, feeling the inconvenience of the rule, had, in many

[1½] La vrai science est une ignorance qui se sait.—Montaigne.

[2] Autocrat of the Breakfast Table, p. 42.

[3] 2 Com. 292. See also *Beverley's Case*, 4 Coke, 124.

points, endeavored to restrain it. This passage from the great commentator is significant of the fact that some of the advances in the medical jurisprudence of insanity have required centuries in order to become incorporated in English law. Still, the fact is encouraging, for it shows that there is a tendency to advance, and it illustrates the point of view of the true scientist; namely, that this whole subject, whether viewed from the legal or medical standpoint, must be treated as a matter of scientific evolution.

378. The subject is both medical and legal.—It is thus evident that the medical jurisprudence of insanity has two aspects,—a medical and a legal one. The medical aspect is purely scientific. The legal aspect is practical. The two, as related to this subject, are, however, inseparable; at least, they ought not to be separated. Science furnishes the facts, while the law applies them. Confusion has arisen from a failure to recognize these separate provinces. The medical and the legal professions should act in harmony, and each should respect the obligations of the other. Medical jurisprudence is a mutual science, and can have no better maxim than the noble precept of the civil law,—*Justitia est constans et perpetua voluntas jus suum quique tribuendi.*[3½]

379. The aim of this treatise.—In composing this article I have aimed to present the subject in its evolutionary aspect—from both the legal and the medical viewpoint—both in its history and its substance. But the main object has been to demonstrate that the scientific method has been struggling from almost the beginning to assert itself, and that the very foundation of the whole subject must eventually be scientific.

380. The extensive literature.—The literature of the subject is enormous, and I make no pretensions to having mastered all of it. This article is not a digest; it is, in a humble way, a treatise. It is concerned more with principles than with reports.[4] But I have endeavored to illustrate each subject copiously, both from law and from medicine. As the work is intended especially for American readers, it relates largely to Anglo-American jurisprudence; but not exclusively, for I have not hesitated to draw upon continental sources.

[3½] Justinian, Institutes, Lib. I. Title I.

[4] *In re* quotation of cases. The editor of Hawkins' Pleas of the Crown says, in his introduction, that he had frequently heard two Lord Chief Justices of the King's Bench say that they never wished to hear of nisi prius decisions quoted as authority. In the United States we have so many nisi prius courts that confusion reigns; and this is likewise true of our courts of last appeal, for we have at least fifty-one supreme courts. In fact, some states have more than one appellate court; as, for instance, Pennsylvania, where there is not only a supreme court but also a superior court.

The laws of the Roman Empire were spoken of as "a load for many camels;" but the present age is an age of steam, and English and American law books would fill a train of cars.[5] The medical profession also is not backward with the pen, and the literature of psychiatry, in the polyglot science of Europe and America, rivals that of the law.

381. The original sources.—I have always, when possible, gone to the original sources, and have but seldom quoted at second hand. Coke[6] was of the opinion *Melius est petere fontes quam sectari rivulos,* —better to seek the fountains than to follow the streams; but I have never blindly accepted authority, for criticism is the life-blood of science. St. Austin said of St. Jerome's knowledge of divinity, *Quod Hieronymus nescivit, nullus mortalium unquam scivit.* This kind of maxim may be good in theology, and is sometimes tolerated in law, but it is heresy in the science of medicine.[7]

In his admirable introduction, "On the Study of the Law,"—a chapter which all men could read with profit,—Blackstone[8] frankly owns that, for the "gentlemen of the faculty of physic," he sees no special reason why they in particular should apply themselves to this study; but he suggests, "and that not ludicrously," that they might learn how to draw up wills. Since his day, however, the subject of medical jurisprudence has greatly advanced and increased; and it is not open to doubt that those physicians, at least, who make a specialty of insanity, can no longer afford to remain in ignorance of so much of the law as relates to the insane.

[5] Coke, in view of the great number of law books, even in his day, exclaimed: "Quæritur ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus."

[6] 1 Litt. 305*b*.

[7] Littleton's observation on the statute of Marlbridge, "What never was ought never to be," is quoted by Collinson (Lunacy, p. 99).

[8] 1 Com. 14.

CHAPTER XXII.

HISTORICAL NOTES.

382. The history of the medical jurisprudence of insanity.
383. Among the ancients.
384. The Greeks.
385. The Roman law.
386. The civil law was very copious.
387. The middle ages.
388. Demonomania, or witchcraft.
389. The subject obscured by demonomania.

382. The history of the medical jurisprudence of insanity.—Morel, a distinguished French alienist, wrote the history of the medical jurisprudence of insanity.[1] From his work it is evident that, among the ancients, the subject was but little appreciated except by the Roman law-makers. Among primitive people insanity was regarded as something mysterious,—even of divine origin. This superstition, favorable to the prestige of the insane, and therefore conducive to their safety, was not advantageous to a scientific view of this subject. The madman was an object of respect, even of fear; but he was not an object of study. From an early period insanity was confused with supernaturalism. As a consequence there were only the most vulgar notions about mental disease, and but little exact observation. When David fled from the wrath of Saul, and took refuge with the King of Gath, he simulated insanity in the most extravagant style. He scrabbled on the doors of the gate, and let his spittle fall down upon his beard.[2] This was enough to prove his case, in the opinion of King Achish, who exclaimed: "Have I a need of madmen, that ye have brought this fellow to play the madman in my presence? Shall this fellow come into my house?" Even yet this question of King Achish does not always find its proper answer in the medical jurisprudence of insanity.

383. Among the ancients.—In the Hebraic law there was practically no account taken of insanity as a factor in crime. Morel has only been able to point to the absence of torture in that legislation, and to

[1] Traité de la Médecine Légale des Aliénés, Paris, 1866.

[2] 1 Samuel, xxi.

conclude that this absence was favorable to the insane, because these patients, as is well known, are sometimes only too ready to accuse themselves. But indirectly the Hebraic law was responsible for great abuses, which, in later ages, were inflicted on lunatics. By the law in Leviticus the man who turned from God to go and consult sorcerers or magicians was condemned to death.[3] This text had great authority in the middle ages, and was relied on as law for the condemnation of many of the insane, who were accused of holding converse with the Devil, or of being possessed of demons, or of engaging in witchcraft. This was the law of that infernalism which was so rampant all through the unspeakable middle ages. It was a law which owed its origin, in large part, to a total misapprehension of mental pathology. It was a law of priests,—cruel, bloody, ignorant, and fanatical.

384. The Greeks.—The Greek school of Hippocrates is noteworthy in that it took a scientific view of insanity. With this school disease of the mind was a disease of the brain; there was nothing supernatural about it. This was all the more creditable because the primitive Greeks, like the primitive Jews, had had their legends and their superstitions about insanity. Ajex, Orestes, and Alcmæon had been celebrated in poetic times as the victims of the anger of the gods, whereas the poor men were only insane. Hippocrates and his successors taught a material pathology: madness was a "phrensy" or "frenitis"—an inflammation of the brain; melancholia, as its name implies, was an affair of black bile;[3½] hysteria was named from the womb, because it was held to be a disease of that organ.[3⅔] These were scientific conceptions in the sense that there was no element of supernaturalism in them. However much in error the Greek physicians remained in their doctrines of pathology, they were, at least, critical; they did not run after witches, nor cast out demons, nor hunt madmen down for being in league with the Devil.[3¾] It was a great gain for that day to know that insanity was not a mere disorder of the "intellect" or of the "emotions," nor a disease of the "soul," but the result of an affection of the organic brain.[4] Celsus spoke of it as being a disease of long duration, which is ordinarily without fever, and does not always compromise life. The seat of the malady is in the brain, which can be affected primarily or secondarily. Hippocrates had been able to write of epilepsy, the sacred disease, that it did not appear to him

[3] Leviticus, xx. 6. Also verse 27: "A man also or woman that hath a familiar spirit, or that is a wizard, shall surely be put to death: they shall stone them with stones; their blood shall be upon them."

[3½] μελας, black, and χολη, bile.

[3⅔] ὑστερη, the womb.

[3¾] Consult Payne, English Medicine in Anglo-Saxon Times, Oxford, 1904, for a eulogy of Greek medicine.

[4] Morel, op. cit. p. 52.

more divine than other diseases, but that it had the same nature as the others.[5]

Yet in all the Greek medical literature there does not appear much evidence, from Morel's researches, that a special study was made of insanity in its relation to the law. That author, it is true, relates the case of Democritus, in which Hippocrates is represented as giving an expert opinion, but the document on which it is founded appears to be apocryphal.

385. The Roman law.— The influence of the Greek scientific school is, however, quite evident in Roman law. The Justinian code is the first system of law in which a just appreciation of this subject appears. With reference to the medical jurisprudence of insanity the fact is incontestable, as Morel says,[6] that the sound doctrines of the great Greek physicians illumined the Roman law. Some of these physicians —Cœlius Aurelianus, Soranus, and Celsus—carried to Rome the rational traditions of Greek pathology, and the imperial law applied these to the problems of insanity. They still form the basis of the civil law on these subjects, and have thus found their way into the legal systems of modern Europe.

The Roman law, however, did not obtain all its ideas on the subject of insanity from the Greeks. In the Twelve Tables, which date from the fifth century B. C., it is written: "If any one becomes mad, or prodigal, and has nobody to take care of him, let a relation, or, if he has none, a man of his own name, have the care of his person and estate."[7] This is a remarkable statute to have appeared among so early a people as the Romans of that age of the Republic. It anticipated, by many centuries, the writs de idiota and de lunatico of the English law, and may, indeed, have remotely suggested them, for it was handed down by Justinian,[8] who was copied by Bracton. That law, it will be observed, does not confine itself to madmen, but includes also prodigals; but in this respect it has not been followed in all jurisdictions, though some jurisdictions provide for guardianship of the estates of prodigals and drunkards.[9]

386. The civil law was very copious.—To follow the Roman, or civil, law in all its applications to insanity, is neither possible nor desirable

[5] This was written several centuries before the Gospel of St. Mark, in which a plain case of epilepsy is introduced as a case of demon-possession, cured by a miracle. Mark, ix. 14–29.

[6] Op. cit. p. 66.

[7] Table V. Law VI. According to Dr. Harris ("Rise and Progress of the Roman Law," in Cooper's Justinian, p. 666), the laws of the Twelve Tables may have been derived partly from the Greeks.

[8] Institutes, Lib. I. Title XXIII., § 3.

[9] 1 Bl. Com. 306. in criticizing the Roman law, gives, as a reason against it, that extravagance is a good thing in a free country, since it keeps property in circulation!

in this brief notice; in the following pages reference will be made to that code as occasion suggests. It is enough here to indicate briefly that the civil law treats of such subjects as incapacity, lucid intervals, remissions, continuous and intermittent insanity, testaments and contracts, criminal responsibility, deaf mutes, idiots, senile dements, infants, trustees and commissions, and the distinctions between insanity and the passions. Surely this list is copious enough to constitute the basis for a very full treatise on the medical jurisprudence of insanity.[10]

387. The middle ages.—The history of insanity during the middle ages is a disgrace to humanity. The light of reason does not illuminate that dismal period. Insanity, in spite of the teaching of the Greeks, and the provisions of the Roman law, had again taken its place among supernatural phenomena. This was the period of demon-possession; of witchcraft; of sorcery,—a period dominated by the medieval church, and become the pandemonium of priests and courts, in the mad attempt to stamp out diseases of the mind by recourse to torture and the stake. If civilization, as has been justly claimed, was set back a thousand years by the fall of the Roman Empire, one of the proofs of this fact is found in the treatment of the insane.

388. Demonomania, or witchcraft.—The history of demonomania—of epidemic witchcraft—has been traced by able hands.[11] One fact stands out with striking prominence; and that is, that insanity was the one factor which contributed most to these popular crazes. The subject has medico-legal significance from that fact alone. The unfortunate insane were not only involved in a popular prejudice against them which relegated them to the class of evil spirits, but they themselves contributed to this error by their self-accusations and their tendency to absorb the popular ideas. This is a profound law of mental pathology. In every age the insane are affected by their environment; and one of the most significant facts brought out in the history of demonomania is, that the insane themselves became infected with the ideas of the times. Just as to-day an insane man will found his delusions on the electric telegraph and telephone, so in medieval Europe he became the victim of delusions of demon-possession. What he acquired from a vicious popular environment was turned against him as evidence in the tribunals. Out of his own mouth he was condemned, for he often confessed readily to implication with the spirits

[10] Students who desire to pursue this subject in detail are referred to Morel's work, already quoted; also to Loiseleur, Des Crimes et des Peines dans l'Antiquitie et dans les Temps Modernes, Paris, 1863.

[11] Morel, op. cit. Also Calmeil, De la Folie, etc., Paris, 1845.

of darkness. This, in turn, fed the popular flame until, between insane delusions on the one hand and popular crazes on the other, it became difficult to say where insanity began or ended. When these frenzies reached their height there was no safety for any person; the innocent were accused; the affrighted were confounded with real lunatics. Even the mighty did not escape; and it is related of a Salem magistrate that, during the epidemic of witchcraft, he kept a horse always saddled, in order to escape at the first moment that he found himself accused. Husbands accused their wives of cohabiting with the Devil before their very eyes; and the wives, often the prey of hallucinations of sight and touch, acknowledged the offense.[12]

389. The subject obscured by demonomania. — The prevalence of demonomania during the 14th, 15th, 16th, and 17th centuries obscures the whole subject of a rational jurisprudence of insanity. It was only when this popular debasement began to recede before the light of modern science, that such a jurisprudence became possible for the nations of Europe. Its traces long remained in the popular and even the legal conscience of Germany, France, and England.[13]

[12] Michaud, in his History of the Crusades (translated by Robson, N. Y. 1881, Vol. III. 335–337), refers to the influence of the crusades on European science, especially medicine. The orientals of those times were far ahead of the Europeans in medicine. (The first hospitals for the insane were founded by the Moslems.) But, as Michaud says, the physicians of Europe were too ignorant to profit by oriental learning. That author, however, makes no reference to insanity in this connection.

According to Lecky (History of European Morals, Vol. II. p. 94), the Mohammedans established the first asylums for the insane soon after the proclamation of Isleam, in the seventh century.

[13] Lecky (History of European Morals, London, 1869, Vol. II. pp. 91 *et seq.*) exposes this witchcraft business in a few well-written pages. "Most commonly," says he, "the theological notions about witchcraft either produced madness or determined its form; and, through the influence of the clergy of the different sections of the Christian Church, many thousands of unhappy women who, from their age, their loneliness, and their infirmity, were most deserving of pity, were devoted to the hatred of mankind; and having been tortured with horrible and injurious cruelty, were at last burnt alive." (P. 93.)

The Anglo-Saxon Leech-Book of Bald (cited by Payne, English Medicine in Anglo-Saxon Times), contains remedies for the "fiendsick" man, or demoniac.

CHAPTER XXIII.

DEFINITIONS.

I. The definition of insanity.
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I. The definition of insanity.

390. Definitions are difficult.—Winslow[1] cautions medical witnesses not to attempt to define insanity. "Above all things," says he, "the medical man should avoid defining insanity." The advice is useless and misleading. Medical men cannot always avoid defining insanity, and the attempt to avoid it is sometimes worse than even an ill attempt to do it. Insanity can be defined, although, perhaps, no definition of it can be given that is absolutely perfect. The difficulty has been recognized by all persons who have attempted this feat, and usually too much, rather than too little, has been essayed. "I have read every definition that I could meet with," said an English jurist, Lord Justice Blackburn, before a committee of the House of Commons, "and never was satisfied with one of them; and have endeavored in vain to make one satisfactory to myself. I verily believe that it is not in human power to do it."[2] This confession from high authority

[1] Plea of Insanity, p. 76.

[2] Quoted in Church and Peterson's Nervous and Mental Diseases, p. 529. Spitzka's statement (Insanity, 1883, p. 19) that definitions are almost peculiar to Anglo-Saxon countries is hardly sustained by the facts. See Régis, Ment. Med. p. 29.

is valuable, and might be quoted by medical witnesses when they are harassed on the subject. But because the task is difficult, or even, in a strict sense, impossible, is no reason why a working definition should not be attempted.[3]

391. A proposed definition of insanity.— Insanity may be defined as an affection of the brain which is characterized by derangement of the mental faculties. Objections to this definition may be raised, but they are mostly sophistical. For instance, it may be objected that this definition includes the delirium of fever. So it does, and properly; because the delirium of fever is, in a strictly scientific sense, a temporary form of insanity, and is closely similar to, if not identical with, several well-recognized clinical types of insanity, such as delirium grave or even delirium tremens. In fact, the delirium of fever tends to throw a strong light upon the pathology of some forms of insanity, especially in reference to infection, or blood poisoning, as a cause of mental disease. It has also not a little medico-legal importance; for some deliria, such as those occurring after child-birth, are often practically the same as the delirium of fever, and may lead to homicidal acts. Moreover, a criminal act committed in the delirium of fever would have to be defended on precisely the same grounds as the act of an insane person. This alone would bring it strictly within the medico-legal definition of insanity.[4] The same may be said of other temporary derangements of the mind, such as occur after injury to the brain, or from poisoning,—as from alcohol, lead, or uremia; these are instances, certainly, in which the mind, for the time, is "insane," or not sound.[5]

392. Dreams are a disorder of the mind.—Even in the matter of dreams, which certainly occur in otherwise normal minds, these phenomena are strictly evidences of a temporarily disordered action

[3] Esquirol's well-known definition is as follows: "Insanity is a cerebral affection, ordinarily chronic, and without fever; characterized by disorders of sensibility, understanding, intelligence, and will." (Mental Maladies, Am. Trans. p. 21.) But this is too restricted, for insanity is not always chronic and afebrile, and other mental faculties are often involved than those mentioned, as, for instance, memory and imagination.

[4] In some cases of typhoid and other fevers the delirium, or mental confusion, continues for a long time after the fever has departed. This is called "post-febrile insanity;" and cases have occurred in which the patients have had to be removed to asylums. Such cases show conclusively that the distinction between febrile delirium and insanity is a purely artificial one. Similar cases may occur after surgical operations, and are probably due to nerve-shock or blood infections, or both. Consult Krafft-Ebing, Traité Clinique de Psychiatrie, p. 211; Spitzka, Insanity, 1883, p. 373; Clouston, Clinical Lectures on Mental Diseases, 1884, p. 416.

[5] These facts were recognized by Lord Chief Justice Hale, for he included under his Dementia Accidentalis vel Adventitia affections due to a "fever or palsey;" also those due to a "concussion or hurt of the brain." 1 P. C. Chap. IV.

of the brain; and this is proved by the fact that the delusional state of the insane is not a little like the disorder of dreaming; and, what is more to the point, in somnambulism, which is a disorder of sleep clearly akin to dreaming, acts of medico-legal import may be committed.[6] Science cannot exclude these various temporary disorders from a strictly comprehensive definition of insanity; and the law cannot do so, either, as is proved by the fact that the medico-legal defense in all these classes of cases would be the same as in cases of mental disease. Practically, however, it must be admitted that the delirium of fever, and the other temporary affections above referred to, are not ordinarily included in insanity; but the distinction is arbitrary.

393. Idiocy is a form of insanity.—The same may be said of idiocy. Alienists, as well as jurists, distinguish idiots from the insane, and include in the former great class those patients whose mental affection is due to a disorder occurring before or during birth or in early life, before the brain has developed; but here, again, the distinction, while proper and of great practical importance, is, in a sense, arbitrary. An idiot is an insane person in the wider sense of the term "insanity."

394. Objections stated and met.—It may be objected to the definition of insanity, given above, that it defines in a circle; that the term "derangement of the mental faculties" is only another term for insanity itself; but this objection is not valid. The two terms are not identical in the ideas they express, but the one term supplements, or explains, the other. "Insane" means "unsound;" while "derangement of the mental faculties" indicates in what respect the unsoundness shows itself. Hence, the above definition fulfils its proper function, which is simply explanatory. To do more would be to write a description; and this is an error into which some writers have fallen in their attempts to define insanity.[7]

[6] "Madness," says Sauvages, "is the dream of him who is awake."

[7] For other definitions by well-known writers, see Esquirol, Mental Maladies, Am. Trans. p. 21, footnote; also an article by Dr. Borie in the Edin. Med. Journ., 1865, Vol. XI., p. 21, "On the Definition of Insanity," etc.

Dr. Brigham, of New York, many years ago gave the following: "Insanity is a chronic disease of the brain, producing either derangement of the intellectual faculties, or prolonged change of the feelings, affections, and habits." The main objections to this are the use of the word "chronic," and the alternative in the latter clauses.

Bracton's definition, as quoted by some legal writers, is as follows: *Furiosus non intelligit quod agit, et animo et ratione caret, et non multum distat a brutis*,—An insane person is one who does not know what he is doing, and is lacking in mind and reason, and is not far removed from the brutes. But, while this represents truthfully Bracton's ideas, it seems to be compounded of two different passages in his great work, De Legibus. In Lib. V. fol. 420*b*, he says of madmen, *non multum distant a brutis qui ratione carent;* and again, in Lib. III. fol. 100, speaking of those who are not competent to stipulate, he says: *Furiosus autem stipulari non*

395. Insanity is a disease of the brain.—Finally, the above definition indicates an important truth in the matter of insanity, and that truth is that insanity is an affection of the organic brain. This is the scientific conception, and is opposed to the old error (not yet entirely eradicated) that insanity is something spiritual, or metaphysical, or purely mental, as distinct from physical.[8]

The objection that temporary "derangement of the mental faculties" may be caused by fatigue, grief, anger, etc., and, when thus caused, would be included in this definition of insanity, is rather a captious criticism. Besides, all such causes, if they act long enough or profoundly enough, may, in reality, contribute to produce genuine insanity.

II. Illusion, hallucination, and delusion.

396. The proper and improper use of these terms.—In common parlance these three terms are often used interchangeably; and even in legal and other learned writings the proper distinctions between them are not always observed; but by scientific writers, and especially by alienists, these terms are now sharply demarcated, and confusion need no longer occur. Indeed, for the purposes of precise thinking and exact writing, these terms should be distinguished from one another; for they stand for things which are quite distinct and easily apprehended in mental pathology. Therefore it is much to be wished that legal writers would join with medical writers in observing these distinctions, which all persons who are once fully informed about them must acknowledge are founded in fact.

potest, nec aliquod negotium agere, quia non intelligit quid agit,—A madman cannot stipulate, nor transact any business, because he does not know what he is doing.

Bracton, who was a learned ecclesiastic and High Justiciary of England in the reign of Henry III., in the 13th century, often quoted verbatim from Justinian, and is himself entitled to be correctly quoted in turn.

Bishop (Criminal Law, Vol. I. § 376) says that the legal doctrine of insanity, *i. e.*, "a lack of mental capacity to entertain a criminal intent," is axiomatic. But this also includes infancy; and, as a definition, it only shifts the difficulty, for the question at once arises, What is a criminal intent? The answer would be, that a "criminal intent" presupposes a sane mind; and so this is merely defining in a circle.

[8] The spiritual conception of insanity was held by Ideler and some of the older alienists. It is now practically abandoned by psychiatrists, who regard insanity as a disease of the organic brain. Sir Fitzjames Stephen defines insanity as a state in which one or more of the mental functions is performed in an abnormal manner, or not performed at all, by reason of some disease of the brain or nervous system. (2 History Crim. Law, p. 130.) This is an excellent definition; but some exacting critic may ask, "What is the definition of the word 'abnormal'?"

Casper (Forensic Medicine, Vol. IV. p. 98, Eng. Trans.) says: "Criminal responsibility is therefore the psychological possibility of the efficaciousness of the Penal Code." Every reader must try for himself to interpret this Teutonic utterance.

397. The definition of illusion.—By an "illusion" is meant a misinterpretation of a sensation. In every act of the senses, as of sight and of hearing, an impression is made on the sense-organ by some external object, and this impression is conveyed to the brain, where, as a rule, it is correctly recognized. Thus, the song of a bird, the voice of a friend, or the sight of an animal walking in the distant landscape, is known at once. But occasionally something interferes with the correct action of the sensory organism, and the person misinterprets the sensory impression; thus, an individual walking along a path in the dusk may mistake a bush for an animal; or a man in a crowd may, in the babel of voices, think he hears someone call him by name. In these cases there has simply been a misinterpretation of a sensation, but this sensation was real; that is to say, it was excited by a real external object. Evidently, therefore, an illusion is not necessarily an evidence of a serious disorder of the nervous system; in fact, the organism may be perfectly healthy, but it acts at a disadvantage, so that a mistake occurs. Therefore healthy persons may have illusions; but, when they do have them, there is a tendency to correct them at once. On the other hand, the insane also may have illusions, but these illusions are the results of a disordered nervous system; and the insane do not tend to correct their illusions, but adhere to them, often with great tenacity. Thus, a hypochondriac may mistake the normal movements of gas in the intestines for the movements of an animal which he believes he has in his belly. In this way in the insane illusions tend to confirm erroneous beliefs.[9]

398. The definition of hallucination.—An "hallucination" is also a disorder of sensation, but it differs from an illusion in the fact that it is entirely subjective. For instance, a person believes that he hears a voice when there is no voice or any other sound whatsoever; or he believes that he sees some object when there is no external object answering to or exciting the vision. In other words, the disorder is entirely within the person's mind; it is subjective; there is no objective reality whatsoever corresponding to the supposed sensory phenomenon. Therefore, clearly, an hallucination is an evidence of a disorder which is far deeper seated than one creating an illusion; in fact, it is of an entirely different kind. Good authorities, indeed, contend that a true hallucination never occurs in a normal person; that where such cases are claimed to have occurred an illusion has been mistaken for an hallucination.[10] Be that as it may, hallucinations occur not infre-

[9] An insane man whom I once had under my care in the Philadelphia Hospital believed that his whole body was encased in a serpent's skin. Every sensory impression acted as an illusion to confirm this belief.

[10] The case of Nicolai is often referred to by older writers. Nicolai claimed

quently in the insane, and when they do occur they are often of grave import. The insane cling to their hallucinations with unswerving tenacity; they do not tend to correct them; no argument, no proof, can disabuse their minds. So real are these hallucinations to the insane that these patients often act in response to their promptings; and criminal acts are committed in response to voices which the patient firmly believes are real. Hallucinations are very confirmatory, also, of the delusions of the insane.[10½]

399. The definition of delusion.—A "delusion" differs from both an illusion and an hallucination in the fact that it is not a sensory disorder, but occurs entirely within the intellectual sphere. It is an erroneous belief, but of such a kind as is due to a disordered mind. The latter clause of this definition is essential, for an insane delusion is something different from an ordinary mistake of judgment or opinion. All men are subject to errors of opinion; this is a matter of common observation in science, in politics, in religion, and in everyday affairs; but all men are not therefore insane, even though some of their opinions may be most extravagant and unreasonable.[11] But an insane delusion is an erroneous belief which is due to the fact that the patient's mind is deranged; and the delusion is of such a character as would not be entertained by him if he were in a normal state. In

that he had a vision of a human form "like that of a deceased person." He was not insane, although mentally disturbed by grief and anger, and recognized that the figure was unreal. Haslam's Medical Jurisprudence, etc.

In the shipwreck of the Lady Hobart, the crew, in their distress, often thought they saw land or even heard breakers, and some thought they heard the firing of guns. Shipwrecks and Disasters at Sea, 1812, Vol. III., p. 391.

For examples of hallucinations due to organic disease of the brain or of the eye, see an article by Posey, "Visual Perceptions as Symptoms of Disease," in Univ. Med. Mag. Dec. 1895.

Hallucinations must be distinguished from the mere images which a person can conjure up at will by an act of the imagination. Thus, it is related of Ben Jonson that he used to spend the nights looking at his great toe, about which he saw, in his imagination, Turks and Tartars, Romans and Carthagenians, fighting. (Collinson, Lunacy.) Such images are not due to an action of the sensory organism, and they are not believed in.

[10½] The origin of hallucinations—whether they occur in the brain proper or in the sensory organs—has been much discussed. White, in a recent paper (Journal of Nervous and Mental Diseases, Nov. 1904), claims that they are of peripheral origin; that is, that they occur in the sensory nerves, not in the brain itself. But the weight of authority is in favor of their origin in the brain proper.

[11] Napoleon Bonaparte had some very queer opinions. "I think that man was formed by the heat of the sun acting upon mud. Herodotus tells us that, in his time, the slime of the Nile changed into rats, and that they could be seen in process of formation." Talks of Napoleon at St. Helena with Baron Gourgaud. Translated by Elizabeth W. Latimer, p. 69.

Sir Isaac Newton was a very credulous man, and also had odd conceits. Watson (Life of Jefferson) tells how Newton cut a big hole in the door for the old cat and a little hole for the kitten. This was not a delusion, but it was a funny mistake for a great mathematician.

other words, the delusion is not the cause of the insanity, but the insanity is the cause of the delusion, and is shown by other symptoms besides the delusion itself. A sane man may believe that Mahomet went to the seventh heaven and returned in an instant of time; or another may believe that his king rules by divine right; or still another may hold that the proper test for insanity is the knowledge of right and wrong. These are matters of opinion. But if an insane pauper believes that he is a millionaire, or that he is Emperor of the United States, he evidently has a belief which contains some element in it that marks it as different from a mere error of judgment or opinion. It is a belief, obviously, which he could not entertain if he were of sound mind. The insane cling to their delusions with logical consistency, and these erroneous beliefs often dominate their whole life and conduct.

400. Varieties of delusions.—Delusions are of two kinds; systematized and unsystematized. A systematized delusion is one that is fixed and coherent; an unsystematized delusion is one that is composed of elements that are more or less fleeting and changeable, and which do not cohere so as to constitute a definite opinion in the patient's mind.[12]

III. Lunatic.

401. The origin of the term.—This word comes from *luna*, the Latin

[12] Wharton in the 4th edition of Wharton & Stillé's Med. Jur. pp. 132, 133 has an amusing paragraph on delusions in judges, but it is not all very pertinent. For instance, Lord Erskine had a superstitious dread of thirteen at table. Lord Lyndhurst had physical, and Lord Brougham intellectual, vanity. Judge Brackinridge, of Pennsylvania, holding court on a hot day, gradually took off his clothes until at last he sat naked. Judge Baldwin, of the Supreme Court, was a hypochondriac. A distinguished New England judge believed he was pregnant. "Yet," says Mr. Wharton, "in none of these cases was insanity ever charged." Because it was not charged was no evidence that it did not exist. A man, for instance, who believed he was pregnant, must have had a seriously disordered mind, and should not have been allowed to sit on the bench another day.

Very few of these cases are instances of "insane" delusions. The dread of thirteen at table, or denuding oneself on a hot day, or showing personal vanity, or displaying deep-rooted animosity towards a particular man (as in the case of Lord Chancellor Clare towards Curran),—these are not cases of insane delusion.

Horace Binney, the eminent Philadelphia lawyer, had a not very flattering opinion of Judge Brackinridge, and also relates how the latter once sat in court in his bare feet. "It is not certain that Brackinridge was at all times sane, and he would have been just as good a judge as he was if he had been crazy outright." Upon such slight grounds do lawyers as well as doctors sometimes make a diagnosis! Life of Horace Binney, by Charles Chauncey Binney, Philadelphia, 1903, p. 41.

word for the moon; and has been used in law for that somewhat hypothetical patient who is supposed to have "lucid intervals." In fact, the idea of "lucid intervals" was formerly always associated in law with the idea of a "lunatic." The patient was called a lunatic *quia lucidis intervallis gaudet,*—because he enjoys lucid intervals,—these intervals being determined by the changes of the moon. According to Collinson,[13] the term, in its legal acceptation, signifies one who has had understanding, which he has lost by the visitation of God. This is in contrast with "idiot," which signifies one who has had no understanding since his birth. Although the lunar pathology has long since given way, yet the idea of a lunatic being one who has lucid intervals still lingers in curious ways in the law. The tendency in recent years, however, both in this country and in England, has been to ignore any special significance in the term, and to regard "lunatic" as synonymous with "insane" person, or person of "unsound mind," or *non compos mentis,* and kindred terms. This is also according to scientific usage.

402. The later use of the term. — Thus, according to the act 25 & 26 Vict., chap. 54 (1862), the term "lunatic" "shall mean and include every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind." In this definition the term "lunatic" is given the widest generic significance, including even idiots; and has quite lost the original or special meaning which it had in law.

403. Usage in the United States.—Similar usage now prevails in the United States almost, if not quite, universally. A lunatic is simply an "insane" person. More or less opprobrium clings to the term, however, and it is not a popular word with alienists. This may be due to the false ideas, entirely unscientific, which were at one time associated with the word, and to which it owed its origin.

The history of the term is inseparable from the history of the terms *non compos mentis* and "lucid intervals," and is fully discussed in the definitions of those terms in the present work.[14]

[13] Law of Lunacy.

[14] For reference, see the articles on *Non Compos Mentis* and "Lucid Intervals" in the present work. For a statement of American laws, see Beaker, op. cit.

CHAPTER XXIV.

NON COMPOS MENTIS.

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404. Confusion about this term.—Great confusion has existed as to the exact meaning of this term in English law, in spite of the fact that the term itself is most simple, and easily rendered in simple English words. As the history of the term throws a strong light on the confusion of ideas on the subject of insanity that long prevailed in British jurisprudence, a brief sketch of this history is essential here.

405. The classical meaning.—*Non compos mentis* means simply "of unsound mind."[1] According to Shelford[2] the terms *compos animi et*

[1] It means literally "not having the mastery of the mind." See Andrew's Latin Dictionary for illustrations from the classics (in the definition of the word *com-pos*).

[2] Lunatics.

compos mentis were used by classical Roman authors, such as Terentius, Cicero, Sallust, and Livy to signify "one in his senses." It occurred also in the Roman, or civil, law; and Justinian uses the term *compos mentis* when speaking of the testamentary capacity of insane persons.[3] Hence, the term was not original in the English common law, but was imported from Latin authors. The direct source was probably Justinian. In fact, the words, so far as we know, were first used, not in the common, but in the statute, law.[3½]

406. Its earliest use in English law.—A very early, if not the earliest, use of this term in the written law, was in the statute De Prerogativâ Regis, which was passed in the seventeenth year of King Edward II., A. D. 1342. This statute, according to Collinson,[4] completely established the King's jurisdiction over idiots and lunatics,—a part of the royal prerogative which has been recognized ever since, and which is exercised through the court of chancery.[5] The distinction between these two classes was early recognized, and for the following reason: Under the feudal customs, since an idiot could not render military service, on which his tenure of land was based, and could never be expected to do so (because the presumption of the law was that one who was born without the use of his reason would always remain so),[6] therefore his lands were seized by his overlord, and held during the idiot's life. It was not unlike the case of a man who cannot pay his rent; except that in the case of the idiot his lands reverted to his heirs at his death. In other words, the overlord had the right to the profits of the land, on the principle of reimbursing himself for the loss of the military service of his idiotic vassal. In that rude age this was considered a fair bargain, especially as the idiot's support had to be paid out of the proceeds of the land, and as his overlord also became his guardian. In the case of the insane, it was rather different. They were looked upon merely as sick persons, who might recover; there was, therefore, not the same reason for seizing their property. Nevertheless, the insane often needed a guardian, and this

[3] Institutes, Lib. II. Tit. XII., § 1. Translated by Thomas Collett Sandars, M. A., 9th ed. London, 1898.

[3½] The slang word "nincompoop" is derived from *non compos mentis*. The explanation that it means a person "nine times worse than a fool" seems to be based on the erroneous idea that it is derived from "nine." See the Century dictionary.

[4] Treatise on Law Concerning Idiots, Lunaties, and other Persons *Non Compos Mentis*, London, 1812.

[5] The jurisdiction in lunacy is really distinct from the court of chancery, for the custody of idiots and lunatics is lodged in the Lord Keeper of the Great Seal, under a special warrant of the Crown (*Sherwood* v. *Sanderson*, 19 Ves. Jr. 285, 13 Revised Rep. 193). But the Lord Keeper is always the Lord Chancellor (*Ex parte Bromfield*, 1 Ves. Jr. 463, 3 Bro. C. C. 510, 2 Revised Rep. 126. See Shelford, also (Chap. II. § 2), for the fine distinctions as to the various powers of the Lord Chancellor.

[6] 1 Bl. Com. *304.

was finally provided in the person of the King, who was not empowered, however, to use the proceeds of their lands, except for their support. As the lands of idiots were doubtless often abused by the overlords, the care of them, as well as of the lands and persons of the insane, was taken from these overlords and lodged in the King; but the distinction as to the use of the lands in the two classes is plainly shown in the statute.[7]

407. The statute De Prerogativâ Regis.—This statute was as follows, translated from the original Latin:

"Cap. XI. The King shall have the custody of the lands of natural fools, taking the profits of them, without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden. And after their death he shall render them to the right heirs, so that nothing shall be aliened by these fools, nor their heirs be disinherited.

"Cap. XII. Also he shall provide, when any one who before time had his memory and intellect, shall become *non compos mentis* (*non fuerit compos mentis*), just as some are *per lucida intervalla,* that their lands and tenements shall be safely kept without waste or destruction, and that they and their household shall live and be maintained competently with the profits of the same; and the residue, besides their support, shall be kept to their use, to be delivered unto them when they come to right mind; so that the aforesaid lands and tenements shall in no wise be aliened within the time aforesaid, and the King shall take nothing to his own use. And if the person die in such state, then the residue shall be distributed for his soul by the advice of the ordinaries."[8]

408. The distinction between idiots and lunatics.—It is to be noted

[7] Collinson, op. cit. The first act giving power over idiots *et stultes*, being such *a nativitatê*, was made in the reign of King Edward I., but it is now lost (Fleta). Shelford says that it seems from Fleta that, in his time, there was no provision for lunatics similar to that made for idiots. The distinction was first made in the statute De Prerogativâ Regis (1342).

But this latter statement cannot be entirely accurate (unless restricted to statute law), for Britton also draws the distinction between idiots and insane persons (167*b*) and the right of the King to act as custodian of the former, with all their inheritances. But this rule was not to hold of those who became insane by any sickness.

Writing in Norman French, he uses the word "sot," not "idiot," and refers to the insane as those who become sots "by any malady." But even in the case of those who are sots from birth (*i. e.*, idiots), the possibility of their recovery is recognized, for the guardianship is only to continue so long as they continue in their sottishness (*taût come ils durent en lour sotise*).

N. B. This was before the statute De Prerogativâ Regis, for Britton dates back to the reign of Edward I.

[8] This translation follows Collinson's, but not *verbatim*. Collinson's translation is a rather free one.

that in this statute, while the distinction is clearly drawn between idiots and lunatics (or insane persons), these two words are nowhere used. An idiot was called *fatuus naturalis,*—a "natural fool;" and an insane person was called *non compos mentis.* Hence, this latter term was applied to the insane as distinct from idiots. Collinson says that the term "lunatic" does not appear to have been at that time in legal use. Later, however, it came to be largely used, and acquired a very distinct and restricted meaning.[9] As to the term *idiota,* it was used in early legal papers much more loosely than at present.[9½] Thus, Collinson shows that in one of the earliest writs issuing out of chancery to inquire into the mental state of a person, the word *idiota* was used to apply to all kinds of mental disease.[10] The writ ran thus:—

Whether A is a natural fool (*fatuus*) and idiot, as aforesaid, or not; and if he be, then whether from his birth or from some other time; and if from some other time, then from what time, in what manner, and how; and whether he enjoys lucid intervals.[11]

This implies clearly that an idiot may not necessarily be so from his birth, but may have acquired his disease in after life, and that he may enjoy lucid intervals,—all of which are the characteristics in later legal writings of a lunatic. Here it is evident that confusion of terms had already arisen. This is important to bear in mind in view of the rigid and narrow definitions adopted later by the judges, and claimed by them to be legal and consistent.

409. The importance of the term "non compos mentis."—The term *non compos mentis,* being thus preserved in statute law, acquired great importance, and was used by Littleton[12] more than a hundred years later; and Coke, in commenting on Littleton, called it "the most sure and legal" term.

410. Coke's use of the term.—But Coke, probably unconsciously, used the term in a different sense from that in which it had been used in the old statute, for he made of it a generic term for all forms

[9] The influence of the moon (luna) in causing insanity has been widely credited. The Greeks called an insane man Σεληνιακος, from Σελήνη, the moon; and the Germans have the term "Mondsuchtig,"—literally, "moonstruck."

[9½] Cockeram, who published a dictionary in 1623, defined an "idiote" as "an unlearned asse."

[10] The escheator, who acted as a modern commission de lunatico inquirendo, was to inquire: "Si A fatuus et idiota sit, sicut prædictum est, nec ne; et si sit, tunc utrum a nativitate sua, an ab alio tempore; et si ab alio tempore, tunc a quo tempore, qualiter, quimodo; et si lucidis guadeat intervallis." — Collinson, op. cit.

[11] Fitzherbert (Nat. Brev. p. 232) gives the writ in which idiots of two kinds were recognized,—namely, those born so, and those who fall into "such infirmity afterwards." He says nothing about a writ de lunatico. Blackstone also says (1 Com. 304) that the old common-law writ was *de idiota inquirendo.* He mentions no other.

[12] Co. Litt. Lib. III. Chap. VI. § 405.

of mental disease, including idiocy. He says[13] "*Non compos mentis* is of four sorts: 1. *Idiota,* which from his nativitie . . . is *non compos mentis.* 2. Hee that by sickness, grief, or other accident wholly loseth his memorie and understanding. 3. A lunatic that hath sometimes his understanding and sometimes not, *aliquando gaudet lucidis intervallis.* 4. . . . he that is drunken." Here is more confusion; for idiocy is now included under *non compos mentis,* and a new division is introduced under the term "lunatic."

411. Hale's use of the term "lunatic."—It was the part of Lord Chief Justice Hale[14] to define a lunatic with a narrowness that was responsible for still more confusion of thought. In Hale's definition, a lunatic was an unfortunate being whose mental disorder depended largely on the moon; and who enjoyed "lucid intervals," which were caused by the changes of that luminary.

". . . For the moon hath a great influence on all diseases of the brain, especially in this kind of dementia: such persons, commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually at the height of their distemper . . . . But such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason . . ."[15]

412. Hale's ideas prevailed.—This idea of a lunatic, as given by Lord Chief Justice Hale, played an important rôle in English law for many years; and, for that matter, does so yet. It was not necessarily the same thing as *non compos mentis.* Its one distinguishing mark was the occurrence of "lucid intervals." In fact, the term "lucid intervals" is always associated in law with the idea of a "lunatic." The two terms inevitably go together, and this for the evident reason that they took their origin in the same conceit; namely, that lunacy

[13] Co. Litt. 247*a*. In *Beverley's Case,* 4 Coke, 124, the term is used very frequently; and in referring to old statutes as far back as 16 Edward III., Coke seemed to make no distinction as to whether the term was in use thus early or not. But he nowhere, in this report, says anything about its ancient use.

Bracton uses *furiosus,* but not *non compos mentis* for an insane person; at least, in all places where I have followed him. But Bracton copied closely the civil law. In fact, as Sir William Jones remarked, he often copied it *verbatim.*

[14] P. C. Chap. IV.

[15] P. C. Chap. IV. p. 31. I do not intend to imply that Sir Matthew Hale was entirely responsible for the absurd ideas expressed in his definition of a lunatic; or that these ideas were newly introduced by him in legal literature. This, of course, is not so. Hale reflected the opinions of his own and preceding ages about the moon's influence in causing mental disease; but, for all that, his definition did much to fix erroneous ideas in English law.

depends on the moon, and that the changes of the moon cause changes for better and worse in the patient's mental state. Such a hold, indeed, did this term acquire in English law, after the time of Lord Chief Justice Hale, that it came near to pushing the older term, *non compos mentis,* to one side, and created infinite confusion. The term "lucid intervals" had, indeed, been used in the old statute De Prerogativâ Regis, in connection with *non compos mentis,* but, as defined by Hale in connection with a "lunatic," it became firmly associated with the idea of "lunacy."

413. His ideas were artificial.—The idea of a "lunatic," as thus defined by Hale,—namely, an insane man whose disease depends upon the moon, and who enjoys "lucid intervals,"—is entirely artificial, and stands for nothing ever seen in actual insanity. To this fact is to be ascribed not a little of the confusion; for judges and lawyers, as the knowledge of insanity advanced, found it impossible to make this artificial term fit all varieties of mental disorder.

414. Trouble in the court of chancery.—The trouble arose mainly in the court of chancery, which, as already stated, has the control of the persons and the estates of the idiotic and the insane. Separate writs, one for idiots and one for lunatics, had been issued ever since a clear distinction had been recognized between these two classes.[16] At what time the terms "idiot" and "lunatic" were first used in English law in their technical sense, and whether they were first used thus in writs, is apparently not known; but evidently neither term is as time-honored in the usage of English law as *non compos mentis.* After Lord Chief Justice Hale had fixed his artificial definition of "lunatic," the court of chancery evidently began to have doubts about including under this term such persons as were only of weak mind, as, for instance, from old age, epilepsy, and other causes. Certainly such patients were not moon-struck "lunatics," neither did they always or even often have "lucid intervals;" and yet they often required the protection of the law for their persons or estates.[17] In order to include these non-lunatics a tendency arose to revert to the old term, *non compos mentis.*

415. Lord Hardwicke's opinion.—Lord Hardwicke,[18] in 1744, said that this term was of a "determinate significance, and well understood

[16] Collinson, op. cit.

[17] The desire to escape the provision of the statute De Prerogativâ Regis, which gives a beneficial interest in the lands of the idiot to the King during the idiot's life, led to juries finding the idiot not an idiot, but *non compos mentis;* indeed, even finding him lunatic, as in the Case of Lord Wenman, 3 Atk. 173. This may have been one way in which confusion arose over the various terms. Collinson, op. cit. p. 100; also Bl. 1 Com. *304.

[18] *Ex parte Barnsley,* 3 Atk. 168.

in courts of law;" and yet he failed to indicate clearly what it meant. In his opinion it seems to have meant lunacy, and nothing else;[19] and did not import mere weakness of understanding, but a "total deprivation of sense." The word "lunatic" was used by him in its legal sense, for a patient having "lucid intervals." But the prejudice excited by the term "lunatic" was shown plainly in the opinion given by Lord Hardwicke in the *Barnsley Case,* for he spoke of it as "coined in more ignorant times."

416. Objections to the term "lunatic."—Barnsley, who was merely broken down with old age, did not seem a proper person to be described as a "lunatic," and the jury had found merely that he had "weakness of mind." This was the root of the whole difficulty. The law in those days recognized only idiocy and lunacy, and by the old writs and commissions a person must be found to be either one or the other of these two things. But "lunatic," owing to the definition of Hale, was an artificial conception: it meant a man who had "lucid intervals," who was affected by the moon, and who, when he was in a crazy paroxysm, suffered a "total deprivation of sense." Obviously it was impossible to fit all kinds of mental disease into this narrow definition. People suffering with old age, or otherwise of weak understanding (and these were just the kind of cases to get into chancery) were not "lunatics" in the legal sense.

Lord Hardwicke declared that an act of Parliament would be necessary to change the law ere it could include persons of merely weak mind.[20] Later, however, in *Donegal's Case,* 2 Ves. Sr. 407, this same Lord Hardwicke drew a distinction between a lunatic and one *non compos mentis,* and said that a commission could issue for

[19] In this opinion Lord Hardwicke was closely in accord with the statute De Prerogativâ Regis (1342).

[20] *Ex parte Barnsley* (July, 1744) 3 Atk. 168. The inquisition was quashed in this case because the return was "that the said Barnsley . . . is, from the weakness of his mind, incapable of governing himself and his lands and tenements, etc." The pith of the objection was in the term "weakness of mind," which was held by Lord Hardwicke not to be a legal term. The inquest had been *de lunatico inquirendo,* and the finding should have been *non compos mentis,* which is a "certain term in law." It is not explained, however, why, if the word *lunaticus* is used in the inquest, it is not also insisted on in the finding. It seems, in fact, to have been, in former times, a good finding to find a man a "lunatic;" but Lord Hardwicke evidently did not like the word "lunatic," for he says it "is a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but discovered by philosophy and ingenious men, that it is entirely owing to a defect of the organs of the body." In short, Lord Hardwicke saw the defects of the word "lunatic," and decided that *non compos mentis* was a good and sufficient term; but he did not attempt, in the *Barnsley Case,* to draw a distinction between the meanings of these two terms. He evidently thought that they practically meant the same thing, except that *non compos mentis* was broader, better, and more scientific.

Blackstone, who wrote about the same time as Lord Hardwicke, uses *non com-*

both these conditions, but that it must expressly find the person to be of unsound mind, or *non compos mentis*. Such was the legal confusion about terms.

But in time the English chancery practice changed still more, as is shown by Collinson.[21] Lord Thurlow believed that a senile dement could be found to be a "lunatic" under the old writ. Lord Eldon[22] was apparently of a slightly different opinion; but he decided that the term *non compos mentis* must be used in the finding to make it legal.

417. Lord Eldon's opinion.—Lord Eldon[23] said that it seemed to have been a very long time before the lord chancellors thought themselves at liberty to issue a commission when the person was represented as being not an idiot or a lunatic, but of unsound mind (*non compos mentis*), importing by those words the notion that the party was in some such state as was to be contradistinguished both from idiocy and from lunacy, and yet such as made him the proper object of a commission in the nature of a commission either *de idiota* or *de lunatico*. As soon, however, as that distinction was established, it became necessary, in Lord Eldon's opinion, that the jury should find in express words that the party was of unsound mind (*non compos mentis*). In other words, Lord Eldon decided that *non compos mentis* was a distinct affection from both idiocy and lunacy, and that the exact words (or their English equivalent) must be used in the finding; but he fails to state at what exact time this change was made in English law, or by whom. A man who was *non compos mentis* was distinct from an idiot or a lunatic, and therefore he might be a proper case for a commission similar to (in the nature of), but not identical with, the old writ *de idiota* or *de lunatico*.[24]

418. Lord Erskine's opinion.—Lord Erskine[25] recognized the ne-

pos mentis both in a generic and a specific sense; thus it is, first, the same as the moon-struck "lunatic," with his lucid intervals; and, second, it comprises all sorts of mental affections, including "such as are judged by the court of chancery incapable of conducting their own affairs." The confusion is noteworthy. 1 Com. *304.

[21] Op. cit. pp. 65 *et seq.*

[22] See Lord Eldon's opinion in the *Palmer Case*, discussed by Haslam, in Medical Jurisprudence as it Relates to Insanity.

[23] *Re Earl of Portsmouth.* Quoted by Shelford, op. cit. p. 105.

[24] I do not know what there was to warrant Lord Eldon in this extraordinary opinion in any old writ, or any old statute, or any old text writer, such as Coke or Hale, or even in the opinion of any former Lord Chancellor. It seems to have been an entirely arbitrary opinion of Lord Eldon. In the old commission de lunatico (as given by Shelford), the word "lunatic" alone was used; but in the finding of the jury, the words "of unsound mind" were interpolated after the word "lunatic;" but when this was first done is not stated.

[25] Erskine, with his clear insight and lucid style, gave a rational statement of this whole subject (*Ex parte Cranmer*, 12 Ves. Jr. 445), and found ample warrant for including senile dements, not under Coke's definition of lunatics, but

cessity of granting legal protection to persons whose minds were broken down with old age.[26] Thus the idea enlarged until it approached more nearly to the present scientific conception. The word "lunatic," in the sense of Coke and Hale, being too narrow, the term *non compos mentis* was gradually expanded until it included, first, weak-minded and senile persons, and, finally, all types of mental disease. And so it had been originally understood by Coke.

419. How confusion arose.—It is thus evident that the early lawmakers in the time of Edward II. recognized a proper distinction between the two conditions,—idiocy and insanity,—but that confusion arose about terms. The three terms most used in English law have been *non compos mentis,* "idiot," and "lunatic." *Non compos mentis* is very old, and was first applied (1342) to the insane as distinct from idiots,[27] and carried with it the idea of lucid intervals. *Idiota* was used in the oldest writs for all forms of mental disease,[28] but later, at an uncertain date, it became restricted to its present use,—for those born so. "Lunatic" was adopted (largely from the definitions of Coke and Hale) as a term for a mental affection which really has no existence,—the moon-struck patient, with his lucid intervals. When difficulties arose in the attempt to make this artificial term cover all kinds of insanity (especially senile dementia) the term *non compos mentis* was turned to as a very old one, and it was grad-

under his second heading of "Hee that by sickness, grief, or other accident, loseth his memorie and understanding." This practically includes every form of insanity.

[26] *Ex parte Cranmer*, 12 Ves. Jur. 449 (July, 1806). In this case it is clearly brought out that a prejudice had long existed against calling persons broken down with old age by the term "lunatics." The Lord Chancellor, Erskine, said: "A man may have passed a great and illustrious life; and by the course of nature his faculties may decay, so that he may not be fit either to govern himself or his affairs. It is unseemly that he should be put upon the footing of a lunatic, etc." The inquisition was quashed, however, because Cranmer was not distinctly found to be, not a lunatic, indeed, but something in "equipollent words;" and these equipollent words were found by a subsequent commission in *non compos mentis.*

In *Ridgeway* v. *Darwin*, 8 Ves. Jr. 65, 6 Revised Rep. 227, Lord Eldon declared that imbecility (from old age, epilepsy, habitual intoxication, etc.) was not insanity, but was entitled to as much legal protection as though it were. Such cases were proper subjects of the commission in the nature of the writ de lunatico inquirendo.

He was confident Lord Hardwicke would not have gone so far, but a course of cases had arisen since his time which established the authority, and he, Eldon, would not alter it.

Before this time, in *Gibson* v. *Jeyes*, 6 Ves. Jr. 273, 5 Revised Rep. 295, Lord Eldon drew the distinction between a "commission in lunacy," and one "in the nature of a writ de lunatico inquirendo." This was a legal quibble meant to cover the cases of weak-minded and senile patients, who were not considered to be "lunatics." By a commission in the nature of a writ de lunatico a weak-minded person could be found *non compos mentis*, and yet not be stigmatized as a "lunatic." (This whole subject is clearly explained by Collinson, op. cit.)

[27] Statute De Prerogativâ Regis, 17 Edw. II. Stat. 1, A. D. 1342.

[28] 1 Collinson, Lunacy, p. 117.

ually made broad enough to comprehend all forms of mental disorder,—a function it is well fitted to discharge by reason both of its venerable age and of its etymology; for it simply means "of unsound mind," and therefore includes all the insane. But the battle has waged largely about *non compos mentis,* because of the restricted use put upon it in the English court of chancery.

420. The various uses of the term.—This term has been used about as follows:—

First: As a specific term for insanity, as distinct from idiocy. (Statute De Prerogativâ Regis, 1342.)

Second: As a generic term for all kinds of mental disease, including idiocy. (Coke.)

Third: As a nondescript term, which included neither idiocy nor lunacy. (Eldon.)

Fourth: As a distinct term for persons who are not capable of taking care of themselves or their property. (English chancery practice.)

Fifth: As a generic term, once more, for all kinds of mental disease. (Present and correct usage.)

Surely this is a rich and variegated experience for three simple Latin words!

421. The American usage.—American courts have closely followed the English courts in their use of this ambiguous term. It was decided by the supreme court of Pennsylvania, in 1835, in the case of John Beaumont,[29] that a return of an inquisition held by a commission in the nature of a writ de lunatico inquirendo, to the effect that the party, "by reason of old age and long-continued sickness had become so far deprived of reason and understanding as to be wholly unfit and unable to manage his estate," was not a sufficient finding that the party was *non compos mentis,* within the Constitution and laws of Pennsylvania.

The grounds for this opinion were stated at length by Mr. Justice Kennedy. The term *non compos mentis,* he said, was the only legal term in Pennsylvania, and was used in the Constitution in force at that date (1835) to describe such persons who were expressly under the care of the several courts of the state, acting as courts of chancery. He traced the term back, but only as far as Littleton, and relied largely on Lord Hardwicke and other English Chancellors whose opinions I have quoted above. He also found that the term had been used in acts of legislation while the state was still a province (1719).

[29] *Re Beaumont,* 1 Whart. 52, 29 Am. Dec. 33.

422. Common-law definitions binding in America.—To the lay reader it may seem strange that any of these opinions should necessarily be binding on a justice of the supreme court of Pennsylvania. The opinions of Littleton, Coke, Hardwicke, and Erskine are not necessarily law in Pennsylvania; but of course the Constitution of the state would be binding. To such an extent, indeed, was it binding, that the court quashed the inquisition because the term did not say expressly that John Beaumont was *non compos mentis*. Therefore, the whole case rested on a mere matter of words. It was not denied that Mr. Beaumont was incapable of managing his affairs by reason of an impaired mind, or, in other words, by reason of insanity, for it was plainly said in the finding that he was "deprived of his reason and understanding." The court decided, in effect, that this was not the same thing as *non compos mentis*.

423. Some hair-splitting distinctions.—In the opinion just cited Justice Kennedy indulged in some hair-splitting distinctions that baffle the quidnuncs of science. Thus, "the most abject and imbecile" mind is not necessarily the same thing as *non compos mentis*. This legal term, he considered, "imports a total deprivation of sense;" and he quotes with approval Lord Hardwicke's opinion, that the term "is legitimated." "Hence," he continues, "it would appear that *non compos mentis* has become a technical term in the English law, of fixed and determinate import, denoting a person entirely destitute or bereft of his memory and understanding;" and yet the court declined to consider Mr. Beaumont in this category, although he was expressly stated to be "deprived of reason and understanding." Surely, confusion of ideas and language cannot extend much farther than this. As for a "total deprivation" of sense, of memory, and of understanding, as these words are used in law, there is not one insane person in a thousand who can truthfully be so described.

Amusing instances are given of attempts to draw a distinction between a "lunatic" or "insane" person, and a person *non compos mentis*. Chitty,[30] for instance, says:

"The malicious, untrue, written assertion that the King or any person is affected with insanity is considered a criminal and indictable act; since it imputes to the party a malady generally inducing mankind to shun his society; though, as no one is of perfectly sound mind but the Deity, it is not libellous merely to say that a man is not of sound mind."

Taylor refers to the instance of a medical man (in 1837) who de-

[30] Med. Jur. Vol. I. p. 353.

clined to sign a certificate of insanity, because the words "unsound mind" were used; he would not have objected, he said, if the word "insane" had been employed instead. Such a distinction is, of course, entirely arbitrary, and is not warranted to-day by medical science, by law, by etymology, or by common sense.

424. Later and better usage.—By 13 & 14 Vict., chap. 60, "the expression 'Person of Unsound Mind' shall mean any person not an Infant, who, not having been found to be a Lunatic, shall be incapable, from Infirmity of Mind, to manage his own affairs."[31] This would practically include any and all forms of mental disease, provided, always, that they caused incapacity. This illustrates the fact that the term, in its legal sense, is often used merely to designate persons who are incapable of managing themselves and their estates. This is the chancery idea. The real object of inquiry is the person's capacity, not the precise scientific form of his mental affection. Whatsoever his mental affection, if it causes incapacity, he is *non compos mentis*.

425. Distinctions ignored.—In recent times the tendency, both in England and in America, has been to ignore any distinction between the term *non compos mentis* and other general terms, such as "lunacy" and "insanity."

Collinson says[32] that the words *non compos mentis* comprehend not only idiots and lunatics, but all other persons who, from natural imbecility, old age, disease, or any such causes, are incapable of managing their own affairs. In the act 25 & 26 Vict., chap. 54 (1862), the term "lunatic" "shall mean and include every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind."

In America all forms of insanity are now embraced under the same legal terms. Becker[33] says that in New York, Massachusetts, and several other American states, statutes have been passed defining the terms "lunatic," *non compos mentis,* and "insane," so as to embrace all forms of insanity except idiocy, making these terms synonymous. "There is no distinction between the terms 'insanity' and 'unsoundness of mind.'" But in some states, as Texas, the term *non compos mentis* includes also idiots. (Same vol., p. 648.)

A distinction is still observed in other states (as Tennessee) by the use of the phrase (not uncommon in legal writings) "idiots, lunatics, and other persons of unsound mind." (P. 645.)

[31] Stroud's Jud. Dict.
[32] Op. cit.
[33] Med. Jur. For. Med. and Tox., by R. A. Witthaus, M. D., and Tracy C. Becker, L. L. B., Vol. III. p. 371.

In Ohio, "insane" and "lunatic" include every kind of insanity or mental derangement; the term "idiot" is restricted to one foolish from birth; so, also, in North and South Dakota.

In New York the jurisdiction extends to all persons incompetent to manage themselves or their affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding or other causes.

In New Hampshire the word "insane" includes every idiot, *non compos mentis,* lunatic, or distracted person; a formula used also in Michigan and Maine.

In Iowa, "insane person" includes idiots, lunatics, distracted persons, and persons of unsound mind. This is practically so also in Indiana, Florida, and Colorado.

In Georgia, "lunatic," "insane," *non compos mentis,*—each includes all persons of unsound mind.

426. A brief review of the subject.—The review, above given, of the history of the term *non compos mentis,* reveals clearly that the real stumbling-block in the way of courts and legal writers was their ignorance of the subject of insanity; and that their trouble lay in their attempts to define subjects of which they had no exact knowledge. The only remedy for this is a resort to science. The science of psychiatry knows no such form of mental disease as the "lunacy" of Coke and Hale, while the state of mind called vaguely *non compos mentis* (in the chancery sense) may be caused by various and widely differing mental diseases. These diseases are principally senile dementia, epileptic dementia, chronic alcoholic insanity, and various grades of imbecility. They are not confined to these, however, for any form of insanity which causes an incapacity in the patient to take care of himself or his estate would constitute a state of *non compos mentis* in the legal sense. The term is thus seen to be a most generalized one, and, like the word "insanity" itself, it can and does include all forms of mental disease.

Lord Hardwicke and Lord Eldon tried to give the term a definite and restricted meaning, and after their time, as Mr. Amos has pointed out, it was used in chancery simply to designate persons who were incompetent to manage their affairs. According to this view, the term was of legal rather than of medical significance: it was not intended to denote any particular kind of mental disease, but simply to designate certain consequences of mental disease in general,—consequences with which alone the court of chancery was concerned. Mr. Balfour Brown,[34] himself a lawyer, said: "It seems to be a

[34] Med. Jur. Insanity.

strife about words;" and so it was, from a purely scientific standpoint. And yet the difficulty that presented itself to those old judges, in the face of the ugly and artificial term "lunatic," was not altogether imaginary or verbal, and should be borne in mind by the medical critics. Dr. Ray, among others, ignores this fact.

427. Conclusion.—The attempts of some legal writers to make something special and distinct out of this term *non compos mentis* have only led to confusion. There is nothing special or distinct in it; and any effort to make it mean something definite in science will prove as abortive as to try to clothe with flesh and blood the moon-struck "lunatic" of Sir Matthew Hale.[35]

[35] The old Anglo-Saxon Leech-Book of Bald, quoted by Payne (English Medicine in Anglo-Saxon Times—The Fitz-Patrick Lectures for 1903. Oxford, 1904), contains remedies for the "fiend-sick" man, or demoniac; and for the "wode-heart," or frenzy; and for "mindlessness," or idiocy. These terms indicate that distinctions in mental diseases were made very early.

A comparatively early use of the word "lunacy" occurs in the statute 33 Hen. VIII., Cap. 20 (1541). This is the statute which provides that persons who have "fallen to madness or lunacy" after the *factum*, may be tried for treason.

CHAPTER XXV.

LUCID INTERVALS.

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428. The early origin of this term.—This term was of very early origin in English law, and has played a conspicuous part in the courts. Bracton,[1] who wrote about 1265, uses the term in describing a madman (*furiosus*). It occurs also in the statute De Prerogativâ Regis (17 Edw. II., A. D. 1342), where it is used in connection with insane persons (*non compotes mentis*) as distinct from idiots (*fatui naturales*). In an early common-law writ, which was issued to the escheator to inquire into the mental state of a party (whence came the modern commission in the nature of a writ *de lunatico inquirendo*), the term "lucid interval" was used in connection also with idiocy.[2]

429. Associated with the term "lunatic."—The term very early became associated with the technical term "lunatic," and was thus used by Coke,[3] who described a lunatic as "one that hath sometimes his understanding, and sometimes not, *aliquando guadet lucidis inter-*

[1] De Legibus et Consuetudinibus Angliæ, f. 420. Edited by Sir Travers Twiss, London, 1878. *Possunt enim quidam dilucidis gaudent intervallis.*

[2] See page 485 of the present work.

[3] Co. Litt.

vallis," but it was more fully defined, and in unmistakable language, by Sir Matthew Hale. According to Hale[4] "lunacy" is marked by "lucid intervals;" and these "ordinarily happen between the full and change of the moon."

430. Its fanciful meaning.—From this definition it seems clear that the cognate ideas of "lunacy" and "lucid intervals" arose from the old superstition that the moon (*luna*) was the cause of mental disease, and that the changes of that luminary caused changes in the patient's mind, among which were "lucid intervals." Sir Matthew distinctly avowed this belief, and based both his science and his law upon it. The term thus became a purely artificial one, standing for something which has no existence in real insanity; but which has been elaborated by many courts and legal writers in language which is not always consistent, or even intelligible to a scientist.

For instance, Hale tells us that in such intervals insane persons have a competent use of reason, and that crimes committed in these intervals should be subject to punishment; and that contracts and sales made then are obliging to the heirs and executors. In other words, the moon is the supreme factor in determining the responsibility and liability of lunatics.

431. Hale's doctrine was unscientific.—The query arises, why seriously criticize such a fanciful doctrine, written two hundred and fifty years ago, by a man who could see his way clear to condemn to death two poor women for witchcraft? Hale's doctrine of "lucid intervals" is based upon the crudest superstition about insanity. It is, moreover, a dangerous doctrine, and absolutely without scientific warrant. Of course, in some forms of insanity the patients have their better and worse spells, and in convalescents the mind may clear by remissions; but never in the arbitrary way suggested by Hale. As for "lucid intervals" occurring in the very midst of attacks of insanity, leaving the mind absolutely unclouded and normal for a brief period, the best authorities know that this must be one of the rarest phenomena, if, indeed, it is ever seen.

432. Lord Eldon's opinion.—The opinions of legal writers as to what really constitutes a "lucid interval" are often contradictory. By comparing these opinions the whole subject may be brought to a focus.[5] In one of his oft-quoted opinions, Lord Eldon said that

[4] P. C. Chap. IV. See the subject discussed at length under the heading of *Non Compos Mentis*, in the present work.

[5] It is worth noting that the doctrine of "lucid intervals" seems, like so much else in the early common law, to be derived from the Roman law. Thus, in the Institutes of Justinian (Lib. II. Title XII. § 1), treating of those persons who are not competent to make a will, it is said: *Furiosi autem, si per id*

the question whether a man was a lunatic was a question, "admitting, in the solution of it, of a decision that imputed to him at one time an extremely sound mind, but at other times an occurrence of insanity." This seems to be a statement to the effect that "lunacy" consists in alternations of madness and reason.

In the case of *Towart* v. *Sellars*,[6] Lord Eldon gave a decision in the House of Lords in which he said: "The question is not whether a man has been insane, but whether he has recovered that *quantum* of disposing mind at the time he executes the deed which ought to give it effect." For the scientist these two questions are not so easily separated. In reality they constitute one problem. To understand whether a man is partially restored from a disease it is necessary to know how and to what extent he was diseased, and how much of his disease remains.

433. The legal idea is artificial.—Collinson[7] says that a lunatic is one who has lucid intervals; and yet, in the next sentence, he says that lunatics are of two kinds,—those who have, and those who have not, lucid intervals. This shows the confusion of ideas on the subject on the part of legal writers. Collinson's chapter reveals very clearly how artificial the legal idea of lucid intervals is. He defines a "lucid interval" as "that in which the mind, having thrown off the disease, has recovered its general habit."[8] But this is a recovery; why call it an interval? In another sentence he says that "to constitute a lucid interval the mind need not have recovered its pristine strength and vigor." But this contradicts the former statement.

D'Agucsseau[9] says: "There must be, not a mere ray of reason, which only makes its absence more apparent when it is gone,—not a flash of lightning, which pierces through the darkness, only to render it more gloomy and dismal,—not a glimmering which unites the night to the day,—but a perfect light, a lively and continued lustre, a full and entire day, interposed between two separate nights of the fury which precedes and follows it." This extraordinary rhetoric has little meaning for anything ever seen in real insanity.

434. Defining in a circle.—Some of the courts[10] define a "lucid interval" as "not a perfect restoration to reason, but a restoration so

tempus fecerint testamentum, quo furor eorum intermissum est, jure testati esse videntur,—but madmen, if they make a will in that period in which their madness intermits, seem to be legal testators.

[6] 5 Dow, P. C. 231. In several places this case reveals Lord Eldon's forte in composing long and involved sentences.

[7] Lunacy, Chap. IV. p. 37.

[8] This seems to have been Lord Thurlow's opinion. *Atty. Gen.* v. *Parnther*, 3 Bro. C. C. 443.

[9] Quoted by Collinson, op. cit. p. 39.

[10] *Ante*, § 9. Also consult Casper (Forensic Med. Vol. IV. p. 229) for references to continental law and practice.

far as to be able, beyond doubt, to comprehend and to do the act with such perception, memory, and judgment as to make it a legal act." This is defining in a circle. It states, moreover, that a perfect restoration to reason is not requisite. This practically means that the patient is still insane; for if his reason is not perfectly restored he is still a lunatic. Hence, this definition recognizes a partial responsibility in law,—a thing which its authors evidently did not intend.

If a patient can have a partial responsibility in the meaning of a lucid interval, as here given, he should not be held entirely accountable for his acts; but who is to decide the nice question as to whether a lunatic has just enough restoration of reason to constitute him a proper person for discharging his legal obligations, whether civil or criminal, at a particular moment?

435. Importance of this subject.—So important is this subject in the eyes of the law that, in the commission de lunatico inquirendo, it is expressly inquired whether or not the lunatic has lucid intervals;[11] but the return by such a commission is only prima facie evidence in case of subsequent legal proceedings involving a question of the party's mental soundness; as, for instance, in case of a disputed will or contract.[12] In other words, in spite of his having been legally found a lunatic without lucid intervals, it would be permissible to prove that he had subsequently had a lucid interval when he signed a legal paper. Thus a very wide door is left open for abuse of this doctrine. An insane man, after having been found to be so by a commission issuing out of court, may be induced, by parties who know his condition, to enter into a contract; and when a defense of insanity is set up by the lunatic's custodian, the plaintiff may attempt to prove that the contract was signed during a lucid interval. In such a case Sir William Grant, Master of the Rolls,[13] decided that the question was a question of fact, to be determined by a jury; and himself declined to decide it, and did not even attempt to give a dogmatic definition of a "lucid interval." This is a more scientific method than for courts to entrench themselves behind arbitrary definitions.

436. Lord Brougham's opinion.—Lord Brougham[14] recognized that

[11] Shelford, op. cit. p. 845.

[12] *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554.

[13] *Hall* v. *Warren*, 9 Ves. Jr. 605, 7 Revised Rep. 306. In this case the subject is discussed very clearly in its legal bearings, but the Master of the Rolls was evidently very dubious about Warren's having had a "lucid interval" at the very moment when he signed an agreement to sell an estate. In the case of Warren, however, the commission did not issue until after the contract was signed; but in the return the man was found to have been a lunatic for the ten years last past, with lucid intervals. Thus the commission overreached the contract.

[14] *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947.

men often mistake for a lucid interval the mere temporary absence of the subject of the delusion from the mind; and that no madman can be said to have recovered his reason unless he truly and voluntarily confesses his delusions. This is not a bad principle. He also held that the burden of proving a lucid interval is on those who assert it; and that much clearer proof is necessary than would have been required had no mental disease been admitted. In other words, it would seem from Lord Brougham that, in these cases, the presumption is against sanity; not, as is usually the case in law, in favor of it. The very attempt to prove a "lucid interval" involves an acknowledgment that the party has been insane, and therefore shifts the presumption as well as the burden of proof.

437. The consequences flowing from this doctrine. — The consequences flowing from the doctrine of "lucid intervals" are most important. Hale says that in the case of a lunatic who has his "lucid intervals," the presumption of law is that his acts or offenses are committed in such lucid intervals, unless the contrary be proved. This principle has been generally assumed in law.[15] Pepper and Lewis[16] refer to cases, occurring in Pennsylvania, in which insane persons have signed legal papers, such as notes and mortgages, and the law has presumed such to have been signed in lucid intervals. This is a double presumption; for, in the first place, the belief that there are such things as "lucid intervals" in the legal sense is a pure presumption; and, in the second place, it is a presumption to believe that a particular insane person did a particular act in such an interval.

438. In criminal cases.—In criminal, even more than in civil, cases, it might be most unjust to presume that an act had been committed during a "lucid interval." And if this doctrine be insisted upon, why is the converse not equally true,—that a criminal act might be committed during a sudden "insane interval" in a person otherwise of sound mind?[17] We know that such a claim is always received, and properly, with great suspicion in courts of law. The human mind, in fact, seldom acts in abrupt transitions either from health to disease or conversely. *Natura non operatur per saltum*,—nature does not act by fits and starts.[18]

[15] Blackstone says, "If a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency." 4 Com. 25.

[16] Digest.

[17] This opens up the question of "transitory mania,"—an alleged clinical form about which probably the less said the better.

[18] An exception to this rule is seen in epilepsy, in which abrupt paroxysms of insanity may occur. Also in some of the periodical insanities, in which, while not nearly so explosive as in epilepsy, the onset and termination of the attacks may be very abrupt.

439. Violent presumptions of the law.—It is against common experience as well as all scientific method to adopt such violent presumptions in cases of insanity. The question whether an acknowledged lunatic has had a "lucid interval" at any particular moment is a question of fact, as was recognized by Sir William Grant; and can only be determined by the evidence in his particular case. It must always be a question of extreme delicacy and difficulty.[18½]

440. The practice has varied.—It is not probable that there are many courts at present in which Hale's *dictum* would be sustained in its entirety. In fact, some of the prevailing opinions, if analyzed, are directly contrary to the Lord Chief Justice, for it does not seem to be held universally that the presumption is in favor of a lucid interval in the case of an insane man who signs a legal paper. Ordinarily the proof of insanity rests on the party alleging it; but, as Chancellor Harrington[19] decided in the case of a man who had been insane for more than twenty years, the *onus probandi* changes when the party is proved to have been insane. In such a case the person who alleges that the act of such a party is binding must show that it was done in a lucid interval. Hence, the presumption is not in favor of a lucid interval, but against it,—an opinion directly opposed to Hale, and in accord with Lord Brougham.[19½]

441. The onus probandi.—The cases in Pennsylvania practice referred to by Pepper and Lewis were cases in which the parties had been found by commissions de lunatico to have been insane, with lucid intervals. It is, therefore, to be assumed that it is only in such cases that the law now-a-days presumes such an interval to have occurred at the time the contract or will was signed. In other words, in cases of insanity in which there was no evidence of lucid intervals ever having occurred, the law would not presume one. The *onus probandi* in these latter cases would be on the parties asserting the

[18½] Charles Lamb was once insane, and wrote as follows to Coleridge, after his recovery: "The six weeks that finished last year and began this, your very humble servant spent very agreeably in a madhouse at Hoxton. I am got somewhat rational now, and don't bite anyone. But mad I was, and many a vagary my imagination played with me. . . . It may convince you of my regards for you when I tell you my head ran on you in my madness. . . . The sonnet I send you has small merit as poetry; but you will be curious to read it, when I tell you it was written in my prison-house, in one of my lucid intervals." (Mary and Charles Lamb, by Carew Hazlitt, p. 214.)

This letter may be seized on by the lawyers as evidence for lucid intervals; but it will be hard to convince alienists that writing poetry by an insane man is an evidence of his restoration to reason. In the asylums it is generally looked upon as a bad sign.

[19] *Frazer* v. *Frazer*, 2 Del. Ch. 260.

[19½] *Semel furiosus, semper furiosus presumitur, et contrarium tenenti incumbit onus probandi sanem mentem.* This maxim of the civilians is quoted by Morel, Traité de Médecine Légale, p. 70.

lucid interval. This was Lord Brougham's opinion, already cited. The distinction is a most important one, and is apparently not indicated by Hale, because, according to Hale, the very fact that a man was a lunatic would raise the presumption that he had "lucid intervals," whether these were specifically proved or not. Such a doctrine is monstrous.[20]

442. Remissions not the same as lucid intervals.—It is true that there are forms of insanity in which remissions occur, and others which show a tendency to periodicity; and in reference to these forms a plausible argument could be maintained in favor of their presenting "lucid intervals." In any particular form of insanity the disease is not always of uniform course. In one disease, for instance, the so-called circular insanity, the symptoms evolve in a cycle, including a period, often prolonged, of good health. In others there are periods of access, followed by remissions, as in cases of recurrent mania. During convalescence in various kinds of insanity the patients may have shorter or longer periods of comparatively clear intelligence before full recovery takes place; but these are not exactly the same things as seem to be meant in legal writings by "lucid intervals," for the latter are something more abrupt, more evanescent, and more sharply in contrast with the preceding and succeeding paroxysm. Moreover, there is no rule about these remissions; they may or may not occur; but "lucid intervals," according to Hale, are an essential feature of "lunacy." Besides, in mere remissions the patients are not recovered, as it is claimed they are in "lucid intervals." Krafft-Ebing[21] cautions us that the intervals between paroxysms, which we have the habit of calling lucid, are not always so in fact. On the other hand, a prolonged period of return to health is properly a recovery, not a mere "lucid interval." The nearest approach we have to "lucid intervals" in the legal sense occurs in the various forms of periodical insanity, described elsewhere in these pages.[22]

443. The prejudice against lucid intervals.—The prejudice against the legal idea of a "lucid interval" has been wide-spread among alienists. Haslam[23] said that in an experience of twenty-five years, he had never observed these "alternations of insanity and reason," such

[20] Again, to discuss the logic of the subject still a little more in detail (for it seems to be largely a question of logic), it is always allowable to disprove, by appropriate evidence, the occurrence of a lucid interval, even if the aforesaid interval has been "presumed" by the law to have occurred. Thus, after all, Justice holds the scales—even if a little unevenly.

[21] Traité Clinique de Psychiatrie. Paris, 1897, p. 251. Traduit par Laurent.

[22] Chapter on "Periodical Insanity."

[23] Med. Jurisprudence as it Relates to Insanity.

as the law presumes in "lunatics." Dr. Benjamin Rush,[24] who had some leaning to the lunar theory, says, nevertheless, that the effect is slight. Dr. Powell[25] testified, in a noted English case, that there was no such thing as a "lucid interval." Spitzka,[26] speaking of the remissions in general paresis, calls them "para-lucid intervals;" thus indicating that they are not complete. This is a proper modification of the term, and would apply to most remissions in insanity.

444. The danger of the doctrine.—But, even granting that this discussion might degenerate into a quibble about words, the fact remains that the legal doctrine of "lucid intervals" is fraught with some grave risks in medical jurisprudence. The tendency has been to seize upon slight symptoms of a return to reason, and to claim them as evidence of "lucid intervals." This has been especially so in cases of disputed wills. Lord Eldon[27] was of opinion that the evidence of a lucid interval need not be as clear as the evidence of the insanity itself; in other words, in the case of a disputed will, he apparently held that a very slight degree of evidence of intelligence should be enough to establish a lucid interval sufficient for making a will, in the case of a man evidently insane. This seems, from a scientific standpoint, a dangerous doctrine; but it illustrates very well how arbitrary, and yet how fluctuating, is the legal definition. It is almost flatly contradicted by the opinion of Lord Brougham, quoted above.

445. Not a complete restoration.—A slight return of reason, a mere glimmer of intelligence, even the temporary power of sustained attention,—none of these, or similar evanescent signs of a remission, are sufficient, in a medical sense, to establish a complete restoration of the mind. And if a "lucid interval" does not indicate a complete restoration of the mind, it is a misnomer, and should be abandoned.[28]

[24] Dr. Rush was fond of novel ideas. He tells us (Diseases of the Mind, p. 170) that "during the eclipse of the sun on the 16th of June, 1806, there was a sudden and total silence in all the cells" in the Pennsylvania Hospital.

[25] *Re Parkinson*, Beck's Med. Jur. Vol. I. p. 368, note.

[26] Insanity, p. 193.

[27] *Re Parkinson*, quoted by Beck, op. cit.

[28] The subject was brought to a *reductio ad absurdum* in the case of *Weaver* v. *Weaver*, 28 Pitts. L. J. N. S. 367 (quoted by Pepper and Lewis, op. cit.) in which a note had been given by a party who was subsequently found by a commission de lunatico to have been insane during the period in which the note had been given, "with lucid intervals of such short duration as to render him incapable of taking care of his property;" and the testimony showed that the lunatic was insane "on every other day," and had executed the note on a "sane day;" yet, in this case, the court refused to open a judgment entered on the note. What would be thought of every-other-day insanity as a defense to the charge of murder?

CHAPTER XXVI.

INSANITY AND THE LAW.

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446. The first definition of insanity in the law.—Where and when was the first authoritative definition of insanity given in the English law? Neither Littleton, Coke, nor Hale gives anything but tradition, to which each author has added his own individual opinions. There is nothing in what they give that has the sanction of an act of Parliament or even of a decree of a court. Hence, it may be asked, why are their opinions so authoritative? Are Littleton, Coke, and Hale to be considered as giving exact voice to the common law in what they say on this subject, or only to their own opinions? It must be confessed that much of what they wrote looks suspiciously like their individual opinions. The common law is only traditional. Therefore, what evidence is there that Littleton, Coke, and Hale represent accurately traditional views on such an obscure subject as insanity,—a subject that was particularly obscure in the 15th, 16th, and 17th centuries, when those eminent lawyers wrote?

447. Crude ideas.—So far as we can know from historical sources, the prevalent views of insanity in those centuries were exceedingly crude. Insanity was believed to be due to a "visitation of God,"[1] or to witchcraft,[2] or to possession by a demon,[3] or to changes of the moon. This last opinion is expressly avowed by Hale in his discussion of "lucid intervals," and his belief in witchcraft was so firm that he is known to have condemned two women to death for it. Even phy-

[1] *Beverley's Case*, 4 Coke, 124.

[2] See instance in the Gospel of Mark, ix. 14–29, of a clear case of epilepsy, reported as a case of demon-possession.

[3] In the East such ideas still prevail. In a recent number of the Journ. of Ment. Sci. there is described the case of a madman in Jerusalem, chained to the altar of a Christian church, in the belief that he was possessed by a demon, which would thus be cast out of him.

sicians believed in witchcraft, for Sir Thomas Browne, the author of the Religio Medici, testified in open court to his belief.[3½]

448. Insanity in the Middle Ages.—According to Regis[4] the study of insanity during the Middle Ages was lost in the general chaos. It lost even the scientific aspect which it had presented in the time of Hippocrates, in ancient Greece. The belief in demons dominated all imaginations; superstition spread everywhere; it was the reign of sorcery; of the witches' Sabbath; of demonopathy; and of demoniacal possession. Terrible epidemics of religious insanity occurred, which led to priestly exorcisms and mystical ceremonies, and ended in the condemnation of the ill-fated insane, and their punishment by torture and death.[4½] Thousands of these unhappy wretches atoned with their lives for their loss of reason, and perished at the stake. Not a voice was raised in their behalf; the parliaments and courts were as bloodthirsty as the church; and it was not until the dawn of the renaissance that the human race seemed to regain its rea-

[3½] The recent proposal in England to raise a memorial to the author of the "Religio Medici" has roused the wrath of Dr. Conolly Norman, a well-known Irish alienist. Whatever claims Sir Thomas Browne has to the admiration of the literati as a great master of English prose, he has no claim whatever, says Dr. Norman, in effect, to the respect of the medical profession. He was not a great physician, since he was neither scientific nor humane. For proof of the first charge Dr. Norman refers to Browne's works; and for proof of the second, to Browne's action in the trial of the women Demy and Cullender, at Bury, in 1664, on the charge of causing fits in children by witchcraft. "Sir Thomas Browne, of Norwich, the famous physician of his time, was in court, and was desired by my lord, the chief baron, to give his judgment in the case, and he declared that he was clearly of opinion that the fits were natural, but heightened by the Devil, co-operating with the malice of the witches, at whose instance he did the villainies." Browne's great influence turned the jury, and the women were condemned. Belief of this sort in an educated man—a contemporary of Hobbes, Butler, and Locke—deprives him of the respect of men of science. Sir Thomas Browne is probably one of the most over-rated men in the history of medicine. See Journal of the Am. Med. Asso. Sept. 24, 1904, p. 903.

[4] Manuel Pratique de Médecine Mentale, Paris, 1885.

[4½] Lea (Superstition and Force, 3d ed. p. 496) shows that the panic about witchcraft had much to do with moulding the system of torture, which was so piously fostered by the Catholic Church. Augustin Nicolas, a judge in the time of Louis XIV., wrote condemning torture, and referred to "our iron stools, heated to redness, on which we place poor half-witted women accused of witchcraft, exhausted by frightful imprisonment, rotting from the dark and filthy dungeons, loaded with chains, fleshless and half-dead; and we pretend that the human frame can resist these devilish practices, and that the confessions which our wretched victims make of everything that may be charged against them are true." (Dissert. Mor. et Jurid. sur la Torture, pp. 36, 37.) Note that the author of this broadside was a contemporary of Lord Chief Justice Hale.

Lea (op. cit. pp. 484, 485) refers to a case of "lycanthropy" occurring in Westphalia, in which the victim was tortured twenty times. This refers to the superstition that certain persons could change themselves into wolves,—a medieval belief bound up with witchcraft, and probably responsible for the conviction and execution of certain kinds of lunatics.

See also Lecky, Rationalism in Europe, chapter on "Magic and Witchcraft."

son on the subject of insanity. But religious delusions continued until long after; and physicians and lawyers alike were slow to free their minds of this frightful demonomania. Calmeil[5] has preserved the history of this deplorable distemper of the human mind, which perverted the Christian church and poisoned the law with its baleful superstitions.[6]

If such were the personal beliefs of educated men, and even of judges, whose place it was to expound the law, what reason have we to maintain that the written legal opinions of such men as Hale were anything but their own personal superstitions, reflecting the gross errors of their times? And, in the absence of acts of the legislature, why must these personal opinions be taken to-day as authoritative, and as expressions of the common law?[6½]

[5] De la Folie, etc., Paris, 1845. See, also, Esquirol's chapter on "Demonomania," in his translated works. Phila. 1845.

[6] See James Russell Lowell's essay on "Witchcraft," in Among My Books, for an account of the damnable epidemic which began at Salem, Massachusetts, and prevailed among the New England Puritans.

Lord Chief Justice Holt (who succeeded Hale in 1689) was a most enlightened judge, and evidently not in favor of trials for witchcraft. "In none of the trials before him for this supposed crime was a conviction obtained, and prosecutions for it from his time fell into discredit, which was increased by his putting into the pillory one Hathaway, convicted of pretending to be bewitched by a poor woman whom he had recently indicted for the crime." Biographical Dictionary of the Judges of England, Foss.

Holt must have believed in the ninth commandment,—thou shalt not bear false witness against thy neighbor. In the Code of Hammurabi, King of Babylon (discovered in 1901, on a tablet, at Susa, and supposed to date back more than 2000 B. C.) it is prescribed: "If, in a lawsuit, anyone on the witness stand utters falsehoods and cannot support his testimony, he shall himself be punished with death if the life of another is involved." (Delitzsch, Babel and Bible, p. 101.)

Esquirol, in his essay on "Demonomania" (a very learned and entertaining work), tells us that the insane were used as oracles by so-called sorcerers; but his statement that Christianity introduced a reformation in the matter of witchcraft is not supported by the facts of history. Demonopathy is in evidence in almost every book of the New Testament, and the Gospel of St. Mark is particularly disfigured by it. It continued to be a part of Christian belief all through the middle ages, and even to this day it is not eradicated from the minds of some true believers. As late as 1894 a book on Demon Possession and Allied Themes was written by a missionary to China, Rev. John L. Nevius, who proclaimed his belief in the crudest kind of witchcraft.

[6½] Medical, as well as other, writers of the time of Coke and Hale, were completely deluded with the belief in witchcraft. Sir Thomas Browne has left an indelible stain upon his fame by a passage in his Religio Medici, and by his testifying against two old women. Burton, in his Anatomy of Melancholy, says of witches: "They can cause tempests . . . and, last of all, cure and cause most diseases to such as they hate, as this of melancholy among the rest." King James I. wrote a work on Demonologie (1597) in which he urged that the plea of insanity should be rejected in the courts for the reason that the witches are not to be regarded as mad; but most of the writings of this monarch are "studded with absurdities." But there was not the excuse for these writers that wiser heads had not yet been heard from. Reginald Scot, in 1584, had published a work (The Discovery of Witchcraft, etc.) in which he exposed the folly and imposition of witchcraft; and Johann

449. Tradition and common law.—The expression "common law" is made to cover many a hiatus by British jurists, just as the word "tradition" is made to stand for much that is more than doubtful in the church. It often means merely the personal opinion of the man who happens to be writing, or happens to occupy a conspicuous judicial position.[7] This is particularly true of the definitions of insanity, given by Coke and Hale. Their *non compos mentis,* "lunatic," "lucid intervals," and "partial insanity," even if not of their own coinage (for most of these terms were in general use in the "common law" before the times of these writers), were, nevertheless, defined by them in a strictly arbitrary way, and were not necessarily authoritative. Even if these writers did not coin them, some unknown writers before them did so. Up to their times, and even to our times, their origin was, and remains, unknown. They, and the ideas they convey, are like the "Torah" of Moses, as to which, nobody knows who wrote it, or just when.

450. Old and fanciful opinions.—In view of these facts, it is unreasonable to ask modern scientific writers to square their ideas with these old and fanciful opinions of Littleton, Coke, and Hale. It would be as consistent for a lawyer to try to conform modern life to the laws of Deuteronomy.[8]

Coke contends [9] that the English laws can be traced back to the year 1103 B. C.; and that they were copied from the laws of the Tro-

Wierus, on the Continent, had issued his work against witchcraft in 1579 (Histoires, Disputes, et Descources des Illusions et Impostures des Diables, des Magiciens Infames, Sorciers, etc.) It was indeed to combat the works of Scot and Wierus that James I. had issued his foolish diatribe, in which, with insensate cruelty, he says that the punishment of death "is commonly used by fire, but that it is an indifferent thing, to be used in every country, according to the law or custom thereof." It is thus that a King of England recommended the slaughter of the insane! See Tuke, History of the Insane in the British Isles, 1882, Chap. I., for not a little light on this dark subject. Also Lowell, Essay on Witchcraft, op. cit.

[7] "No general description can be given of what constitutes a 'book of authority.' It is a matter of judicial custom and professional tradition. We have already seen that being written by a judge does not make a book authoritative. Some books which are highly esteemed, and which it is not improper to cite in argument, are still short of having authority in the professional sense; Blackstone is the leading example. Sir Michael Foster's treatise on Crown Law, first published in 1762, only three years before Blackstone's Commentaries, is said to be the latest book to which authority in the exact sense can be ascribed."— Pollock, First Book of Jurisprudence, p. 236.

It can hardly be a matter of surprise that laymen, and especially scientists, should decline to accept as valuable the ancient opinions on insanity that rest on no better foundations than are indicated by Sir Frederick Pollock in the above passage.

[8] For an interesting account of the origin of Deuteronomy (one of the oldest codes extant), see Wellhausen's article on "The Pentateuch" in the British Encyclopedia; also Renan's History of the People of Israel. Renan thinks Deuteronomy was a Utopian scheme, devised by the priests, and never used as a practical rule of life.

[9] 3 Rep. Preface, "To the Reader."

jans about the time that Samuel was judge in Israel. They were, moreover, written in Greek by the Druids; but Coke says he will not examine these things in a quo warranto. The passage, however, reflects his historic sense, and what manner of critic he was in matters scientific.[10] It also shows what a tremendous task it might be, if Coke were correct, to search these scriptures for new light on the subject of insanity.

451. Very few old authorities.—The mass of legal literature in Britain and America is already great enough without going back to the times of Samuel or even to the Greek-speaking Druids. And yet the multitude of authorities, in the medical jurisprudence of insanity, is more apparent than real. The student cannot follow this subject far ere he discovers that all the courts and all the critics hark back to a very few old authorities. The standard ones run about as follows: Bracton, Littleton, Coke, Hale, Erskine, and the judges in the *M'Naghten Case*. In addition to these there are, of course, a large number of opinions by individual judges, but it is surprising to a scientific mind to note how little of originality the various courts have allowed themselves. The decisions of one court after another are much in the same line of thought, and even in the same or very similar language. Where variety of opinions occurs, there are too apt to be contradiction and confusion,—a disadvantage which has occurred not seldom on the subject of insanity in its legal aspects.

452. The writings of Bracton.—The name of Bracton stands near the head of the list of authorities in English law whom we can quote on insanity. And yet Bracton was not so much a "common-law" writer as he was a "civilian," or follower of the Roman law. He was Chief Justiciary in the Aula Regis, or highest court in the Kingdom, about 1265; and, as was usual in those times, he was a priest. There was every reason, therefore, as he was a Roman ecclesiastic, why he should have a partiality for the civil law, or law of the Roman Empire, and it is certain that he copied it. "When I rely on the authority of Bracton," says Sir William Jones,[11] "I am perfectly aware that he copied Justinian almost word for word." He probably belonged to that class of ecclesiastics to which Blackstone[12] refers; who, being the only educated persons in the realm, acquired almost exclusively the administration of the laws, and, despising the

[10] Sir Fitzjames Stephen (2 History Crim. Law, Chap. XXI. p. 206) says: "A more disorderly mind than Coke's . . . it would be impossible to find;" and, "The speculative parts of his writings are mostly puerile."

[11] Quoted by Bridgman, Legal Bibliography, p. 27.

[12] Introduction, Com. 18, 19, and 20.

native laws, desired to introduce those of the Romans. These facts suggest that, after all, much of the boasted "common law" of England was really derived at an early age from the Roman, or civil, law. Certainly Bracton's definition of insanity, as quoted by legal writers, has a terseness and crispness that is strongly suggestive of the old Latin way: *Furiosus non intelligit quod agit, et animo et ratione caret, et non multum distat a brutis,*[13]—an insane person is one who does not know what he is doing, and is lacking in mind and reason, and is not far removed from the brutes.

453. His influence has been long-continued.—This definition, compounded from Bracton, continues to this day to have influence in the courts, and the *dictum* that an insane man is one who does not know what he is doing has been pronounced in the United States in very recent years.[14] The statement, of course, is not correct. The insane, especially the criminal insane, know well enough what they are doing, unless they are dements or stuporous or maniacal lunatics. But such lunatics and dements do not commit crime. As for the "wild beast" theory of insanity, *i. e.,* that the insane are similar to brutes, it had a long course in the English law, and was exploited especially by Justice Tracy in the *Arnold Case.*[15] But the insane are not like brutes, except superficially; because underneath the deepest degradation of their insanity they have what no brute has,—a human mind. Bracton's idea of an insane patient was evidently limited to a furious or raving maniac. In this respect, too, he still has his followers. The idea that a man may have some intelligence and still be insane has evidently not dawned for all.

454. His dependence on the civil law.—As showing Bracton's leaning to the civil law, and the wisdom of the latter, Coke may be quoted. Coke[16] says that, according to the civil law, all acts which "ideots" or *non compotes mentis* do without their tutor are utterly void; and that some persons criticize the common law for not agreeing in this matter with the civil law. But others say that anciently the common law did agree with the civil law, as shown by Bracton,[17] who says: *Furiosus autem stipulari non potest, nec aliquod negotium agere, quia non in-*

[13] De Legibus et Consuetudinibus Angliæ, edited by Sir Travers Twiss, London, 1878, Lib. III. fol. 100, and Lib. V. fol. 420*b*. See the very learned introduction to this work for a statement of Bracton's obligations to the Roman, or civil, law, and the use of the civil law in England in the 13th century. This use was very extensive, and must greatly have affected the English common law. The definition as given in the text is in the form quoted by some legal writers, but it is really compounded of two separate statements by Bracton.

[14] *State* v. *Ducstrow*, 137 Mo. 69, 38 S. W. 554, 39 S. W. 266.

[15] *Rex* v. *Arnold*, 16 How. St. Tr. 695.

[16] *Beverley's Case*, 4 Coke, 124.

[17] De Legibus, Lib. III. fol. 100.

telligit quid agit,—an insane person cannot trade, nor transact any business, because he does not know what he is doing. But it is certain that Bracton got this from the Roman law; and it even reminds us of the very ancient law of the Twelve Tables,—"If any one becomes mad, or prodigal, and has nobody to take care of him, let a relation, or if he has none, a man of his own name, have the care of his person and estate."[18]

455. Justinian.—This is also prescribed in the Institutes of Justinian,[19] wherein it is said that curators, or guardians, of the insane are to be appointed *ex inquisitione,*—after due inquiry. Herein is indicated an ancient rule *de lunatico inquirendo.* But to show still more clearly how closely Bracton followed the civil law, it is only necessary to quote Justinian in one other place,[20] as follows: *Furiosus nullum negotium gerere potest, quia non intelligit quod agit,*—a madman can transact no business, because he does not know what he is doing. These are almost Bracton's exact words. Evidently the early "common law" on insanity, as written by Bracton, was only a transcript of the civil law.

456. Britton.—But the "wild beast" theory had other exemplars in those early days. Thus, Britton,[21] who dates back to the reign of Edward I., says that any child born a monster, "as one that has more than the proper number of members, as three hands or three feet, or a deficiency in the same, as no hands or no feet," cannot inherit; and such children are not to be "accounted as children, but as beasts and monsters." But Bracton, quoted by Nichols, modifies this harsh doctrine a little, for he says that an increase or decrease in the number of members, "not affecting the human form," as six or four fingers on one hand, does not affect a child's rights. At a still later age an idiot was not estimated by the number of his hands and feet, for Fitzherbert,[22] about 1535, defined an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father[23] or mother, nor how old he is, etc." But "if he know and understand his letters, and do read by teaching or information of another man, then it seemeth he is not a sot nor a natural idiot." But modern experience in the training of feeble-minded children proves conclusively that many of these patients can do all the things that Fitzherbert said they could not do, and many more besides.

[18] Tab. V. Law VI.

[19] Lib. I. title XXIII. § 3.

[20] Lib. III. title XX. § 8.

[21] 167*b*. English translation by Nichols. I am aware that, according to some authorities, Britton is identified with Bracton.

[22] Nat. Brev. 233.

[23] Shakespeare reversed this test, for he said, "It is a wise father that knows his own child." Merchant of Venice, II. 2, 81.

457. The statute De Prerogativâ Regis.—Long before Fitzherbert, however, an accurate view of idiocy had been taken in English law, and this condition had been clearly distinguished from insanity. This was first done in the written law in the statute De Prerogativâ Regis (17 Edw. II., A. D. 1342), although even before that time Britton[24] showed that the distinction was recognized. In this old statute the term *non compos mentis* was used to designate the insane as distinct from the idiot, and this term was evidently introduced from Justinian,[25]—another instance of the influence of the civil law. As this whole subject is explained elsewhere in this work,[26] it is enough here merely to say that the early law-makers saw clearly that an idiot, or, as they called him, a natural fool (*fatuus naturalis*), was one who was born so, being thus distinct from an insane person, or *non compos mentis,* who, having originally been endowed with intelligence, had lost this "by the visitation of God."

The next glimpse that we get of the state of the legal conscience on the subject of insanity is more than a century later; but this glimpse shows us that sundry ideas must have been evolving all the while, which it is now quite impossible, or, at least, unnecessary, to trace in detail.

458. Littleton, and the doctrine of non-stultification.—Littleton,[27] writing of Descents, refers to "a man which is of non sane memory, that is to say in Latine, *qui non est compos mentis;*" and then proceeds to explain the law relative to certain rights and liabilities of such a person in civil matters. For instance, he refers to the fact that a man was not allowed to plead he was insane, in civil matters, when property was in question, "for that no man of full age shall be received in any plea by the law to disable his owne person."[28] And then Littleton continues: "But the heir may well disable the person of his ancestor for his owne advantage in such case, . . . for that no laches may be adjudged by the law in him which hath no discretion in such case." This was an old principle (long since abandoned) in English law, that a man was not allowed to stultify himself, and therefore he could not plead his own insanity to annul his obligations; but his heir could do this, and thus maintain his own rights. For the heir had had "no discretion" in the matter, but the lunatic himself should have had more discretion than to become crazy. Such was the reasoning of the early English law on the subject of insanity.

[24] 167*b*.

[25] Institutes, Lib. II. title XII. § 1.

[26] Under the definition of *non compos mentis*, p. 482, *ante*.

[27] Co. Litt. Lib. III. Chap. VI. § 405.

[28] "Pur ceo que nul home de pleine age serra resceive en ascun plee per la ley a disabler le person demesne."

459. Why a man was not allowed to stultify himself.—It is easy enough to declaim against such fatuity as the above; but we can well afford to be content with the assurance of good authorities that such is no longer the law.[29] To a lay mind the principle involved seems to indicate the extreme suspicion that was held, even in those early days, of the plea of insanity, and the ease with which this plea could be abused. In an uncritical age, when the knowledge of insanity was of the crudest kind,—when, in fact, there could not be said to be a science of psychiatry,—such suspicion was not unnatural or unwarranted. There were no scientific criteria by which to go; and, on the other hand, there were the rights of property to be guarded. What was more natural than for the law to resent the idea that a man was to be allowed to come into court and plead, in avoidance of his obligations, that he had been suffering with a malady which no one in those days knew much about? If a more enlightened age cannot tolerate such a law, this is largely for the reason that the knowledge of insanity has immensely advanced, and it is now possible to secure for this disease more reasonable consideration in our courts. But the attitude of the law in this matter in former days was no more irrational than the attitude of the church, or even of the medical profession; for the church believed that insanity was due to possession by demons, and the medical profession that it was a fault that could be scourged out of a man, or for which he should be kept in chains.[29½]

460. Coke and the Beverley Case.—Coke says of Littleton's book: "This book is the ornament of the common law, and the most perfect and absolute work that ever was written in any human science." This is high praise, and imports that, in Coke's judgment, such a book contained the acme of wisdom; therefore, Coke must have approved of the doctrine of non-stultification. That he did so, and that this doctrine was good law in those days, is set forth in his report of *Beverley's Case*.[30] This case is a landmark in the medical jurisprudence of insanity, for in it Coke has condensed much law which he had gathered from old law-reports on this subject. It has to do in detail with questions of the legal rights and liabilities of *non compotes mentis* (a term for the insane which is used all through it); more especially with reference to their civil rights in matters of property. It is quaint, technical, and, to a lay reader, obscure; and, I imagine, some of it is rather antiquated law now-a-days; but it doubtless re-

[29] 2 Bl. Com. 292.

[29½] Tuke, History of the Insane in the British Isles, 1882, Chaps. I. and II.

[30] 4 Coke, 124. Coke enjoys the distinction of having his works quoted in legal writings without his name,—a dubious honor, and one which is not ventured on in these pages.

flects the law and the ideas of those times: hence, its interest and value.

461. Insanity and high treason.—In addition to the doctrine of non-stultification, Coke expounds another legal notion in *Beverley's Case,* which is equally extraordinary. He observes that *"non compos mentis* may commit high treason; as, if he kills or offers to kill the King;"[31] for the King *est caput et salus reipublicæ, et a capite bona valetudo transit in omnes* [for the King is the head and safety of the state, and from the head good health is transmitted to all]; and for this reason their persons are so sacred that none can offer them any violence; but he is *reus criminis læsæ majestatis, et pereat unus ne pereant omnes* [guilty of the crime of laese majestie, and let one die lest all perish]."

This practically means that, although an insane man is not to be held guilty of criminal offenses, yet an exception arises in the case of his killing or attempting to kill the King, for the reasons given. And those reasons have nothing whatever to do with the question of insanity, but are based entirely on the sacredness of the persons of kings. This doctrine, even more than the doctrine of non-stultification, shows clearly how incapable our legal ancestors often were of grasping accurate ideas of insanity. A man could be insane on every other subject, but let him beware how he lost his reason on the subject of the personal comfort of kings.[32] This was considered such sound doctrine that even after Coke's time it was approved by Lord Chief Justice Hale,[33] who said: "This is a safe exception, and I shall not question it, because it tends so much to the safety of the King's person."[34]

462. The early prejudice against the insane regicide.—There is seen in this doctrine a tendency, still very common, to regard regicide as a crime that puts a man almost or quite outside the pale of law, and one for which even insanity is no excuse. In fact, even to this day, there is no crime for which the plea of insanity is so unpopular, and so dif-

[31] "Mes in aseun cases non compos mentis poit committe hault treason, come si il tua, ou offer a tuer le roy."

[32] Coke gives a later, fuller, and more rational statement (3 Inst. 4) about the law of treason in reference to the insane, and says that *non compos mentis* is not within the statute against treason, for the principal end of punishment is that others, by example, may fear to offend (*ut poena ad paucos, metus ad omnes perveniat*); but such punishment can be no example to madmen. He also says distinctly (3 Inst. 6) that *non compos mentis* cannot commit high treason, but it must be "absolute madness" and a "total deprivation of memory."

[33] 1 P. C. Chap. IV. p. 37.

[34] This was a safe conclusion on the part of a chief justice who, having originally taken his seat under Cromwell's government (which had cut off a king's head), was probably desirous of keeping his place upon the accession of Charles II., even by sentencing, if necessary, every madman in the realm.

ficult to obtain a dispassionate hearing for, as the assassination of a president or a king. Therefore, this enunciation by Coke of the doctrine that insanity is no defense for the crime of "laese magestie" is of interest as showing how deep-rooted such ideas are in Anglo-American law. A criticism of such a doctrine is scarcely necessary. The mere bald statement of it, as made by Coke, carries its own condemnation; for, as seen in its naked ugliness, it is wholly repugnant to reason and to justice. The heat of popular passion and the desire of official vengeance, as shown, for instance, in the cases of Damiens,[35] Bellingham,[35½] and Guiteau, merely reflect that disposition to ignore evidence, or to railroad a man to his doom, which finds expression in the doctrine set forth by Coke.[36]

463. Coke's attempts at a classification of insanity.—It is the chief merit of Sir Edward Coke that he was the first writer on English law who attempted anything like a scientific treatment of the subject of insanity. He essayed both to define and to classify insanity, and his influence in this way has been very great. In commenting on the passage in Littleton, quoted above, he says: "Here Littleton explaineth a man of no sound memorie to be *non compos mentis*. Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legal."[37]

Coke thus adopted the old Latin term for insanity, which had originally been taken by the early English civilians from the Institutes of Justinian;[38] and he showed that he had a more just appreciation of its meaning than some subsequent writers, for he attempted to make nothing special or distinct out of it, but merely used it as a generic term for all forms of insanity. This is shown conclusively in the way he used it in his scheme of classification.

464. His scheme of classification.—This was as follows: "*Non*

[35] Damiens did not succeed in his attempt to assassinate Louis XV., whom he "wounded slightly under the fifth rib" (Carlyle); but he was executed, according to some accounts, with great barbarity. For a reference to his case, see the American Journal of Insanity, III., p. 185.

[35½] Bellingham, to be sure, was not a regicide, but he assassinated a high officer of state,—an offense which is nearly identified in the popular mind with the crime of killing the head of the state himself.

[36] This spirit of undiscriminating vengeance in the old English law against treason was shown in the statute 33 Hen. VIII. chap. 20, which provided that if a person being "of good, perfect, and whole memory" should commit high treason, and afterwards fall into madness, he might be tried in his absence, and executed as if he were sane. This law was repealed by 1 and 2 Phil. and Mary, chap. 10. See Coke, 3 Inst. 4 and 6; 1 Hale, P. C. 34; and Blackstone, 4 Com. 25. Coke well says that such an execution of a madman would be "a miserable spectacle;" and Blackstone calls it a "savage and inhuman law." The statute is given in full by Collinson, 2 Lunacy, 105.

[37] 2 Litt. 246.

[38] Lib. II. title XII. § 1.

compos mentis is of four sorts: 1. Ideota, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis* and therefore he is called *non compos mentis* so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himself of his memorie and understanding, as he that is drunken. But that kinde of *non compos mentis* shall give no privilege or benefit to him or to his heires."[39] The rest of the passage in Coke refers to the rights of property, and is expressed in a very technical way.

465. Coke's distinction between civil and criminal insanity.—After expounding why and how a *non compos mentis* shall not be allowed to "disable himself" (or stultify himself by proving himself insane) in civil matters, Coke goes on to say:

"But this holdeth only in civil causes; for in criminal causes, as felonie, &c., the act and wrong of a madman shall not bee imputed to him, for that in those causes *actus non facit reum, nisi mens sit rea* [the act does not make the criminal unless the mind, or intention, is criminal]; and he is *amens* (*id est*) *sine mente*,—without his minde or discretion; and *furiosus solo furore punitur*,—a madman is only punished by his madnesse."

This passage is most significant, for it is not only a noble statement of the irresponsibility of the insane, but it is also a very early, if not the earliest, attempt in English law to make a distinction between the civil and criminal liabilities of the insane. Such attempts, as will be shown later in these pages, were not uncommon in after years; but the attempt of Coke differed from those that appeared later, for Coke showed a greater leniency towards the insane in criminal than in civil matters; whereas with later writers it was just the reverse. This fact seems to have escaped the critics. It is not only to the credit of Coke, but it shows that the later dogma was not inherent in the common law, but was an afterthought.

466. Coke's scheme is noteworthy.—Coke's classification is noteworthy on several accounts. As already said, it was the first attempt by any English jurist. It showed a comprehensive view of the subject, and was scientific in the sense that it included idiocy; for, in a strictly scientific sense, idiocy is a form of insanity. It was exceedingly simple, and although it is not of much present value, it was sufficient for all legal purposes. It included alcoholism, but with a saving clause which long stood in law, but which has gradually yielded to some im-

[39] 2 Litt. 247*a*.

portant exceptions, for alcoholic insanity is now recognized in the courts. It did not attempt any super-refinements in defining terms, such as *non compos mentis,* but took this latter term (which was afterwards much abused) at its simple and obvious meaning; namely, as a generic term to include all forms of mental disease. It showed some rational insight into the causation of insanity, as in the second group, wherein "sickness, grief, and accident" are named as etiological factors. Finally, it presented one great fault; namely, the recognition of lunacy as a distinct form of insanity, and the description of it as being characterized by "lucid intervals."

467. His ideas of lunacy.—This subject of "lunacy" and "lucid intervals" is criticized at length elsewhere in these pages.[40] It is sufficient here to point out that Coke seems to have been the first writer to erect this purely artificial conception as a legal entity, and to attempt to give it an objective existence. There is no such thing in actual insanity as the "lunatic" of Coke, if by that term is meant a distinct clinical form, and if that clinical form is always characterized by "lucid intervals." Science knows no such clinical form. Therefore, the separation of "lunatics" from patients who become insane from "sickness, grief, or other accident," is entirely arbitrary and unscientific. Moreover, the subject is of more than academic interest, because, as shown elsewhere, the creation of this artificial "lunatic," with his "lucid intervals," led to great confusion among English and American jurists.

468. The writings of Hale.—Sir Matthew Hale, Lord Chief Justice of the King's bench (1671–1676), was the next writer of English law who left an indelible stamp on the medical jurisprudence of insanity. His influence has been even greater than that of Coke, whom, however, he followed in many of his ideas. Like Coke, he treated the subject of insanity with some attempt at system, and gave the topic a form which it retains in law even to this day.

469. His definitions.—Hale[41] divided the subject as follows:

"1. Idiocy, or fatuity *a nativitate vel dementia naturalis;* such a one is described by Fitzherbert, who knows not to tell 20 shillings, nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no idiot. Fitzherbert, Nat. Brev. 233*b*. These, though they may be evidences, yet they are too narrow, and conclude not always, for idiocy or not is a question of fact, triable by jury, and sometimes by inspection.

[40] See articles on *Non Compos Mentis*, "Lucid Intervals," and "Lunatic."

[41] 1 P. C. 1st Am. ed. Phila. 1847, Chap. IV.

"2. *Dementia accidentalis vel adventitia,* which proceeds from several causes; sometimes from the distemper of the humours of the body, as deep melancholy, or adust choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which, as to the purpose in hand, may be thus distributed: 1. There is a partial insanity of mind; and 2, a total insanity."

The former is of those persons who "have a competent use of reason in respect of some subjects," but yet are "under a particular dementia in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offense for its matter capital." He acknowledges that it is very difficult to define the invisible line that divides perfect and partial insanity, and it must be decided by judge and jury. He proposes as a test, "such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."

He recognizes Coke's absolute madness, or "total deprivation of sense" as the same thing that is indicated by his own term "total" madness. Hale then makes his distinction between permanent madness and "that which is interpolated, and by certain periods and vicissitudes." This latter affection is lunacy,—so called from the moon.

"For the moon hath a great influence in all diseases of the brain, especially in this kind of dementia: such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper; and therefore crimes committed by them in such their distempers are under the same judgment as those whereof we have before spoken, namely, according to the measure or degree of their distemper; the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty as if he were mad without intermission. But such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no such deficiency . . ."

Finally, Hale recognizes:

"3. *Dementia affectata,* or drunkenness;" of which he says that "by the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."

470. Hale on tests for insanity.—In criticizing Sir Matthew Hale's psychiatry, the first thing that strikes us is the fact that he discusses the subject of tests for insanity. In fact, if we except Fitzherbert and his test for idiocy, Hale was the first legal writer to give this subject of tests any prominence, and he is therefore the pioneer in this department of medical jurisprudence. And it is noteworthy, in the first place, that he demolishes Fitzherbert's test with a criticism that goes to the root of the whole matter; and one, moreover, that has been applied by a few later judges to demolish all such tests whatsoever. Fitzherbert had said that an idiot was one who could not tell 20 pence,[42] or who was his father and mother, and other such commonplace matters; but Hale says: "These, though they may be evidences, yet they are too narrow, and conclude not always, for idiocy or not is a fact triable by jury, and sometimes by inspection." This is a most important statement by Lord Chief Justice Hale, and has not been duly apprehended by most later writers. It is practically a condemnation of all juridical tests for insanity, and clearly means that such questions are matters of fact, to be determined by a jury on the evidence, and not according to the *dictum* of the court. This is identically the position taken by some of the more advanced American judges,[43] and it is extraordinary to a medical reader that so many judges, both in England and America, who have relied so largely on Hale, have entirely ignored this fundamental statement. If idiocy is a fact triable by jury, so is insanity; and juries are sworn to try questions of fact according to the sworn evidence, and not according to tests promulgated by the judges, who are not on their oaths to give testimony as experts.

471. His own test.—But Hale himself did not see the full import of his own criticism, for he proceeds shortly to give a test of his own; and this was the first test for insanity, so far as appears, ever given in English law, just as Fitzherbert's was the first test for idiocy. According to Hale the proper test would be: "Such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person

[42] Hale quotes 20 shillings, according to the American edition of his work; but the original of Fitzherbert is "pence."

[43] Especially by Judge Doe, of New Hampshire, in the case of *Boardman* v. *Woodman*, 47 N. H. 120. The subject is discussed in the present work under the head of "The Rules in the M'Naghten Case."

as may be guilty of treason or felony." That is to say, having just condemned Fitzherbert's 20-pennies test, he proposes the fourteen-year-old-child test. It is needless to insist that the one is no better than the other, for both are of the same caliber and equally trivial. The fact that a learned writer, accustomed to close and accurate thinking on legal subjects, such as Lord Chief Justice Hale unquestionably was, could reject one of these tests and then propose the other, is a curious evidence of the loose thinking that prevailed in those days on the subject of mental disease.

That the understanding of a healthy child, fourteen years old, has no resemblance whatever to the various forms of insanity in adults, is a fact in mental pathology so obvious that it hardly needs to be inculcated to-day, even for the benefit of non-medical readers.

472. Hale's "partial" insanity and "total" insanity.—Hale's celebrated division—"partial insanity" and "total insanity"—has been much followed in courts of law, but both terms are misleading. When he wrote of partial insanity, Hale evidently had in mind those persons who labor under depressive or delusional ideas; for he says of them that "they are under a particular dementia in respect of some particular discourses, subjects, or applications;" and again, that they "are not wholly destitute of the use of reason." This description applies only to patients with delusions, more or less systematized and fixed: hence, to melancholiacs, and especially to paranoiacs. Now these are the very patients who are the most apt to furnish examples of the criminal insane; and yet, so oblivious of this fact was Hale, that he expressly says that this "partial insanity seems not to excuse them in the committing of any offense in its matter capital." Here, with one sweeping sentence, whose true import it may be doubted whether he understood, Hale excludes from all leniency the vast majority of the criminal insane. Nothing that Sir Mathew Hale wrote on the subject of insanity has had such an injurious influence as these words. They have constantly supported the contention that the delusional lunatic, inasmuch as he can reason correctly on most topics, is to be held responsible; and they found their ultimate interpretation in the rules in the *M'Naghten Case,* nearly two hundred years later; namely, that a knowledge of right and wrong (which is among the most elementary of human concepts) is sufficient to establish a man's responsibility; and that a delusion only excuses in case a man acts in direct response to it, and then acts consistently with the law. All the later controversies about "delusions" and "monomania" (that impossible insanity of "one idea") can be traced more or less directly to Hale's definition.

473. What is "partial" insanity?—Few legal writers seem to care to analyze what is meant, or can be meant, by a partial insanity. If the words are taken strictly, they must include almost all the insane; for there are few, if any, insane persons who have not some use of their minds. Only the most advanced dements or the most furious maniacs can be placed in a class of patients who have no glimmer of reason, no use of their senses, no power of memory, no play of emotion, however slight; and even of these extreme cases such absolute negation of all normal mentality can hardly be affirmed. On the other hand, it is not more reasonable to say that a paranoiac or a melancholiac is only partially insane than to say that a patient with typhoid fever is only partially ill because, perchance, his heart or his kidneys may be sound; or to say that a patient with cirrhosis of the liver is only partially sick because his brain or his knee-joints are not affected by the disease.

474. And "total" insanity?—This same argument applies, of course, *per contra,* to the idea of a total insanity. Is there ever such a thing as a total insanity? Does the term not mean the absolute extinction of every mental function, every perception, every sensation, every impulse, every mental reflex whatsoever? Is such a form, such a complete blank or night of the mind, ever conceivable? The answer must be that such a total extinction of mentality occurs only in the most advanced dements; and such dements are never the objects of medico-legal inquiry, because they have not sufficient mental power to commit an act in its nature purposive.

475. The terms criticized.—The truth is that the terms "partial" and "total" are not applicable as descriptive terms of insanity, and are not used as such by many scientific alienists. The attempt to analyze these terms involves us at once in mere verbal refinements or quibbles. All diseases exist in various degrees, but this is not the same thing practically as total or partial. This is seen if we take the case of any other disease than insanity,—a fever, for instance. One patient may have a mild, another a severe, grade of typhoid fever; but surely no pathologist would say of the one that he had a partial, and of the other that he had a total, attack. The same is true of insanity. Is a patient with a mild mania only partially insane? and, if so, who will assume to say at what stage he passes the boundary line into a total mania? Lord Lyndhurst[44] said, in *Dew* v. *Clarke,* that

[44] 5 Russ. Ch. 166–168. Lord Lyndhurst's exact words were: A person could not be partially insane and sane at the same moment of time; to be sane the mind must be perfectly sound; otherwise it is unsound.

It may be worth while to state, in passing, that Lord Lyndhurst was of

if a man be partially impaired in his mind he is *non compos mentis;* for certainly a man who is partially insane is not of sound mind,—a criticism which is invincible, and which strikes the very foundations out from under Sir Matthew Hale's mental pathology.

When Hale leads us to infer that only those patients who are totally insane are exempt from punishment, he ignores his own cautious rule, wherein he lays it down that "it is very difficult to define the invisible line that divides perfect and partial insanity." It is indeed difficult, and more than difficult, for it is impossible.

476. Hale's erroneous definition of a lunatic.—Of Sir Matthew Hale, it merely remains to say that his definition of a "lunatic," in which he follows and elaborates the ideas of Coke, did more than aught else to fix that erroneous conception in English law; but as the subject is of special importance, it is discussed in detail elsewhere in these pages.[45]

477. Hawkins and the right-and-wrong test.—The next writer of importance was Mr. Hawkins;[46] and he is noteworthy for a single contribution to this subject. He uses the expression "those who are under a natural disability of distinguishing between good and evil" as descriptive of infants, idiots, and lunatics. This seems to be the first occurrence in English law of the celebrated test of "a knowledge of right and wrong." Whether it was original with Mr. Hawkins does not appear from anything he says, but he announces it as such a matter of fact that it seems highly probable that the idea had already taken root. At any rate, there is no explanation of the term given by him. It springs ready-made from his pen, assumes its place without comment, and begins in his pages its long career in English and American law. There is no hint of this doctrine in either Coke or Hale, both of whom evidently regarded insanity as an affection of the understanding, the memory, and the emotions. The idea of a test based upon the state of the moral faculty alone was entirely foreign to those two eminent jurists. If Hawkins borrowed it, its source is not apparent; but it may have crept into the usage of some of the courts about or a little before his time. He wrote early in the 18th century. As a "common-law" doctrine, therefore, this has no great antiquity.[47]

American birth, having been born in Boston, and was the son of the artist Copley. "His life has been written by Lord Campbell, and fully justified what he himself said when he heard that it was contemplated, that the prospect added another pang to death."—Ballantine, Experiences of a Barrister, p. 123.

[45] See the article on *Non Compos Mentis*, page 482, *ante*, and "Lucid Intervals," page 496, *ante*.

[46] 1 P. C. edited by Curwood, London, 1824, Chap. I.

[47] The expression—knowledge of good and evil—is used by Hale (1 P. C. 26) in reference to "infants;" but I have found no instance in which he uses this test for insanity. Some of the ideas originally held in law about "infants"

An erroneous opinion about insanity does not gain truth by being repeated from many different benches, but from this time onwards the doctrine of a knowledge of right and wrong assumes an importance in all courts which the students of medical jurisprudence cannot ignore. For jurists it becomes an "open sesame" to unlock the mysteries of the insane mind; but for medical experts it is only the *casus belli* of many a hard-fought field. With the *début* of this doctrine, we unfortunately enter into the broad domain of controversy.[48]

478. The laws of insanity as made by the judges.—We enter, also, the era of case reports; or, as some persons have called it, the period of "judge-made law." From now on the doctrines of insanity are the doctrines of the judges. They are not formulated in conventions nor enacted in legislatures; they are not even elaborated by special students or by plodding text-book writers; but they are pronounced by the judges from the bench; and this not in any concert, but individually, each judge stating his own concept of the law and his own definition of insanity. There has thus arisen confusion, even contradiction; but this could not be otherwise, because, as must be evident from what goes before, the common law was practically mute with reference to any scientific and unanimous definition of insanity. Hence, all was left to the judges; and we have yet to see any authoritative writer who will claim for their pronouncements on the nature of insanity the sanction of either the common or the statute law.[49]

But the early cases were not numerous, and we can pass from one to another as on stepping-stones over a somewhat troubled stream.

479. The Arnold Case.—In 1724 occurred the trial of Edward Arnold[50] for shooting at Lord Onslow,—an act which had evidently been inspired by an insane delusion. In charging the jury Justice Tracy said that the point was whether the man had the use of his reason,—whether he was under the visitation of God, and could not distinguish

seem gradually to have been applied to the insane. This is probably so of the "knowledge of good and evil;" and it is evidently so of Hale's fourteen-year-old-child test; for this was doubtless suggested to Hale by the fact that the civil law fixed the age of responsibility for crimes at fourteen years, and it is the "age of discretion" in English law, which here, as so often, follows the Roman law. See Hale, 1 P. C. 17 and 18.

[48] For an instance of the working of this test against an insane man, see *Reg.* v. *Higginson*, 1 Car. & K. 129.

[49] See Sir Fitzjames Stephens' History Crim. Law. This idea is discussed by him at length in his Chap. XIX. I am content to fall back on such an authority.

Lord Denman, in *Reg.* v. *Oxford* (9 Car. & P. 525), said that a precedent for a rule (or test) could not be found. His language clearly implied the opinion that there was no fixed rule of law as a test for insanity.

[50] 16 How. St. Tr. 695. Arnold was convicted, but his sentence was commuted at the request of Lord Onslow himself. He died in an asylum many years later.

between good and evil and did not know what he did. "If the man be deprived of his reason, and consequently of his intention, he cannot be guilty. . . . The punishment of a madman, a person that hath no design, can have no example. . . . It is not every kind of a frantic humor or something unaccountable in a man's actions that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment."

480. The wild-beast theory.—This definition shows the influence of the civil, or Roman, law all through it: a madman is one who does not know what he is doing (*non intelligit quod agit,* as Justinian has it);[51] but it specializes in a way that the Roman law did not, for it narrows the test down to a knowledge of right and wrong. As for the rest of the charge, there are no insane persons who are "totally deprived of understanding and memory" (if those terms are to be taken literally), unless it be in the lowest forms of dementia or the worst types of raving mania; and such madmen are practically never the objects of medico-legal inquiry. They do not commit crime, for they have not the capacity to intend or to accomplish anything; but delusional lunatics (paranoiacs), who form the great bulk of the criminal insane, are in a very different class, and they can never be included in such a definition as given by Justice Tracy. These "lunatics" are never "totally deprived of understanding and memory;" they are never at the intellectual level of "an infant, a brute, or a wild beast." Nevertheless they may be very insane, just as Arnold was, and properly exempt from punishment. Moreover, the mind of an infant is not like the mind of a wild beast, nor is either of these like the mind of a madman. Such psychology is primitive and crude, but it reflects Hale's fourteen-year-old-child test[52] and the "wild beast" theory of the Roman law and of Bracton.[53] The trouble with Justice Tracy's definition is, that it does not define anything that is recognizable in mental pathology. It is as though a judge, in a case involving the tests for arsenic, should lay down rules drawn from his own imagination as to what arsenic should and should not do. But if Justice Tracy is open to criticism, he is also entitled to the credit of having expressed one of the noblest sentiments ever given from the bench,

[51] Lib. III. Title XX. § 8.
[52] 1 P. C. Chap. IV.
[53] De Legibus, Lib. II. fol. 100, and Lib. V. fol. 420*b*.

for he said that "the punishment of a madman can have no example."[54]

481. The case of Earl Ferrers; an insane man forced to conduct his own defense.—The trial of Earl Ferrers,[55] in 1760, for the murder of his steward, Mr. Johnson, is noteworthy for the fact that the accused, according to the former usage of the English common law,[56] was not allowed counsel. The Earl was tried by his peers in the House of Lords; and the trial exhibited the extraordinary spectacle of a man in jeopardy of his life, trying to prove himself insane by the acumen with which he examined and cross-examined the witnesses! Surely, the inconsistencies of the English law on the subject of criminal lunacy were never shown in such an unfavorable light as in this case. The prisoner, in order to prove that he was insane, was obliged to reveal the fact that he had sufficient reason to conduct his own defense. This he did—for it was his only chance—with some show of coherence and insight; and this very fact was then seized upon by the Solicitor-General to prove that the man was sane. In other words, his predicament was such that the more he tried to prove by witnesses that he was insane, the more he proved, by his own display of logic, that he was not insane. Never was a man placed between the two horns of such a dilemma. It would be hard to say whether the trial had more the elements of a tragedy or of a farce; but the Earl was hanged[57] in spite of the fact that insanity had prevailed in his family and that he himself was probably suffering with chronic alcoholism when he shot his man. It is sufficient to say that the English law has since been changed, and prisoners on trial for their lives are now allowed counsel; and that such a trial of an insane person has never taken place in America since the adoption of our Constitution.[57½]

482. The right-and-wrong test fully started.—In *Earl Ferrers' Case* the test of the knowledge of right and wrong was insisted on by the Solicitor-General in his speech for the Crown; it may therefore be assumed that by this time this test, which had first been formulated

[54] This may have been suggested by Coke, who said (3 Inst. 4): "Punishment can be no example to madmen." The ideas are not the same, but one may have suggested the other.

[55] 19 How. St. Tr. 886.

[56] 4 Bl. Com. 355.

[57] Earl Ferrers went to his execution in a coach-and-six, followed by a hearse-and-six, and attended with more state than an American president, going to his inauguration. A highly diverting account of it is given by Howell in his State Trials. Just before the Earl was swung off a violent squabble took place between the executioner and his assistant, on the scaffold, over 5 guineas which the condemned man had just given them.

[57½] *Earl Ferrers' Case* made Henley, who presided as Lord High Steward at the trial, a peer. He had been simply Lord Keeper, not Lord Chancellor, and it was thought necessary to increase his rank for the occasion. He was charged by Walpole with lack of dignity during the trial. See details in Eden's Chancery Reports, Vol. I. pp. 21, 22.

in Hawkins' text-book, as above stated, had come to be generally recognized as legal; and, in fact, from this time on this test seldom fails to appear in criminal cases involving the question of insanity. And this it is, more than any other one thing, that has enabled a legal writer[58] to say: "The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals." This is a heavy responsibility for one doctrine to bear, and Mr. Bishop's indictment of the law is a severe one,—too severe to have been quoted here if it had not been the expression of a legal writer. It is not too much to say that the doctrine of the knowledge of right and wrong, the origin of which has just been traced, is the cardinal doctrine of Anglo-American jurisprudence of insanity: it is the one contribution to the science of psychiatry which legal pundits have made with anything like unanimity. This is true also of Scotland; for Allison,[59] writing of Scotch law, says: "To amount to a complete bar of punishment . . . the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, as applied to the act in question, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, in his own case, and to know that he was doing wrong in the act which he committed, he is liable to the full punishments of his criminal acts."

So well has this doctrine been established since the trials of Arnold and Earl Ferrers, that the subsequent history of criminal lunacy resolves itself largely into a repetition of it, or into the attempts of courts to give varied expression to it.[60] To repeat all the cases would be superfluous and wearisome.

483. This test not satisfactory to all legal minds.—But while this is so, all the best legal minds have not given unqualified assent to this doctrine; and this has been especially so in the cases of advocates at the bar, who have felt how unjustly the test bore against their clients. While there has been practical agreement on the bench, there has not been agreement at the bar. It remained for the subtle mind of Erskine to voice this dissent, and to give expression to a new test of insanity,—the test of delusion.

[58] Bishop, Crim. Law, § 390.

[59] Principles of the Criminal Law of Scotland, p. 654.

[60] Thus a recent legal writer—Becker (Med. Jurisp. For. Med. and Tox.)—claims that this test is still the one by which criminal cases must be decided, and that the English and American courts still adhere to it. He also says it is a good rule, and avoids "confusion and metaphysics." As to "avoiding metaphysics," no rule can avoid metaphysics if judges and doctors want to indulge in metaphysics. The "right and wrong" rule is essentially metaphysical, and prolific of metaphysical refinements.

484. Erskine and the case of Hadfield.—The celebrated case in which Erskine succeeded in establishing a new test for insanity was that of James Hadfield, who was tried in the court of King's bench, in April, 1800, for shooting at George III., in Drury Lane theater.[61] Hadfield had been a soldier, and had received many wounds in battle, as a result of which he had become a victim of delusional insanity. He seems to have conceived the delusion that he was commanded by heaven to sacrifice himself, and to shoot at the King in order to attain to a sort of martyrdom.[62] From the standpoint of modern psychiatry the case is simple enough, and need not be repeated in detail here, for it is given in full in Erskine's speech. The man was unquestionably insane. The problem that confronted Erskine was to establish the fact of insanity in the face of the definitions of Coke and Hale, and of the right and wrong test; and this he did by placing his argument squarely on the ground of delusional insanity. Nothing like this had ever before been attempted in an English court, and the champions of the common law will search in vain for any warrant for it in that ancient system. The whole scheme was Erskine's, and remains Erskine's to this day.

485. The test of delusion.—Erskine's thesis, in brief, was that delusion was the proper and only test of criminal insanity. "Delusion," he says, "where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death, for a crime, he ought not to be acquitted." This was his whole proposition, and in order to establish it he maintained several minor points. In the first place, he held that the act must be the direct outcome of the delusion,—a contention which has since been much insisted on in the courts. He must convince the jury, he said, "that the act in question was the immediate, unqualified offspring of the disease."

486. Erskine's distinction between civil and criminal cases.—In the second place, Erskine drew the distinction between civil and criminal insanity,—a distinction which was not original with him, for it was clearly stated, as above shown, by Coke.[63] The defender of Hadfield held that in civil cases the law avoids the act of a man *non compos mentis,* even though that act cannot be connected with the delusion; but he was by no means prepared to apply this rule to criminal cases. Thus Erskine differed with Coke, for the latter extended more le-

[61] 27 How. St. Tr. 1281.

[62] It is doubtful whether Hadfield intended to kill the King. He wished to make sure of his own execution, and he knew perfectly that under the English law he would be hanged for the attempt the same as for the assassination itself. This was a fine instance of exact knowledge and logic in an insane man.

[63] 2 Litt. 247*a*.

niency to the insane in criminal than in civil matters. This discrepancy has not been sufficiently noted by the courts, most of which have followed Erskine.[64] In the third place, Erskine's claim for delusion as the only safe test was directly against Hale's statements about partial insanity. By this term Hale[65] had clearly indicated delusional insanity, and he had stated explicitly that such partial insanity is no excuse for capital crimes. The two positions are diametrically opposed to each other.

487. The right-and-wrong test without authority.—In the fourth place Erskine rejected the right-and-wrong test "as too general a description." He did this without any apparent consciousness that this test had the sanction of law. His common sense would simply have none of it; and he cast it aside as he would scarcely have done in the case of an accepted principle of law. He even claimed, and claimed correctly, that there was no warrant for this doctrine in the authorities cited by the Attorney General, which authorities were Coke and Hale. This is one of the most significant features of Erskine's speech; and his rejection, unchallenged, of this test, is one of the strongest arguments that can be brought against its validity at that date. It played no part in Hadfield's acquittal.

488. No such thing as "total" madness.—Finally, Erskine demolished the claim that an insane criminal must be "totally deprived of memory and understanding," as Coke and Hale had described him. "No such madness ever existed in the world," he said, with sweeping emphasis. "In all the cases which have filled Westminster Hall," he declared, "they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness." This remarkable sentence, so profoundly accurate, marks Erskine as no mean psychiatrist in an age when that science had not yet penetrated into the courts.

489. The importance of Erskine's speech.—The most noteworthy thing about Erskine's speech is the place which it immediately took, and has ever since held, in English jurisprudence. At the present day it would not be considered an extraordinary speech, for it deals largely in what are now regarded as truisms; but in its own day it was epochal. It established firmly in the legal conscience of England and America the idea that delusion is a safe test for insanity, and it thus

[64] For some American cases see *State* v. *Spencer*, 21 N. J. L. 196; *McTaggart* v. *Thompson*, 14 Pa. 149; *Com.* v. *Mosler*, 4 Pa. 264. The most extreme statement of this dogma was made in *Rex* v. *Bellingham* (1 Collinson, Lunacy, 636).

[65] 1 P. C. Chap. IV.

marked progress. Its greatest value, indeed, is the fact that it did mark progress; that it demonstrated that the subject of insanity is not irrevocably fixed in old tests and old definitions. But, at the same time, it hedged the subject in with a series of qualifications, such as the distinction between civil and criminal insanity, and the relation of the act to the delusion, which have led to endless disputes and confusion. These subjects are discussed elsewhere; it is sufficient here to say that Erskine's doctrine of delusions, wise as it was, and successful in its day, cannot be accepted as the final word for science on the subject of the responsibility of the insane.[66]

But Erskine's speech has a still wider significance for the medical expert. Although it was nothing more than the ingenious argument of an advocate at the bar, and therefore without any legal authority whatever, and, moreover, running counter to the so-called common-law definitions, it was, nevertheless, immediately accepted by the courts as good law, and continues to be quoted as such to this day. This fact throws a curious light on the origins of common law. At that time there was neither statute nor juridical decision in support of Erskine's thesis, and yet his opinions passed at once into the body of the common law by reason merely of his having urged them successfully for the acquittal of Hadfield.[67] If this supplies a legal argument in favor of the flexibility of the common law, it also supplies a medical argument in favor of the common law being still open to further improvement on the subject of insanity. It is fatal to any argument that the English common law is a safe and sure guide, much less a fixed guide, on the subject of criminal lunacy.[68]

[66] Napoleon, who always had a fear of assassination, once said: "I have always had a dread of madmen. One night I hired a box in the theater, and went incognito with Duroc. A man came up to me. I thought he wanted to hand me a petition, but he cried, 'I am in love with the Empress.' I answered, 'You seem to have chosen an extraordinary confidant.' Duroc then recognized him as a madman who had escaped from the Bicêtre, and he was arrested. Madmen always talk of God or kings." (Talks of Napoleon at St. Helena with Baron Gourgaud, p. 84.) It is noteworthy that this madman was not acting under the influence of delusion, but of eroticism.

[67] Chitty (3 Crim. Law, 724) accepts Erskine's statement that an insane delusion will excuse a man, but gives no higher authority for this test than Erskine himself; thus proving that Erskine was the originator of this test, and that, when he promulgated it in *Hadfield's Case*, it had no authority in law. It was simply accepted by the court in *Hadfield's Case* as a loop-hole of escape from an ugly dilemma, although it had nothing to do with the test of right and wrong. But why should Erskine's personal opinion on a subject in psychiatry (a subject of which he had no expert knowledge) be accepted ever since his time as a part of the common law? Erskine was merely an advocate, pleading at the bar; his opinions did not have the weight of law. And even if they had had the weight of law in England in April, 1800, how does that fact give them legal authority in America?

[68] Lord Kenyon, who presided at the trial of Hadfield, had been much against the prisoner at first, but he was so carried away by Erskine's speech, that he gave his opinion to the Attorney Gen-

490. The written law.—The statute law of England has been remarkably silent on the subject of tests for insanity. These artificial rules seem to have been confined entirely to the courts and to text-book writers. This was strikingly shown about the very time of Hadfield's trial. In the 39th and 40th years of the reign of George III. (the very king whose life had been attempted by Hadfield), therefore about the year 1800, was enacted the statute known as 39 & 40 George III., chap. 94, in which the law on criminal lunacy was clearly stated.[69] This law was as follows:

"In all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offense, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offense, the court, before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until his Majesty's pleasure shall be known; and it shall thereupon be lawful for his Majesty to give such order for the safe custody of such person during his pleasure in such place and in such manner as to his Majesty shall seem fit."[69½]

491. The statute law requires no tests.—It is to be noted that this act requires nothing more than that the accused be found to be "insane." It does not require that it be shown whether he had the

eral that the trial should not be further proceeded with, and the prisoner was acquitted. (Cooper's Tracts on Medical Jurisprudence.) It is safe to say that if Hadfield had killed the King, no logic or eloquence could have saved him. He would have perished like Bellingham.

[69] Some authorities say that this statute was passed as a result of the *Hadfield Case*. See 27 How. St. Tr. 1355. If so, the omission to define "insanity" is all the more noteworthy.

[69½] By a later English act, known as the trial of lunatics act, 1883 (Law Reports, Vol. XIX. p. 128), the jury is directed to find a special verdict, *i. e.*, that the accused is guilty, but was insane at the time of the act. The effect of this verdict is to confine the prisoner as a criminal lunatic. It is noteworthy that, by the change of wording, the accused is found "guilty."

In New York the law makes some attempt at defining insanity, for, by the Penal Code, § 21, it is provided that, to excuse from criminal liability, there must be such defect of reason as that the accused either did not know the nature and quality of the act, or did not know it was wrong; and, by § 23, a morbid propensity to commit prohibited acts in a person not shown to be incapable of knowing the wrongfulness of such acts is no defense.

These provisions are both unscientific and unjust, and they exhibit the defects which inevitably must arise from attempting to define insanity by statute. See the New York Penal Code (edited by Parker, 1900) for many references to cases in New York courts. The Minnesota Code copies the New York Code *verbatim*, and the language in both is suggested by the M'Naghten rules.

"knowledge of right and wrong," or whether he was "totally deprived of his understanding and memory." It is as direct and unqualified as need be, and is a model statement of the only proper question at issue in such cases. In this respect it compares favorably with the French law, which says: "There is no crime nor offense when the accused was in a state of madness at the time of the act."[70] But, unfortunately, this act, although having all the force of Parliamentary law, has had no influence on the courts in their trials of this question. Such is the force of common-law tradition that judges have persisted in the use of definitions which are not necessary or called for in the contemplation of that statute. According to the letter and spirit of that law the jury is simply to determine whether the accused is "insane." No tests are prescribed. The question is left as a naked question of fact, to be determined by the jury. The imposition of tests, not founded on scientific knowledge, and not given as evidence, is not included in anything said or implied in that act.[71]

492. The small number of cases up to one hundred years ago.—Up to the year 1800 the number of cases of criminal insanity that were tried in English courts was remarkably small. We come now to a somewhat larger group of cases, for the records of which we are indebted to Mr. Collinson.[72] These are the cases of Bellingham, Parker, and Bowler, and to these may be added the cases of Offord and Oxford. To the fact that for so many years so few of such cases came to trial may, in part, be attributed the little advance that was made. These cases were tried according to a stereotyped formula, and that formula was largely composed of the doctrine of right and wrong.

493. Bellingham's Case.—The case of Bellingham is the most notorious in the medico-legal annals of England. Bellingham was a de-

[70] "Il n'y a ni crime ni délit lorsque le prévenu etait en état de démence au temps de l'action."— French Penal Code, 64th art. This is admirably brief and to the point, and is what ought to be the legal test in America. For further details on this point,—especially the attempt of the French Advocate General Peyronnet to substitute Hale's definitions, and the remonstrance of the French alienist Georget,—see Winslow's Plea of Insanity, p. 9.

[71] Chief Justice Richardson, of New Hampshire, is one of the few judges who have treated the subject in the way indicated by the English act. In *State* v. *Cory* he told the jury that the only question for them to determine was "whether the accused was of sane mind when the deed was done." See also *State* v. *Prescott*. (Quoted by Ray, Medical Jurisprudence of Insanity, p. 58.) Ray does not give the references to these important cases. The former was tried in 1830, the latter in 1834, and the reports were in pamphlet form, according to Judge Doe, in *State* v *Pike*, 49 N. H. 421, 6 Am. Rep. 533. For another reference to Chief Justice Richardson's opinion, see *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242, where he is quoted.

[72] Lunatics. All subsequent writers quote from the meagre records preserved by Collinson for most of these cases. In this way these cases have become classical and somewhat time-worn.

lusional lunatic of much the same kind as Hadfield, except that his delusions were of the persecutory type,—by far the most dangerous of all. He believed that the government owed him a large sum of money,—about $500,000,—and he endeavored to recover this by appealing to cabinet ministers; and he even tried to bring the matter before Parliament. He had not the shadow of a rational claim upon the government: the whole thing was an insane delusion, and had been recognized as such by his friends for some years. He had tried to enlist the interest of Mr. Spencer Perceval, First Lord of the Treasury; and, failing in this, he had shot and killed Mr. Perceval in the lobby of the House of Commons.[73] The act was committed on the 11th of May, 1812, and the prisoner was arraigned four days later, on the 15th instant.[74]

The doctrine of delusion, so skillfully elaborated by Erskine in *Hadfield's Case,* was entirely discarded in the *Case of Bellingham.* Sir James Mansfield,[75] in charging the jury, said:

"If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all."

By this ingenious reasoning there can be no such thing as criminal insanity; the only irresponsible man is he who has so completely lost his power of reasoning that he is not able to entertain an intention to do anything. In other words, an insane man becomes exempt from punishment only when he becomes so insane as not to be able to commit an intentional act! This was a fair sample of the psychiatry that found voice in *Bellingham's Case.*

494. The test of delusion rejected.—Again, the Chief Justice deliberately denied that an insane delusion is an excuse for crime; thus:

[73] 1 Collinson, Lunacy, 636.

[74] The indecent haste with which Bellingham was "railroaded" to his doom has often been condemned. His counsel vainly begged for postponement. "I never saw the prisoner before," pleaded one of them, "and it has not been in our power to bring forth all the evidence to prove whether he be sane or insane." The plea was in vain. It was afterwards boasted that Bellingham's body was on the dissecting table eight days after he shot his victim. No wonder that Sir J. Campbell, Attorney General, said, in a subsequent case (*Reg.* v. *Oxford,* 9 Car. & P. 533), "I will not refer to *Bellingham's Case,* as there are some doubts as to the correctness of the mode in which that case was conducted."

According to Erskine, in his speech for Hadfield (27 How. St. Tr. 1281), a period of fifteen days was allowed before trial. In a footnote in Howell's State Trials it is explained that there must be fifteen days between arraignment and trial. This was twelve years before *Bellingham's Case.* It is difficult to understand the difference in the two cases, unless it was that Hadfield was tried for treason and Bellingham for murder.

[75] This was not the great Lord Mansfield, of the King's bench, but Sir James Mansfield, of the common pleas.

There is a species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act. If such a person is capable, in other respects, of distinguishing right from wrong, there is no excuse for any act of atrocity which he may commit under this description of derangement.

This was a complete reversal of the doctrine of insane delusion, according to which Hadfield had been acquitted twelve years before.[76] It substituted for that test the older test of knowledge of right and wrong. Now Bellingham had himself resented, in open court, the imputation of insanity. He wished it known that he relied entirely upon the justice of his cause; that his killing of Mr. Perceval was right, and was justified by the fact that the government had rejected his claim, and thus justified him in taking the law into his own hands; and this was a refutation of the charge of malice prepense. This characteristic insane logic showed a complete lack of the knowledge of right and wrong, in reference to the act itself; but, according to the logic of Sir James Mansfield, the right-and-wrong rule would not apply so long as the accused had the capacity to distinguish right and wrong in other respects.

495. The right-and-wrong rule not properly applied.—From this standpoint *Bellingham's Case* marks an era. It was one of the very first cases in which the right-and-wrong rule was announced as law, and then was not applied properly by the court. Many delusional lunatics who commit crime in response to their delusions have inability to distinguish right and wrong in reference to that act. Their moral sense is obtunded to that extent, at least. In *Bellingham's Case* it was conspicuously so; and, like Guiteau, he attempted to argue it himself in open court. This leads to the obvious conclusion that if courts will insist upon the right-and-wrong rule, they should apply it properly, and stand by it. The only question at issue is the crime charged; and the test of right and wrong should be applied to that act, and limited to it. The moral sense of no delusional lunatic is impaired equally on all subjects, any more than his intellect is deranged equally on all topics. He is to be tried on the question of his delusion, and how that impairs both his reason and his conscience. Any other method is irrelevant to the issue. *Bellingham's Case* derives a large part of its ill repute, and deservedly, from the obtuseness of Sir James Mansfield on this very point. His ruling has always

[76] He only can be excused "whose whole reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon some thing which has no foundation or existence." Erskine's Speech for Hadfield.

been an example for evil; but, fortunately, it has been reversed by later and better opinions.

In *Bellingham's Case* it was also announced that the accused, in order to be exempt, must not be able to know "that murder was a crime against the laws of God and nature." But there is no delusional lunatic who is ignorant of such an elementary principle of ethics. It would be as fair to insist that he must not know that two and two are four. Such tests do not touch the real question of his responsibility under the domination of an insane delusion.

496. The distinction again between civil and criminal insanity.—Finally, the Attorney General, Sir Vicary Gibbs, made the following declaration of the distinction between civil and criminal insanity:

"A man may be deranged in his mind; his intellect may be insufficient for enabling him to conduct the common affairs of life, such as disposing of his property, or judging of the claims which his respective relations have upon him; and if he be so, the administration of the country will take his affairs into their management, and appoint to him trustees; but, at the same time, such a man is not discharged from his responsibility for criminal acts. I say this upon the authority of the first sages in this country, and upon the authority of the established law in all times."

This is diametrically opposite to the opinion given by Coke,[77] who was certainly one of the "first sages" of the English law, and it is a monstrous interpretation of this peculiar doctrine. The Attorney General did not give his authorities.[78] It is the most extreme statement of this dogma ever given in an English court. That a man so deranged in his mind as is indicated in that passage should be held accountable for his acts is repugnant to every dictate of humanity, and to all the teachings of science. Moreover, it is more than doubtful whether any court at the present day would subscribe to the statement as it stands.[78½]

497. The cases of Parker and Bowler.—The right-and-wrong test was

[77] 2 Litt. 247*a*.

[78] He probably relied entirely on Erskine, in his speech for Hadfield (27 How. St. Tr. 1281).

[78½] It is interesting to read the opinion of Sir Samuel Romilly, the reformer of England's criminal law. He wrote of Bellingham: "No person can have heard what the conduct and demeanor of this man has been since he committed the crime, or can have read his defense, without being satisfied that he is mad; but it is a species of madness which probably, for the security of mankind, ought not to exempt a man from being answerable for his actions." (Life of Romilly, Vol. II. p. 36.) Romilly himself went insane and committed suicide; and it is said that the son of Mr. Perceval, killed by Bellingham, also went insane, and published an account of his own case.

See *Bensell* v. *Chancellor*, 5 Whart. 371, 377, 34 Am. Dec. 561.

still further confirmed in the cases of Parker[79] and Bowler.[80] In the latter case Sir Simon Le Blanc charged the jury that it was for them to determine whether the prisoner "was under the influence of any illusion . . . which rendered his mind at the moment insensible of the nature of the act." This short sentence embodied still another test which has since figured largely in the courts. Knowledge of the nature of the act may be criticized as a somewhat metaphysical statement: it is doubtless intended to refer to the act as a crime, or as a violation of "the laws of God and nature." It is therefore merely a restatement, in different language, of one of the tests formulated by Sir James Mansfield in *Bellingham's Case*; and is open to the same criticism.

498. The case of Offord.—In the case of *Rex* v. *Offord*,[81] in 1831, Lord Lyndhurst charged the jury that they must be satisfied that the accused "did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offense against the laws of God and nature?" He then referred to *Bellingham's Case*, and agreed with Mansfield's opinion.

Thus the definitions of responsibility in the insane are seen to have been becoming more stereotyped.

499. The cases of Bellingham and Offord compared.—The two cases of Bellingham and Offord present a striking example of the inconsistency of the law. Both these men were delusional lunatics of exactly the same type; for they both suffered with delusions of persecution, which render such lunatics the most dangerous of all the insane. The jury in each case was charged in practically the same language, and yet Bellingham was hanged and Offord was acquitted. It is difficult to understand why, if the former was convicted, the latter

[79] *Parker's Case*, 1 Collinson, Lunacy, 477. Parker was a weak-minded fellow who had been taken prisoner by the French, in battle. He joined the French ranks and donned a French uniform, because it was better to have "liberty and money" than to linger in prison. Brougham defended him in vain on the ground that he had not the possession of his mental faculties in such strength and vigor as to warrant his conviction. He was hanged for treason.

[80] *Bowler's Case*, 1 Collinson, Lunacy, 673, note. Bowler was an epileptic imbecile who had even been found insane by a commission in lunacy, and of whose insanity the strongest evidence was produced. He had committed murder, and was condemned and executed. Some years afterwards Baron Alderson, in *Reg.* v. *Oxford* (9 Car. & P. 533), said: "Bowler was executed, I believe; and very barbarous it was." Thus repentance sometimes comes to the judgment seat, even though a little late.

[81] 5 Car. & P. 168. Offord had delusional insanity of a most confirmed type, believing that the inhabitants of Hadleigh were in league against his life. Under the influence of these delusions he would abuse strangers in the streets; and he carried a list of about fifty names, entitled "list of Hadleigh conspirators against my life." He shot and killed a man named Chisnall, whose name was on this list. He was acquitted "on the ground of insanity."

was found not guilty. The crime of each was precisely the same,—the murder of an unoffending man; and the motive was the same,—the impulse of an insane delusion. Legal writers who attempt to defend the courts cannot escape the dilemma presented by these two cases; and these cases are mentioned in detail here because of their historic importance in a highly formative period of the medical jurisprudence of insanity.

500. The case of Oxford; a step in advance.—In the next case of importance, however,—that of *Reg.* v. *Oxford*,[82] in 1840,—a distinct advance came near to being made towards a scientific statement of criminal insanity. Lord Chief Justice Denman charged the jury:

"If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible."

This was an unexceptionable statement from a scientific standpoint, and it is unfortunate that it was not allowed to stand without further elucidation. It would have constituted an exemplary definition for all future ages, and would have been to the everlasting credit of the distinguished judge who uttered it. But Lord Denman, with that tendency to refine and elaborate which is so characteristic of the legal mind, did not seem satisfied that it exhausted the law of the subject; for he continued:

"The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing: or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

He also used the expression, whether "he was insane at the time when the act was done,—whether the evidence given proves a disease of the mind, as of a person quite incapable of distinguishing right from wrong."

It is evident all through this charge that Lord Denman's mind grasped the central idea,—the essential issue in all such cases,—and grasped it much more clearly than any of his predecessors had done. He reverts again and again to the simple question whether the prisoner was "insane." It was only when he attempted to qualify that question with the consideration of the "knowledge of right and wrong"

[82] 9 Car. & P. 525. Oxford was the victim of hereditary insanity. His grandfather had died in an asylum, and his father also was insane. He fired a pistol at Queen Victoria, but it was doubtful whether he intended to injure her, or even whether the pistol was loaded with a bullet. He was acquitted; but, as was said of Hadfield, he probably would not have escaped if he had killed, or even only wounded, his sovereign.

and of the "knowledge of the nature of the act" that he spoiled a good definition, and lost a great opportunity. That the jury saw the point, however, is evident from the fact that they found Oxford "not guilty, on the ground of insanity." They did not find that the prisoner did not know the difference between right and wrong, or that he did not know that it was a crime to shoot at the Queen, for their common sense must have told them that he probably knew both these things. But they took Lord Denman at his word, and found merely that Oxford had a "disease of the mind."

501. The formative period.—The long period which we have just traversed may be called the formative period in the medical jurisprudence of insanity in the English law. It was the period during which definitions were gradually becoming fixed. It shows conclusively that, contrary to what so many jurists have maintained, there was little, if any, authority in the old common law for the arbitrary definitions which finally became current. Sir Edward Coke had fixed the term "total deprivation of memory and understanding." Sir Matthew Hale had described his "partial insanity." Mr. Hawkins had formulated the doctrine of "the knowledge of right and wrong." Erskine had announced the test of "delusion," and had drawn the distinction between civil and criminal insanity as it has since remained. Sir James Mansfield had declared for the knowledge that the crime was "against the laws of God and nature," and Lord Denman had emphasized the test that an insane man must not be able to know "the nature and consequences of his act." In all this we see no authority of the ancient "common law," and but little exact knowledge of the science of psychiatry. These definitions were merely the pronouncements of judges or advocates, striving in a vain attempt to include, in a convenient formula, that which is not susceptible of being so conveniently formulated. During all this time the statute law was silent as to definitions, and the judges were left to their own devices to evolve tests. These rules were no sooner pronounced from the bench than they were claimed to have acquired the authority and sanctity of "common law."

502. Madness not to be reduced to fixed rules.—"I shall not pretend," said Mr. Hope, afterwards Lord President of the Court of Session, in Scotland,[83] "to enter the lists of definition . . . with McKenzie or with Hale; they are all great and able men; but I suspect much that they are better lawyers than physicians, and that they have given

[83] *Rex* v. *Kinloch*, 25 How. St. Tr. 891. Sir A. Gordon Kinloch shot and killed his brother. He was acquitted and found insane in the same verdict, in spite of the right-and-wrong rule.

way too much to a professional propensity to subdivide and methodize. For my part I shall not attempt to reduce madness to fixed rules, nor to define the different kinds and degrees of it, which I have always found to be as numerous and diversified as the unhappy persons who were the subjects of the disorder."

To this trenchant criticism nothing need be added, except to say that some of the best, if most severe, critics of the law have been lawyers themselves; and their criticisms have been wrung from them when they appeared at the bar of justice as advocates, and were forced to protest against the definitions of the judges.[84]

The uncertainty of the English law had become so apparent in 1843 that an attempt was made to give permanent authority to this subject; and the occasion for this attempt was the celebrated case of Daniel M'Naghten.

[84] Justice Miller, of the United States Supreme Court, said that, in the conference room of that court, the judges readily agreed on questions of law, but disagreed on questions of fact. "Judges are not preëminently fitted over other men of good judgment in business affairs to decide upon mere questions of disputed fact." 49 Alb. L. J. 196.

CHAPTER XXVII.

THE RULES IN THE M'NAGHTEN CASE.[½]

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503. No binding authority on criminal lunacy.— Sir Fitzjames Stephen[1] is authority for the statement that, from the time of Lord Hale up to the time he himself wrote, in 1883, there practically was no binding authority in the English law on the subject of criminal lunacy. All that existed was a series of opinions given by the several judges who had presided at the various trials from the time of

[½] "Sir, these subjects may be dull, and want the light and shade of more exciting topics, but the expense which is incurred, the numbers that suffer, and the nature of their sufferings, will perhaps justify the present demand upon your time and patience."— Lord Ashley, speech in Parliament on a lunacy bill, 23d July, 1844.

[1] History Crim. Law, Vol. II. Chap. XIX.

Arnold's Case, in 1724.[2] In other words, there was only some "judge-made law," but nothing that had the binding force of an act of Parliament, or even the sanction of the old "common law." Even this "judge-made law" does not escape the animadversions of Sir Fitzjames Stephen, who was himself a judge; for he refers to it in no uncertain terms as of very uncertain value. In most cases, he tells us, the judges have only repeated each other, with variations, and these variations have been the mere suggestions of the moment, arising from particular facts of the case.[3] There had been no single instance in which an English court, sitting in banc, had delivered a written judgment on criminal lunacy, though there had been such judgments in civil cases. He considered the reports of what single judges had really said often untrustworthy, especially in view of the number of cases in which even the best judges are held to have misdirected juries in trials at nisi prius. The answers of the judges in the *M'Naghten Case* he evidently considers, as we shall see presently, of uncertain value in science, and of dubious authority in law.

504. Recent opinions largely based on the M'Naghten Case.—But since these answers of the judges were given in the *M'Naghten Case*, practically every English opinion, and the majority of American opinions in courts of law, have been founded upon them. There were at the time grave doubts about the propriety of these questions and answers in the *M'Naghten Case,* and there have been still graver doubts since. Lords Lyndhurst, Brougham, and Campbell felt called upon to act the part of apologists on the floor of the House for the extraordinary procedure, and Mr. Justice Maule declined to join in the answers, because, as Sir Fitzjames Stephen hints,[4] he doubted either the propriety or legality of them. Yet these answers, thus dubiously born, and almost smothered from their birth in a cumbrous phraseology, have been the oracles of Anglo-American jurisprudence in insanity for sixty years.

505. The case of M'Naghten.—M'Naghten, like Hadfield and Bellingham, was a delusional lunatic.[5] His delusions were of the persecutory type: he believed that he was harassed by enemies; and, in-

[2] *Arnold's Trial,* 16 How. St. Tr. 695.

[3] In another place (Chap. XX. p. 188), Stephen, speaking of the distinction between the common and statutory law, says: "No act of Parliament throws any light on the questions as to the extent to which insanity is an excuse for crime." These questions still continue undecided.

[4] Op. cit. p. 154, footnote.

[5] M'Naghten's case was a perfect example of Hale's "partial" insanity. The man was able to transact business, and conducted himself in the ordinary relations of life in a way that did not suggest that he was "totally" insane, or totally "deprived of memory and understanding."

cluding Mr. Drummond, the private secretary of Sir Robert Peel, among these enemies, he had shot and killed him on the street. According to some accounts he mistook the secretary for the statesman; and it was really Sir Robert Peel whom he had intended to assassinate. He was successfully defended, and was acquitted on the ground of insanity;[5½] but the verdict was unpopular, and the House of Lords, responsive to popular criticism, addressed a request to the judges for an authoritative statement of the law on the subject of insanity as a defense for crime.

The prisoner was tried in 1843.[6] The evidence was that M'Naghten was suffering with "morbid delusions" and that persons so suffering "might have a moral perception of right and wrong, but that, in the case of the prisoner, it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion; that it was of the nature of the disease with which the prisoner was affected to go on gradually until it had reached a climax, when it burst forth with irresistible intensity,—that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms."

506. Delusional insanity.—The above is the statement of *M'Naghten's Case,* as submitted to the House of Lords. It is to be noted that it is a clear statement of a case of delusional insanity; only in skeleton outlines, to be sure, but still giving the essential points in such a case. It meets the question of right and wrong, and disposes of it properly; that is, it disposes of it as properly as such an irrelevant question can be disposed of. It also claims that such lunatics have no control over their delusions. This is practically true, but it is not equally true in all cases. Lunatics vary in this respect, but in a criminal act by a delusional lunatic the inference is that he was controlled by his delusion. In *M'Naghten's Case* this was the vital scientific point; *i. e.,* the fact that he was controlled by his delusions: not the question whether he had the ability to distinguish between right and wrong in the abstract or even in the concrete. With reference to his particular act, however, his moral perceptions were doubtless obscured by his delusion.

507. Lord Tindal's charge.—Lord C. J. Tindal, in his charge to the

[5½] M'Naghten was defended by Cockburn, afterwards Lord Chief Justice, who, according to Ballantine (Experiences, p. 206), made "one of the most masterly arguments ever heard at the English bar" in this case.

[6] *M'Naghten's Case,* 10 Clark & F. 200, 1 Car. & K. 130, note, 8 Scott N. R. 595.

jury, had said: "The question to be determined is whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him."

508. Two distinct tests.—This is one of the most curious charges ever given to a jury in a case of criminal lunacy; and its oddity consists in the fact that the learned judge, in a very few sentences, managed to promulgate two distinct tests which have practically nothing to do with each other. First, he lays down the test of right and wrong in all its naked boldness; then, in the second place, he proclaims that a sound state of mind is to be the governing test of the prisoner's responsibility. Why, may we not ask, is not the latter test as good for the prisoner's insanity as it is for his sanity? If he is to be held responsible if he is found to be in a sound state of mind, why is not the converse true, and he is to be held irresponsible if he is found to be in an unsound state of mind? Framed thus, the test of Lord Tindal would be above criticism; but when he drags in a reference to "the laws of God and man," and a knowledge of "a wrong and wicked act," he frames an hypothesis which does not cover the question of irresponsibility in the case of any delusional lunatic; and this for the simple reason that lunatics do not act with reason and according to law. M'Naghten doubtless knew, as every man knows, that the "laws of God and man" forbid murder; and if he had been sane he doubtless would have observed those laws; but, being insane, he simply disregarded them in response to his delusion. The only "test" of insanity is the evidence of the disease as it exists in every individual case. There can be no other test. Hence, Lord Tindal's second "test" was the true and only one in a scientific sense, *i. e.*, Was the patient of sound or of unsound mind?

509. The questions propounded to the judges.—M'Naghten had been found "not guilty, on the ground of insanity,"—a righteous verdict, legally and scientifically worded. But the case was brought up for discussion in the House of Lords, and on June 19th, 1843, a series of questions were propounded to the judges, as follows:

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where, at the time of the com-

mission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"2d. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example) and insanity is set up as a defense?

"3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind when the act was committed?

"4th. If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?"

510. The questions analyzed.—Stripped of redundancy these questions mean simply this: 1st. What is the law respecting the alleged crimes of delusional lunatics? 2d. What is the question at issue when a delusional lunatic commits an alleged crime? The third question practically repeats the second. The fourth question practically repeats the first. The second question also very nearly repeats the first. There probably never was a series of questions embodying one simple point of inquiry clothed in such redundancy and reiteration. The point at issue simply was—What was the English law, in 1843, concerning delusional lunatics who committed crimes under the influence of their delusions? This was the point of inquiry, and this point of inquiry, one would suppose, was the proper and only one to be submitted to the jury with reference to the case on trial. But, in striving after refinements of definition, this simple inquiry was obscured in a lot of involved interrogations, which, when analyzed and boiled down, can mean only one thing; *viz.*, What is the English law respecting delusional lunatics who commit crimes?[7]

[7] The most obvious answer to this question is, that there was no English law on the subject. The authority for this is Sir James Fitzjames Stephen, who says (History Crim. Law, Vol. II. Chap. XIX. p. 151): "From the time of Lord Hale to our own, no legal writer of authority has discussed this matter

The fifth question was entirely apart from the main inquiry, and referred merely to the privilege of an expert giving his opinion on the evidence at the trial.

511. The answers of the judges.—The answers given by the judges to these questions suggest the suspicion that both the questions and the answers were devised by the same mind, or minds. They are written in the same redundant and involved style, and the same preconceived opinions are apparent in them.[8] Too voluminous to quote, the answers of the judges, delivered by Lord C. T. Tindal, who had presided at the trial of M'Naghten, embodied the following opinion: A delusional lunatic is responsible if he knew "that he was acting contrary to law. . . . That to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." And this knowledge was further qualified as pertaining, not to the abstract, but to "the very act with which he is charged;" and then certain refinements were made as to the prisoner's knowledge of the "law of the land," which the law presumes all men to have. But the answer to the fourth question must be quoted more in full, for it has led to great abuse, both of justice and common sense: A delusional lunatic "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." That is, if the lunatic kills another man in supposed self-defense, even though acting under a delusion, he is exempt; but if his delusion is that the other man has simply done injury to his character and fortune, he is liable to punishment. Nothing can exceed the gravity of this error, or show more clearly the utter misconception, on the part of the judges, of the true nature of delusional insanity. It is equivalent to saying, as Dr. Ray has caustically remarked,[9] that a lunatic is not to be held liable for his acts so long as he acts with reason and propriety!

512. The three points involved.—Such is the gist of the famous questions and answers in the *M'Naghten Case*. They evolved nothing new that was important, and they confirmed nothing old that was not

upon its merits, and though there have been numerous trials . . . the circumstances have never been such as to afford an opportunity for a solemn argument and judgment laying down the principles of law by which the relation of insanity to crime may be determined."

[8] There is nothing improbable in this theory, and, in fact, such a prearranged plan would be quite in keeping with the practices both of legislative bodies and of courts. An authoritative opinion was wanted, and it was prepared in the form of a series of questions and answers.

[9] Med. Jur. Insanity, 5th ed. p. 49.

erroneous. The effect of them has simply been to emphasize three points on which a lunatic's faculties are to be tested: (1) His knowledge of the nature and quality of the act; (2) his knowledge that the act was against the law; (3) his ability to distinguish between right and wrong. The first expression is too vague to be applied; the second has no applicability in an insane man's conscience; and the third, even when restricted and applied to the act in question, is no test for lunacy. For, first, a "knowledge of the nature and quality of an act" necessarily includes, second, a "knowledge that the act is against the law;" and, third, both of these items of knowledge include the "ability to distinguish between right and wrong." These various phrases, in other words, practically all say the same thing, and they describe elements of knowledge which a delusional lunatic may share in common with sane men, and yet be radically insane and irresponsible. In brief, the celebrated opinion in the *M'Naghten Case* simply reaffirmed, in obscure language, the test of "right and wrong,"—a test which had already stood for a century and more in English law, and one which can never be subscribed to by alienists. It advanced the subject not a whit.

513. Sir Fitzjames Stephen's opinion.—Sir Fitzjames Stephen, himself a judge, speaks most slightingly of the replies of the judges in the *M'Naghten Case*,[10] and yet he distinctly implies that these opinions of the judges are the most binding authority in English law. "It has been the general practice ever since [1843] for judges charging juries in cases in which the question of insanity arises to use the words of the answers given by the judges [in the *McNaghten Case*]. . . . It is a practice which I have followed myself on several occasions, nor until some more binding authority is provided can a judge be expected to do otherwise, especially as the practice has now obtained since 1843. I cannot help feeling, however, and I know that some of the most distinguished judges on the bench have been of the same opinion, that the authority of the answers is questionable; and it appears to me that, when carefully considered, they leave untouched the most difficult questions connected with the subject, and lay down propositions liable to be misunderstood;

[10] "They do not form a judgment upon definite facts proved by evidence. They are mere answers to questions which the judges were probably under no obligation to answer, and to which the House of Lords had probably no right to require an answer, as they did not arise out of any matter judicially before the House." History Crim. Law, Vol. II. p. 154.

though they might, and I think ought to, be construed in a way which would dispose satisfactorily of all cases whatever."[10½]

514. Inconsistencies in Stephen's opinion.—I have great respect for Sir Fitzjames Stephen, but I cannot help thinking that the incongruities of this passage are amazing. According to it, it is incumbent on judges to follow an authority which they believe to be questionable, simply because "the practice has obtained since 1843;" and although these answers or rules "leave untouched the most difficult questions connected with the subject," nevertheless they can be construed to "dispose satisfactorily of all cases whatever." How a set of rules or principles which leave the main parts of a scientific subject untouched can be used to dispose satisfactorily of all cases that arise on that subject is more than the average scientist will be able to grasp.

515. The right-and-wrong test criticized.—The rules in the *M'Naghten Case* suggest the following comments:

The right-and-wrong test, as pointed out elsewhere, is based upon the same kind of psychology that has given rise to the doctrine of "moral insanity." Both conceptions are of the same piece. They presuppose the existence of a moral faculty which can be conceived of as a distinct organ of the brain, and which can be separately diseased or separately healthy. If this organ is diseased, the patient is a moral lunatic, say the doctors; if it is not diseased, then, regardless of how much deranged the rest of the brain may be, he is responsible, say the lawyers. Both conceptions are unscientific. The human brain is not divided into distinct mental territories, each having its own proper diseases. Therefore, so long as courts insist upon the right-and-wrong test, they are not in a position to criticize the doctrine of a moral insanity.

516. In reference to the act itself.—The answers in the *M'Naghten Case* narrow the test down to the act itself.[11] In other words, they make it a concrete test, and no longer an abstract one. The question no longer is, Can the accused distinguish right and wrong in general? but only, Can he distinguish the right and wrong of the act of which he is accused? This is an advance, and should be recognized as such by alienists; for it is unquestionably true that many insane persons who have a perfect appreciation of right and wrong in general have not such an appreciation in respect of the act of which they are

[10½] Sergeant Ballantine (Experiences of a Barrister, p. 205) is in accord with Stephen in his criticism of the M'Naghten rules. Such a procedure "fortunately has never been repeated." He refers also to the popular "denunciation of mad doctors" which followed the verdict in that case.

[11] *Com.* v. *Freth*, 3 Phila. 105; *Smith's Case*, 15 L. I. 33.

accused. This was conspicuously so of Bellingham and of Guiteau. But, while this is true of some, it would be an error to say that it is true of all, and, therefore, that it is necessarily true. The springs of action in an insane brain cannot be so unerringly detected and analyzed. An insane man, acting under a delusion, may deliberately do an act which he acknowledges to be wrong. In other words, he does not act with reason and with conscience; his motives are all perverted,—in short, he is insane.

517. The distinction between "moral" and "legal" wrong.—Therefore, the distinction between moral and legal wrong—so much dwelt on by Sir Fitzjames Stephen—is not of great importance. Certainly insane persons may be confused by such a nice distinction; for instance, a man who believed that he had a command from God to kill would believe he was morally right in killing, even though he knew he was legally wrong. But, on the other hand, insane persons may do acts which they know are both morally and legally wrong,—as, for instance, an insane mother who kills her child in an access of melancholia. Such a case destroys the value of this distinction as a test of insanity. There are few melancholiacs who would try to justify on moral grounds their attempts at suicide. Many of them act on an impulse that leads them deliberately to ignore their moral principles on the subject. After abortive attempts they sometimes display keen remorse. All alienists must have seen such cases. Moreover, the impulse to suicide is sometimes resisted for a long while for moral reasons. When the impulse at last gains sway, it overwhelms the moral feeling, but does not obliterate it.[12] This may not be true of all, but it is true of some.

518. The test of delusion.—Erskine's test of delusion has been widely accepted by legal authorities, following the answers of the judges in *M'Naghten's Case*. There has even been a tendency to consider it the final statement on the subject of responsibility in the insane.[13] That an insane delusion is a good defense in criminal cases is, and ought to be, a good rule; but the subject is not so simple as it looks.

519. The criminal act must be traced to the delusion.—In the first place, according to the M'Naghten rules, the criminal act must be traced to the delusion. When it is thus traced, the subject is clear

[12] Suicide is against the law in some countries and some states. In New Jersey an attempt at suicide is a misdemeanor. In May, 1904, a case of this kind was brought before Judge Joline of Camden. The man was adjudged insane. In cases of double suicide, in which one of the parties survives, a nice question arises whether the survivor can be held for the homicide of his companion. See Garnier, La Suicide à Deux, Ann. d'Hyg. 1891, XXV. 202.

[13] *Com.* v. *Meredith*, 17 Phila. 90.

enough, although it was not allowed in the case of Bellingham. But to trace this connection is not always possible with the certainty contemplated by the law.[14] And this is so because it is not always possible to trace all the motives in an insane man's mind. This truth is clearly recognized by Erskine in civil cases, for he says that "the law avoids the act, though it cannot be traced or connected with the morbid imagination." Why, then, does not this rule hold good in criminal cases? Does the insane mind act differently in civil and criminal affairs? Is there one kind of disease for a will, and another kind for a murder? When a man's mind is completely possessed by a delusion (or series of delusions, as is usually the case) will it be possible for any psychologist to say precisely just how much this delusional state obscures his judgment, clouds his moral sense, enthrals his will, and determines his acts? Lord Lyndhurst[15] said that if a man's mind is impaired in part, he is of unsound mind. Lord Brougham[16] maintained that the mind is one and indivisible. If it is controlled by a delusion, no man and no court can assume to say with certainty that the acts are not logically the result of that delusion. Sir Fitzjames Stephen[17] with great acumen says that delusion is an evidence of disease of the brain far more widespread than the mere delusion itself, and therefore is an evidence that a man cannot control his conduct, and cannot distinguish the moral aspects of his acts. The opinions of these eminent judges are in accord on this subject with the teachings of science. They are not in accord with the M'Naghten rules.

520. The insane man must act as though he were sane.—In the second place, the rule in *M'Naghten's Case,* that an insane man's act is to be judged by the same law as though he were sane, is unspeakably unjust. Thus, if an insane man has a delusion that another man intends to kill him, and kills that man in supposed self-defense, he is exempt, because the law acknowledges the right of self-defense; but if the delusion is merely that the other man intends to do some injury short of taking life, the insane man is not exempt, because the law does not recognize the right to take vengeance in such a case. This rule is based on the theory that an insane man must act with reason and moderation; he must measure his acts strictly by a ra-

[14] *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427.

[15] *Dew* v. *Clarke,* 5 Russ. Ch. 166, 6 L. J. Ch. 186. Lord Lyndhurst would have agreed with Landor (Imaginary Conversations, p. 133), who said: "Freedom, to be, must be perfect; the half-free can no more exist than the half-entire." So of insanity: a man cannot be both partially insane and sane at the same time.

[16] *Waring* v. *Waring,* 6 Moore, P. C. C. 341, 12 Jur. 947.

[17] History Crim. Law, Chap. XIX.

tional standard; but insane men do not do this; and for the reason that they are not sane.[18]

521. The test of delusion not applicable to all cases of insanity.—Finally, the test of delusion is not applicable in all cases of insanity. To attempt to limit the criminal responsibility of the insane by this rule is to ignore many cases in which the criminal act may arise from other impulses than systematized delusions. Maniacal, delirious, and emotional disturbances, quite as pronounced as delusions, and quite as well within the boundaries of disease, are ignored by such a rule. Erskine himself referred to the case of a woman who, in an access of despair, shot her seducer, and was acquitted by a jury on the ground of insanity, as a case which furnished an exception to his own rule. An insane man may act in a frenzy; or in an access of melancholia; or from uncontrollable impulse; or from obsessions. None of these cases is an instance of delusion such as is contemplated in the M'Naghten rules; but to ignore such cases is to ignore some of the commonest facts in insanity.

522. Loss of self-control.—This is not clearly indicated in the M'Naghten rules as a test for irresponsibility; but it has been "read into" these rules by some judicial interpreters. Sir Fitzjames Stephen,[19] whose dissatisfaction with the law on insanity was so great, says that "no act is a crime if the person who does it is, at the time when it is done, prevented [either by defective mental power or] by any disease affecting his mind, from knowing the nature and quality of his act, or from knowing that the act is wrong [or from controlling his own conduct, unless the absence of the power of control has been produced by his own default.]" But the parts bracketed are denoted by Stephen as doubtful law. This author was always striving after a more scientific statement than the M'Naghten rules, and is candid enough to admit that some of his own ideas are not the ideas of the law.[19½] It was the idea of Marc, the French alien-

[18] *Taylor* v. *Com.* 109 Pa. 262; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275. For an adverse criticism, see *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

[19] Digest of Crim. Law, p. 17.

[19½] According to Justice Sommerville (*Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854), a bill was introduced into the British House of Commons in 1874, which incorporated in the old rule the new element of an absence of the power of self-control, caused by disease affecting the mind, and it is said that Sir Fitzjames Stephen had something to do with this bill, and that it was recommended by Lord Chief Justice Cockburn. But Justice Sommerville does not state that this bill ever became law. The provision, however, is in accord with Stephen's ideas, and also with the ideas clearly expressed by Sergeant Ballantine in his Experiences of a Barrister, Chap. XX. See also Balfour Brown, Med. Jurisp. of Insanity (quoted in *Parsons* v. *State*, 81 Ala. 577, p. 589, 60 Am. Rep.

ist, that insanity is an affection of "the will;" but he developed this idea with too much metaphysical refinement. Justice Stephen's opinion has had influence, and is in line with a liberal interpretation, for it is true that insane persons are impelled by the power of a diseased mind.[20] This is much nearer the point than the knowledge of right and wrong. This idea of a loss of self-control as a test for insanity has been elaborated by a few courts.[21]

523. Bishop's idea that a test is like a yardstick.—Mr. Bishop[22] describes a test of insanity as "a sort of legal yardstick," which the judge puts into the hands of the jury in order that they may "measure the evidence, and determine whether or not the prisoner had a sufficient length of mental alienation to escape responsibility for his act." But this figurative language has no scientific value, and is only quoted here as an illustration of the loose terminology in which legal writers sometimes indulge when they write about insanity. A test is not a yardstick. It is simply a form of evidence. The juridical test for insanity is a statement from the bench as to matters of fact, —a statement, moreover, which is not given from expert knowledge, and is not sworn to. From the legal standpoint, this is the radical defect of it. Such a test would not be tolerated for a moment in a case of poisoning; the tests for arsenic or strychnin are matters entirely of expert testimony.[23] Why the rule should be different in insanity has never been shown. To state dogmatically from the bench that ignorance of right and wrong is a symptom of insanity is the same thing as to say that strychnin kills by narcosis. To say that a delusion must be present to establish irresponsibility is the same as to say that arsenic must necessarily be found in the kidneys. These statements may or may not be true; some of them, in fact, are not true; but, whether true or false, they are matters of fact, to be

193, 2 So. 854); 1 Wharton, Crim. Law, 9th ed. § 45, note 1; Bishop, 1 Crim. Law, 7th ed. § 383b. The loss of self-control, or the impelling power of mental disease, is the most rational legal test ever proposed. See also the statement by Lord Denman in *Reg.* v. *Oxford*, 9 Car. & P. 525: "If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible." (See § 500, *ante*.)

[20] Sir Fitzjames Stephen's interpretation of the M'Naghten rules is the ablest and most liberal of any interpretations of those rules by legal writers. It is a brilliant attempt to make the best of a bad statement; for that the answers in the *M'Naghten Case* are a bad statement was clearly Justice Stephen's opinion. History Crim. Law, Vol. II. Chap. XIX.

[21] *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com.* v. *Mosler*, 4 Pa. 264; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Dunn* v. *People*, 109 Ill. 635.

[22] Crim. Law, §§ 381–383.

[23] *Reg.* v. *Palmer*. An account of this case is given in Stephen, History Crim. Law, p. 408. The subject of tests for strychnin is illustrated there, and how it is absolutely a question for the experts.

determined by evidence. Marsh's test for arsenic did not have its origin in a court of law, but in a laboratory. It has never been accepted in a court of law except on sworn expert testimony. No judge would ever assume to be competent to announce in court what is the value of the process by which Sertürner discovered morphin; or what are the symptoms of a fractured bone.

524. Not a question of law, but a question of fact.—Sir Matthew Hale,[24] as we have seen, discarded Fitzherbert's test for idiocy as inapplicable; and said that "idiocy or not is a question of fact, triable by jury." Judge Doe, of New Hampshire,[25] declared that the tests and symptoms of insanity are no more matters of law than are the symptoms of consumption or cholera. The contrary claim, that insanity is not a medical question at all, but a purely legal one (a claim once made by a British jurist), is never referred to now except as a curiosity. Such a sweeping denial of mental disease is only equaled by Mrs. Eddy's denial of physical disease. It is certainly not to the credit of public intelligence and conscience, either in this country or in Europe, that this important subject has been thus left to shift for itself in our courts of law, and to take its chances with the various judges who have had to wrestle with it. It would not be easy or admissible to attempt to define a scientific subject too narrowly by statute, but the importance and gravity of this topic seem, to some persons, to demand that some settled, authoritative, and not too narrow, definition should be given to the subject of criminal lunacy. Upon this point, however, good opinions differ; and, as said already, the question of insanity is regarded by the best thought as a question of fact, just as arsenical poisoning is a question of fact; and the definitions of it and tests for it are not properly to be laid down in the law, either by statute or by the courts: they are questions for scientific determination. What is wanted, therefore, is not more definitions, however authoritative, but a more settled conviction on the part of courts that the question of insanity is to be settled in every individual case, not by *a priori* definitions, but by a study of the symptoms.[26]

[24] 1 P. C. Chap. IV.

[25] *Boardman* v. *Woodman*, 47 N. H. 120.

[26] In the matter of the "age of discretion," the law does not bind itself even with its own tests. Under the age of seven, indeed, nothing is admitted to overthrow the presumption of innocence; but between seven and fourteen the law is not so dogmatic; for while it affects to fix the age of discretion at fourteen, it nevertheless weighs the circumstances in each case. "The power of contracting guilt is measured rather by the strength of the delinquent's understanding than by days and years." The maxim is *malitia supplet ætatem*. Children of eight, ten, and thirteen years have been executed for crimes, because they manifested discretion. (1

525. The M'Naghten rules not always followed.—The English courts have not always adhered to the rules in the *M'Naghten Case*. At the trial of a woman who had killed her child, and was stopped from killing a second one by this one giving her a caress, Lord Blackburn[27] told the jury that, although the prisoner knew right from wrong, and also the character of the act, yet there were exceptional cases; and, on the strength of this charge, a verdict of not guilty, "on the ground of insanity," was returned. It is precisely these "exceptional cases" that destroy the validity of the M'Naghten rules.

In line with the foregoing is an enlightened opinion by Justice Mellor,[28] in which the rules in the *M'Naghten Case* are criticized. Very important and very enlightened and critical adverse views of the legal test of right and wrong were expressed by Justice Hawkins in the case of Ware. Lord Chief Justice Cockburn is also on record as criticizing the legal tests.[29] But Lord Denman,[30] in the case of Cole, charged that, although the prisoner had a delusion, still he knew he was doing wrong, and knew that he acted contrary to the law of the country, and therefore was not exempt. Such an opinion is the logical outcome of the M'Naghten rules, and needs only to be quoted to be condemned.

526. The law takes no heed of insanity in the abstract.—Even worse was the charge of Justice Brett, in the case of Blampied.[31] He told the jury that the law took no heed of insanity abstractly considered, or of the presence or absence of delusions. To exempt from responsibility a man must be so mad as not to know the nature of the act he committed. If he knew what he was doing, and if he knew that it was wrong, then, however mad he might be, he was still responsible. This prisoner had been insane and confined in an asylum for four years, and had killed a fellow laborer with whom he had quarreled. He was acquitted by the jury in spite of the judge's charge. Justice Brett deliberately ignored the M'Naghten rules in what he said about delusions, but he did not err on the side of mercy.

527. A contrary opinion.—In the Scotch case of Alexander Milne, tried at Edinburg, in 1863, for the murder of James Paterson,[32]

Hale P. C. 26, 27; 4 Bl. Com. 23; Chitty, Crim. Law, 724, 725.) In other words, the responsibility of a child is a matter of fact in each individual case, and not a matter of "days and years." Such should be the case also in insanity.

[27] Quoted by Dixon Mann, Forensic Med. and Tox. 2d ed. p. 361.

[28] *Reg.* v. *Cockroft*, Leeds Aut. Assizes, 1865. See Taylor, Med. Jur. 12th ed. p. 761.

[29] Quoted by Dixon Mann, op. cit. pp. 367, 368.

[30] *Reg.* v. *Cole*, C. C. C. 1883.

[31] *Reg.* v. *Blampied*, quoted by Taylor, Med. Jur. 12th ed. p. 762.

[32] Quoted by Rorie, Ed. Med. Journ. 1865, Vol. XI. p. 18.

the Lord Justice Clerk charged: "If you are quite satisfied that the prisoner was under insane delusion at the time of the act, you need not inquire whether he knew right and wrong. If the delusion be once established, the law will presume from that that he did not know right from wrong." This contradicts Lord Denman and Justice Brett as flatly as one judge can contradict another. And again: "If the mind is diseased, the man is insane; and if the mind is diseased, it is no matter what has caused it, so be that the insanity is actually produced and present at the time." This is a flouting of all "tests," and is a scientific statement.

528. Insanity a fact to be determined by jury.—Shelford[33] tells us that the existence of insanity is a fact which, by the law of England, is, in general, decided by a jury, according to the evidence. Insanity is nowhere defined in the English statute law, but is only determined in each particular case. One would suppose, in view of this principle, that the existence of insanity would be determined entirely, as Shelford says it ought to be, by the evidence, just as in a case of poisoning; and that no tests should be admitted that are not sworn to by experts as being reliable.

529. Insanity, being a fact, is not definable by statute.—It is indeed significant that there is no authoritative statement in English statutory law of what insanity really is. Being a fact, to be determined by jury, insanity could not well be defined by statute. This could be done no better than to define by statute what are the symptoms of arsenical poisoning, or what is the force of a blow necessary to kill a man. But, as statutory law is the highest of all English law, since it supersedes both common law and the decisions of the judges, it is evident that there is no highly authoritative statement in English law of what insanity really is. The highest, as we have seen, in reviewing the whole subject, is based upon the opinions of the judges, who differ widely from each other, and whose opinions, as Sir Fitzjames Stephen has said, are not so authoritative as one could wish. Therefore, insanity, not being defined at all by statute, and not being defined consistently by the judges, should remain, as Shelford says it ought to be, a question of fact, triable by jury; and not of tests, prescribed by the courts.

[33] Laws of Lunacy.

CHAPTER XXVIII.

THE M'NAGHTEN RULES IN AMERICA.

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556. The so-called legal tests criticized from the bench.
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530. Their authority in American courts.—It is hard for a layman to understand how the answers of the English judges in the *M'Naghten Case* have legal authority in America. It is, of course, well known to every one that the English common law, as it stood at the time of the separation of the two countries, is also the common law

of the American states. That law had been inherited, and was a perfectly legal possession; but this rule does not apply to any English law, whether common or statute, that has arisen since the independence of this country. Neither an act of Parliament nor the decision of an English court is binding in America. Chancellor Kent[1] says that the English common law, "so far as it is applicable to our situation and government," has been assumed by the courts or declared by statute in every American state. This applies, he says, also to English statutes passed before the emigration of our ancestors; but he does not say that it applies to English laws and decisions since the adoption of our Constitution. Perhaps it may be claimed that we are in the position towards recent English law that the old common law was in towards the civil law. Blackstone is careful to tell us that the civil law, as such, was never binding in an English court.[2] It was only when that code, or any portion of it, was voluntarily adopted into the common law, that it became of force. This is the fiction of the law; and yet the fact is that not a little of the civil law found its way insensibly into the common law, being simply appropriated by the courts and by legal writers.[3] Bracton, one of the earliest codifiers of English law, copied *verbatim* from Justinian.[4] From this it is evident that the early courts in England must have conformed to the Roman law simply as a matter of custom and convenience. The manufacture of law in that rude age was not so much a matter of Parliament. The civil law was found ready-made, and was simply adopted in many cases without formal assent; but this certainly does not supply a precedent for our American courts in reference to contemporaneous English law.

531. Not necessarily binding in America.—The answers in the *M'Naghten Case* were not given until 1843. According to Sir Fitzjames Stephen they are of doubtful authority, even in England. They were not given by the court in banc, sitting to try an issue actually joined before it. They were simply given *extra curiam,* or out of court. It is doubtful even whether the House of Lords had authority to command these answers.[5] In view of this fact, the M'Naghten rules can only be used in our American courts as rules

[1] Com. on American Law, 472. See an interesting footnote in the 13th edition, by Barnes.

[2] 1 Com. 79.

[3] See Pollock, First Book of Jurisprudence, pp. 240, 241, for a statement of the part taken by the judges in molding the early "common law."

[4] This is on the authority of Sir William Jones. See Bracton and His Relation to the Roman Law, by Guterbook, translated by Coxe, Phila. 1866.

[5] 2 Stephen, History Crim. Law, Chap. XIX.

for the interpretation of American law, and not as a part of the law itself. This is an important distinction, and one which is not commonly made. If they are found to be in accord with established law, they may supply a formula for the expression of opinion; but they are not the law itself. But it would be difficult, indeed, to demonstrate that the rules governing delusions[6] and the knowledge of right and wrong, as expressed in the *M'Naghten Case,* had any pre-existence in American law. They had no pre-existence even in English law, for they contain entirely new matter. They do not strictly follow Bracton, or Littleton, or Coke, or Hale, or Erskine. They do not confirm the ruling of any former court. They are not based on any act of Parliament. They are a brand-new formula, announced by English judges, for England, in 1843. How, then, do they become a part of American law? The only answer is that they become a part of American law by being adopted arbitrarily by the courts. There is no statutory warrant for them.

532. The right-and-wrong rule long used in America.—The right-and-wrong rule had undoubtedly been used in England, and also in America, long before the *M'Naghten Case.* It dates back at least as far as Hawkins,[7] and was used in the case of Arnold,[8] in 1724; but an entirely new interpretation was put upon it in the *M'Naghten Case,* for, as already shown, it was restricted in that case to the act itself. This practically made a new law of it; and this was not a slight matter in cases of life and death. So also of the doctrine of delusion: the answers of the English judges put an entirely new construction on that subject. All this is of English origin, dating only from 1843, and has no other authority in America than what it derives from being recognized as law in England.

533. The McNaghten rules not accepted in all American courts.—The fact is that the M'Naghten rules have not been received by all American courts as good American law. There has been great diversity of opinion and of practice. The student is often reminded of Cicero's criticism: *Alia lex Romæ, alia Athenis, alia nunc, alia posthac,*[9]—one law of Rome, another of Athens; one law now, another law later.

[6] The doctrine of "delusion" in English law extends back, as shown elsewhere in these pages, only to Erskine's speech for Hadfield. (27 How. St. Tr. 1281.) This occurred in the year 1800, and was the expression merely of Erskine's own opinions, delivered by him as an advocate at the bar; but in 1800 the American states were not a part of Great Britain, and were not obliged to take their law from an English barrister, striving, however brilliantly, to win his case.

[7] 1 P. C. Chap. I.

[8] *Arnold's Trial,* 16 How. St. Tr. 695.

[9] Quoted by Horace Binney (Life, by C. C. Binney, p. 297) in reference to the changing opinions of the U. S. Supreme

It is said that Justinian forbade any commentaries on his laws: the Pandects and the Institutes were to be kept as he gave them. Commentators change the laws by their comments: they introduce new matter and alter the old matter, so that in time immense accretions gather about a written code. King James said that in Coke's Reports there were many dangerous conceits which were the author's own, uttered for law.[10] In America we have numerous supreme courts, and their various comments and opinions tend to confusion. This is true, at least, in respect to the M'Naghten rules.

Dr. Maudsley[11] has pointed with satisfaction to the fact that the rules in the *M'Naghten Case* have been changed and even rejected by some of our American courts. That eminent English alienist seemed almost to despair of ever seeing these famous rules relax their iron grip upon English jurisprudence, and he took some comfort in casting his eye across the Atlantic to what he evidently deemed was a ray of light on this dark subject. It would be satisfactory, indeed, if we could chronicle as a fact that American courts have always shown an independence of English precedent in the matter of the M'Naghten rules, but the truth is that too many of our judges have too blindly followed them. Yet, on the other hand, not a few American courts have modified these rules, while some have rejected them entirely; and a few have criticized them with as much vigor as the most advanced alienists. No fewer than seventy cases are on record,[12] from Maine to California, in which it is claimed that these celebrated rules have been violated by the judges. The result has not been altogether a happy one, for confusion now reigns where formerly there was a measure of uniformity. Yet the very fact that there is confusion is a hopeful sign, for unrest is better than inertia, and always precedes an intellectual advance.

534. The M'Naghten rules rejected in one case as demanding too much proof.—In a very recent case[13] one of the rules in the *M'Naghten Case* was pronounced by Justice Bartlett, for the court of appeals, not to be law in the state of New York. A poor and illiterate Italian barber had killed his wife under the insane delusion that she exerted an evil spell over him, put bugs in his ear, poison in his food, sucked blood from his ear, put water and blood in his body, and contemplated eloping with a man worth ten thousand dollars. The trial judge

Court in the *Dred Scott Case*, 19 How. 393, 15 L. ed. 691.

[10] Kent, Com. on Municipal Law.

[11] Responsibility in Mental Disease, Chap. IV.

[12] 16 Am. & Eng. Enc. Law, 2d ed. p. 620.

[13] *People* v. *Nino*, 149 N. Y. 317, 43 N. E. 853.

charged the jury in the exact phraseology of the M'Naghten rules; but the court of appeals ordered a new trial, on the ground that the statement of the rule in that case was likely to mislead the jury as to the amount of proof necessary to rebut the legal presumption of sanity, and to establish a reasonable doubt in favor of insanity. Although the point is rather an abstruse one, such as lawyers are apt to make on the subject of "reasonable doubt," yet the fact remains that the rules in the *M'Naghten Case* have been declared by the court of appeals not to be the law in the state of New York. Judge Bartlett said that the law does not require that insanity must be "clearly proven" (as the words are in the M'Naghten rule), as a preponderance of evidence meets the legal requirement; moreover, if the prisoner's evidence "creates in the minds of the jury a reasonable doubt as to his sanity at the time of the killing, the prosecution must remove that doubt by a preponderance of evidence." It is to be observed that these objections to the M'Naghten rules rest, not upon the definition of responsibility, but upon the amount of proof.[14]

535. The law in Pennsylvania.—Pennsylvania law offers little variation from the English procedure.[15] Chief Justice Gibson, in 1846, decided as follows:[16] "A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature or consequences of his moral duty, it is no defense. . . . It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity."

This definition by Gibson has had great weight in Pennsylvania practice, and to it may be traced the language of many subsequent decisions by the various judges.[17] It is to Pennsylvania law what Hale is to English law. The influence of the *M'Naghten Case* is also very evident in this state. The language of the eminent jurist shows not a little confusion of ideas, from the alienist's standpoint,

[14] Judge Bartlett's opinion in the *Nino Case* is a model of clear and concise statement. Intelligence, humanity, justice, and a regard for scientific evidence, are its prevailing qualities.

[15] Pepper & Lewis, Digest of Opinions, etc.

[16] *Com.* v. *Mosler*, 4 Pa. 264.

[17] See, as examples, *Sayres* v. *Com.* 88 Pa. 291; *Com.* v. *Farkin*, 2 Pars. Sel. Eq. Cas. 439; *Com.* v. *Heidler*, 191 Pa. 375, 43 Atl. 211.

Pepper & Lewis's Digest contains references to, and compendious statements of, all Pennsylvania cases.

although highly esteemed by the lawyers. It is not clear, for instance, how "a man may be mad on all subjects" and yet have "glimmerings of reason;" nor how a "general" or total insanity may be not so great as to blind a man to the nature of his moral duty. As explained elsewhere, a total insanity, in the sense used by Gibson, following Hale, is never seen in a criminal lunatic, and hardly in any other lunatic. Neither is insanity, except in advanced dements or raving maniacs, ever so great as "entirely to destroy" the perception of right and wrong. The latter part of the definition, however, which refers to a delusion controlling a lunatic's will, and rendering him irresponsible, is psychologically sound, but it does not necessarily include all cases of criminal lunacy.

A digest of the Pennsylvania law reveals the truth of Sir Fitzjames Stephen's statement, that the judges merely repeat each other on the subject of insanity. There is hardly a novel or original idea to be found in it from the time of Chief Justice Gibson. There has, however, been a gradual tendency to modify that statement on a few points. The chief ideas for sixty years have been as follows:

535a. The knowledge of right and wrong.—This test has been so universally applied that it is needless to recapitulate the cases. In some few instances the distinction is made between moral and legal wrong; but this distinction is seldom given its full significance, for a lunatic may know that his act is against the law, but at the same time believe it is morally right. Thus Judge Brewster[18] made it a point of inquiry whether the accused knew that "his act was forbidden by the laws of God and man." Here no distinction is made between culpability in these two respects. Such a decision could have no significance in the case of a lunatic who believed he was commanded by God to break the human law against murder.

535b. The knowledge of right and wrong in respect to the particular act.—This is a distinction that has been emphasized in a very few cases in the Pennsylvania courts. Thus, Judge Ludlow[19] charged that the test "is the power . . . of a prisoner to distinguish between right and wrong in reference to the particular act in question;" and Judge Allison[20] also charged that the accused must have such power "with reference to the act charged against him as a crime." This limiting the test of right and wrong to the particular act in question robs it of some of its injustice and makes it more applicable; but

[18] *Com.* v. *Winnemore,* 1 Brewst. (Pa.) 356.

[19] *Com.* v. *Freth,* 3 Phila. 105.

[20] *Smith's Case,* 15 L. I. 33 (1858).

it would not be difficult to prove that such a limitation is by no means universally recognized or insisted on in courts of law.

535c. Hale's "partial" insanity recognized.—In Pennsylvania courts Sir Matthew Hale's "partial" insanity has had full sway, and by it is evidently understood "monomania" or delusional insanity. In fact, few judges seem to have any idea of any other kind of insanity, and this is probably because delusional insanity is the most common criminal type. Exactly contrary to Hale, however, who expressly said that "partial insanity seems not to excuse them [lunatics] in the committing of any offense for its matter capital,"[21] the modern courts have practically decided that this is the only kind of insanity that does thus excuse; but in Pennsylvania they have, in most instances, followed the rules in the *M'Naghten Case:* First, that the act must be related to the delusion; and, second (that most unjust rule), that the delusion only excuses in case the facts believed by the lunatic to be true would justify the act if they really were true. Thus, Judge Fell[22] said that "insanity is always marked by delusions." He had evidently never seen or heard of acute mania, or acute delirium, or stuporous insanity, in which systematized delusions, to which he evidently referred, do not exist. In the case of a convict who killed his keeper under the alleged delusion that the latter was poisoning his food, the court charged[23] that if the prisoner had acted under a delusion that the keeper simply "inflicted a serious injury on his character or fortune," he would not be excusable,—the idea being apparently that such injury, if really inflicted, would not justify a homicide. Again, Judge Dean[24] held that a delusion, to render a person irresponsible for an act otherwise criminal, must be a delusion that a state of facts exists which, if really existing, would wholly excuse the act. In other words (but not in Judge Dean's words), a lunatic must act with reason,—there must be method in his madness. This principle has been criticized elsewhere. Judge Arnold[25] charged that "insane delusions in respect to one thing or person will not relieve the person affected from responsibility for his acts towards other persons or things, unless his insanity or delusion is such as dethrones his reason, and renders him incapable of forming or carrying out a purpose, or to resist the impulse to commit the act, if he would." This remarkable sentence might be construed either for or

[21] 1 P. C. Chap. IV. p. 30.
[22] *Com.* v. *Meredith*, 17 Phila. 90.
[23] *Taylor* v. *Com.* 109 Pa. 262.
[24] *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.
[25] *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 163.

against any delusional lunatic. It first implies that the criminal act must be directly connected with the delusion, and then it allows that delusions may so dethrone reason that a lunatic is not responsible for any of his acts; but who will read the mind of a lunatic so unerringly as to be able to follow all its illogical processes or the influence of delusions upon conduct? or who will deny that if "insanity dethrones reason," a lunatic is not fairly responsible? The charge was based on the unscientific idea that a lunatic's delusions can and must always be traced step by step in his conduct. Practically this is often impossible.[26]

535d. Loss of self-control.—This has been allowed as a test of insanity. Thus, Justice Agnew, for the supreme court,[27] held it was no error for the lower court to have charged, among other things, that "it is the absence of that self-determining power which, in the sane mind, renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses" that determines true irresponsibility. By a liberal interpretation this might be made to cover the case of many a criminal lunatic, for the insane are usually, by the very nature of their malady, incapable of resisting their impulses. It comes nearer to the point than the test of right and wrong. Chief Justice Gibson, in the case before cited,[28] said: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance." If this figurative language means anything in actual psychiatry, it must refer to irresistible impulses, or the promptings of insane delusions. These undoubtedly impose a loss of self-control so far as rational conduct is concerned. Judge Allison[29] charged that if an alleged uncontrollable impulse "amounted to anything short of an absolute dispossession of the free and natural agency of the mind, it furnished no defense." This is practically saying the same thing in two different ways, for an "uncontrollable impulse" could hardly fall short of a "dispossession of the free and natural agency of the mind," if by this latter phrase is meant the freedom of choice. But, liberally interpreted, this phraseology would exempt most lunatics.

535e. No unanimity among the judges.—These various definitions

[26] Judge Arnold's qualifying phrase, "unless insanity is such as dethrones reason," will strike the average alienist as at least odd. If insanity does not dethrone reason, what does it do? The phrase is about as sensible as to say, "unless sickness is such as upsets the health."

[27] *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420.

[28] *Com.* v. *Mosler*, 4 Pa. 264.

[29] *Smith's Case*, 15 L. I. 33.

and tests, as quoted above from the Pennsylvania courts, show that there is considerable confusion, and no real unanimity, among the judges, although, in very many cases, there is a tendency to adhere to a few cut-and-dried formulæ, such as the knowledge of right and wrong. Where any progress has been made, it has been in the direction of limiting the knowledge of right and wrong to the particular act, and of defining more clearly the loss of power of control. This latter is unquestionably a more pertinent subject of inquiry than the knowledge of right and wrong.

536. The M'Naghten rules not satisfactory.—Judge Cox charged the jury in *Guiteau's Case*[30] that "the answer of the English judges [in the *M'Naghten Case*] . . . has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or rather the capacity to know it, as the test of responsibility; and the question of insane delusion is only important as it throws light upon the question of knowledge of, or capacity to know, the right and wrong." In this short statement Judge Cox, after seeming to discard the M'Naghten rules, does, in effect, adopt exactly what they say; *i. e.*, that the test of a knowledge of right and wrong as to the particular act is the proper test. The passage is self-contradictory; for his whole treatment of the subject of insane delusion is based upon the answers of the English judges.

537. Inability to control the conduct.—Judge Battle, of Arkansas,[31] was of opinion that the accused must have been "so affected by insanity as to render him incapable of distinguishing between right and wrong, in respect to the act of killing; or, if he was conscious of the act he was committing, and knew its consequences, that he was, in consequence of his insanity, wrought up to a frenzy which rendered him unable to control his actions." Here there are two tests, not clearly reconcilable with each other. It is difficult to see how a man in an insane frenzy can be fully conscious of his acts and their consequences.

538. A test that inculpates every delusional lunatic.—Chief Justice Park, of Connecticut,[32] held that it is enough to constitute responsibility if the accused has "mental capacity sufficient to form a specific intent to commit the homicide, and apprehend the nature and character of the act, and committed it wilfully, deliberately, and premedi-

[30] 10 Fed. 182.
[31] *Williams* v. *State*, 50 Ark. 511, 9 S. 664.
[32] *State* v. *Swift*, 57 Conn. 496, 18 Atl

tatedly." This would inculpate practically every delusional lunatic who ever did a murder, unless a loop-hole for him were found in the phrase "apprehend the nature and character of the act." The insane do not always apprehend the true nature and character of their acts; otherwise they would not be insane. The test says nothing about "delusion" or "right and wrong."

539. The will overmastered.—Mr. Justice Lumpkin, of Georgia,[33] quotes with apparent approval the opinion of another judge, that an exception to the general rule exists "where a man has sufficient reason to distinguish between right and wrong as to a particular act . . . yet, in consequence of some delusion, the will is overmastered, and there is no criminal intent." This is superseding the right-and-wrong rule with the tests of delusion and of self-control.

540. Guilty even though insane.—Mr. Justice Craig, of Illinois,[34] found that "if, at the time a deadly assault is made, the person making the assault knew that it was wrong to commit such an act, and had the power of mind to choose either to do or not to do, and of controlling his conduct in accordance with such choice, he will be held amenable to the law, although he was not entirely and perfectly sane." Here the element of self-control is added to the right-and-wrong test. But the question of self-control is absolutely a question of fact, that can be decided only in each individual case according to the evidence, —if it can, indeed, always be decided thus. It is a nicer question to determine the amount of a man's self-control at a particular moment in the past, than to determine whether he was insane.

541. Nearly a model test.—Judge Breese,[35] also of Illinois, held that "a safe and reasonable test . . . would be . . . that at the time of doing the act charged the prisoner was not of sound mind, but affected with insanity; and such affection was the efficient cause of the act, and that he would not have done the act but for that affection."

This is as nearly a model statement from the scientific viewpoint as could be conceived. It is a pity that the learned judge felt called upon to spoil it as follows: "But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." This is somewhat too metaphysical.

[33] *Carr* v. *State*, 96 Ga. 284, 22 S. E. 970.

[34] *Dunn* v. *People*, 109 Ill. 635.

[35] *Hopps* v. *People*, 31 Ill. 385, 83 Am. Dec. 231.

542. The element of self-control.—Judge Pryor,[36] of Kentucky, reversed the judgment of the lower court, and remanded for a new trial the case of an imbecile boy, convicted of burglary. The grounds stated were that the accused was an imbecile, or of such weak mind that he did not know right from wrong, and without mind to resist persuasion, or the will power to resist the importunities and persuasions of others. Here the element of self-control is added to the right-and-wrong test.

543. Consciousness of the act done.—Judge Morrow,[37] of Pennsylvania, after an elaborate charge, in which he followed closely, and used the exact language of, the M'Naghten rules, concluded with these words: "If he had power of mind enough to be conscious of what he was doing at the time, then he is responsible to the law for that act." Exceptions were taken to this extraordinary statement, but the supreme court, by Chief Justice Agnew, approved it, the Chief Justice explaining that the word "what" was intended to refer to the "real nature and true character of the act as a crime, and not to the act itself;" and that it was idiomatic, and used in the same way by Jesus, on the cross, when he said, "Father, forgive them, for they know not what they do."[38]

Judge Hirzel,[39] of Missouri, after following closely the M'Naghten rules, also used the expression, "was not conscious of what he was doing," as indicating an element of irresponsibility. It is almost needless to say that the expression is not applicable to the vast majority of criminal lunatics for most of them know well enough what they are doing. In fact, a lunatic who was so deranged as not to know what he was doing would not have mind enough to commit a homicide: he could only kill by accident, as in a maniacal frenzy. This definition is very old, and is from Justinian:[40] *Furiosus non intelligit quod agit*,—an insane man does not know what he is doing.

544. Irresistible impulse is no excuse.—Judge Gummere,[41] of New Jersey, was of the opinion that where insanity is set up as a defense, unless the prisoner was not conscious at the time of the killing that the act was morally wrong, he is responsible, even if he was impelled

[36] *Hays* v. *Com.* 17 Ky. L. Rep. 1147, 33 S. W. 1104.

[37] *Brown* v. *Com.* 78 Pa. 122.

[38] And yet, Judge Agnew, from his language, did not hold the Jews who crucified Jesus irresponsible, even though they did not know what they did, in the sense of apprehending the moral quality of the act. So his rule does not work.

[39] *State* v. *Duestrow*, 137 Mo. 69, 38 S. W. 554, 39 S. W. 266.

[40] Institutes, Lib. III. Title XX. § VIII.

[41] *Genz* v. *State*, 59 N. J. L. 488, 59 Am. St. Rep. 619, 37 Atl. 69. (See also *State* v. *Spencer*, 21 N. J. L. 196. for a leading New Jersey case.)

by an impulse which he was unable to resist. This is expounded as good New Jersey law. According to it, loss of power of self-control has nothing to do with the question, and an insane man is responsible even though impelled irresistibly by his disease to do an illegal act. This is directly contrary to the opinions of other courts, cited herewith, that loss of self-control is an important element of criminal lunacy.[42] The unreason of holding an insane man responsible for an impulse which he was unable to resist must be patent to all persons of reason.[43]

545. Knowledge and power always coexist in law.—The New York court of appeals,[44] in affirming a decision in which the charge was in the language used by Tindal, C. J., in the *M'Naghten Case,* said that the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them. This was evidently intended as a blow at so-called "moral insanity." It relegates the power of choice, or of self-control, to the rear, or assumes that it follows necessarily upon the capacity to know. But experience disproves such an assumption: the capacity to know, and the capacity to do, are not identical or always associated, even in the sane mind, and therefore much less in the insane.[44½]

546. Free agency an element.—Judge Welch,[45] of Ohio, gave the opinion for the supreme court that the true inquiries are: "Was the accused a free agent in forming the purpose to kill? Was he, at the time, capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man?" Here the self-control is put in the foreground. The M'Naghten rule, on the right-and-wrong test, is given second place.

547. A will sufficient to restrain an insane impulse.—Judge Staples,[46] of Virginia, held, for the supreme court of appeals, that "mental power sufficient to apply knowledge," and "a will sufficient to restrain the impulse that may arise from a diseased mind," are elements that make for responsibility, even though the prisoner have a

[42] "There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid." Bishop, 1 Crim. Law, 7th ed. § 383*b*.

[43] Judge Gummere also said that a rule which, like the right-and-wrong rule, had been in operation for fifty years, "ought not to be changed by judicial decision." This was also the opinion of the Medes and Persians.

[44] *Flanagan* v. *People,* 52 N. Y. 467, 11 Am. Rep. 731.

[44½] "Our principles of action contain an element which is not involved in the exercise of our powers of knowledge." —Flemings, Moral Philosophy, 1876, p. 12.

[45] *Blackburn* v. *State,* 23 Ohio St. 146.

[46] *Dejarnette* v. *Com.* 75 Va. 867.

"partial insanity." It would indeed be a hard question to determine whether a man who had "a will" sufficient to restrain the impulse of his own diseased mind was crazy or not. If he could restrain his insane impulses, the man himself would be sane, while his mind would be insane. This would be something of a paradox.

548. Insanity is a question of fact, and not of legal definition.—Mr. Justice Somerville,[47] of Alabama, subjected the whole question of the tests for criminal lunacy to a rigorous criticism, in which he practically discarded the M'Naghten rules. Next to the learned opinion of Justice Doe, of New Hampshire, this is probably the best and most rational statement on the subject ever given from an American bench. Justice Somerville maintained that the question of insanity is a question of fact, to be determined by the jury according to the evidence, and not a question of mere legal definitions. He held that a person is "not legally responsible if, by reason of the duress of mental disease, he has so far lost the power to choose between right and wrong as not to avoid doing the act in question, so that his free agency was at the time destroyed; and, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product or offspring of it solely." The latter part of this definition is the only safe rule for any court to follow. It is the only possible test, if any test is possible in a domain where, as Mr. Bishop says,[48] a test "has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist."

549. The M'Naghten rule too exacting.—Mr. Justice Stone,[49] in a dissenting opinion in the above case, said: "I am willing to disclaim, as untenable, one of the tests of legal accountability declared by the judges in the *M'Naghten Case*. . . . In that case it was said that the delusion would be a defense only when the supposed facts, if real, would have justified the act done. This rule is too exacting."

550. The right-and-wrong rule not a safe test.—Judge Dillon,[50] of Iowa, ruled that the capacity to distinguish between right and wrong is not, in all cases, a safe test of criminal responsibility. "The jury, in substance, should be told that if the defendant's act . . . was caused by mental disease . . . which dethroned his reason and judgment with respect to that act, which destroyed his power ration-

[47] *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

[48] 1 Crim. Law, 7th ed. § 381.

[49] *Parsons* v. *State*, 81 Ala. 610, 60 Am. Rep. 193, 2 So. 854.

[50] *State* v. *Felter*, 25 Iowa, 67.

ally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment." This is a much quoted opinion, and is more in line with scientific thought than the old tests. Still, it is not a little involved in its discussion of the "judgment," the "reason," and the "will." If only the first and last clauses of the sentence were used, it would be unexceptionable.

551. An involuntary act of the body, not of the mind.—Chief Justice Shaw,[51] of Massachusetts, was one of the metaphysical judges; one who indulged in all sorts of psychological refinements as to what did and what did not constitute criminal lunacy. It is bewildering to follow him in the case of *Com.* v. *Rogers,* in which he describes insanity in a way that makes it resemble nothing that has ever been seen on earth. The Chief Justice, in effect, proposed four or five different tests in one sentence; as, for instance: 1st, a knowledge of right and wrong; 2d, a knowledge that the act subjects one to punishment; 3d, has no will, no conscience, or controlling mental power; 4th, has no power of memory; 5th, has his reason, conscience, and judgment overwhelmed (a partial repetition of 3d). It remained for this highly respected jurist to invent a phrase which ought not to be allowed to die, for he described the act of a lunatic as not the act of a voluntary agent, but "the involuntary act of the body, without the concurrence of a mind directing it." Such an automaton, such a monster, as is described in that short sentence, exists nowhere in nature.[52]

552. The New Hampshire cases.—To the state of New Hampshire belongs the credit of taking the initiative in presenting a rational and scientific discussion of criminal lunacy from the bench; and to such New Hampshire jurists as Chief Justice Bell, Chief Justice Perley, Mr. Justice Doe, and Mr. Justice Ladd, is due the honor of being among the very first judges (either in America or England) who threw aside the traditions and antiquated definitions of the common law, and endeavored to place the subject of insanity in its proper scientific light before the courts. In a series of charges and opinions,[53]

[51] *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458.

[52] The curious part of *Rogers's Case* was that the accused, who had been a convict in the state prison, and while there had killed the warden by stabbing him in the neck, was acquitted on none of the grounds given by Judge Shaw, but because he had acted under a delusion; and the verdict did not even state that fact, but was given in the simple and appropriate words, "Not guilty, by reason of insanity."

[53] *Boardman* v. *Woodman,* 47 N. H. 120; *State* v. *Pike,* 49 N. H. 399, 6 Am. Rep. 533; and *State* v. *Jones,* 50 N. H. 369, 9 Am. Rep. 242.

Chief Justice Bell (*State* v. *Wier,* quoted in *State* v. *Jones,* 50 N. H. 376, 377, 9 Am. Rep. 242) said: "I have been accustomed to regard as the distinguishing test of insanity the inability

of extraordinary scope and brilliancy, they subjected the whole matter to careful revision and to searching criticism; and they gave the correct interpretation of this subject in courts of law, just as it is recognized by the medical profession. They properly indicated, in the main, its scientific outlines. The underlying principle of these New Hampshire jurists is that the question of insanity is a question of fact, to be decided upon by the jury; not a question of law, to be defined by the judge. Insanity is a disease,—a pathological process,—and as such it is a fact, to be determined by the jury; and all signs, symptoms, and tests of it are matters of evidence, and are not to be laid down as definitions of law. In Judge Doe's opinion,[54] the tests and symptoms of insanity are no more matters of law than are the tests and symptoms of consumption, of cholera, or of poisoning; and the conclusion from his remarks is legitimate, though not given by him in these identical words, that, no more than he could have tolerated the tests for arsenic, if they had been laid down two hundred and

to control the actions of a man's mind. . . . One subject, or perhaps a few subjects, engross the whole thoughts,—force themselves on the attention; if driven away by business, they recur when the mind is not occupied. If painful, the party may try to resist them,—to fly from them to business, to amusement, to drinking, even; but they steadily pursue, and may override his judgment, his will, and also his natural affection; may change love to hate, and confidence to suspicion; and this equally when the prevailing idea is false,—a mere delusion,—or is true in fact, but magnified beyond all just proportion by the mental disease. The power of the control of the thoughts being lost, the power of the will over the conduct may be equally lost; and the party under the influence of disease acts not as a rational being, but under the blind influence of evil thoughts which he can neither regulate nor control." Chief Justice Bell was a brother of Dr. Luther Bell, the eminent alienist; and in the above characterization of insanity he showed the influence of his relationship. The sketch applies, of course, largely to delusional insanity; but, so far as it goes, and barring a little metaphysical lingo about the "power of the will," it is fairly accurate, and a great advance on the "knowledge of right and wrong."

[54] *Boardman* v. *Woodman*, 47 N. H. 120.

Justice Doe said: "The question whether Miss Blydenburgh had a mental disease was a question of fact, for the jury, and not a question of law, for the court. Whether delusion is a symptom, or a test, of any mental disease, was also a question of fact, and the instructions given to the jury were erroneous in assuming it to be a question of law. The jury should have been instructed that if the writing propounded in the probate court was the offspring of mental disease, the verdict should be that Miss Blydenburgh was not of sound mind. Insanity . . . is the result of a certain pathological condition of the brain,—a condition in which the intellectual faculties, or the moral sentiments, or the animal propensities, have their free action destroyed by disease, whether congenital or acquired; and the tests and symptoms of this disease are no more matters of law than are the tests or symptoms of any other disease in animal or vegetable life. If a jury were instructed that certain manifestations were symptoms or tests of consumption, cholera, congestion, or poison, a verdict rendered in accordance with such instructions would be set aside, not because they were not correct, but because the question of their correctness was one of fact, to be determined by the jury, upon evidence. Experts may testify to the indications of mental disease, as they could not if such indications were matters of law."

more years ago by Coke or Hale, could he take from those writers the tests for insanity.

553. Errors of former days have gained the sanction of the law.—Judge Doe points out very clearly that the medical errors of former days gained the sanction of law merely by being published in law books of high authority. He implies that Coke and Hale but repeated the crude medical opinions of their times; opinions which have now been abandoned or modified by the medical profession for many long years. It is well known that Hale's lack of judicial criticism —his credulity and cruelty—were shown in his published avowal of a belief in witchcraft, and in the fact that he condemned two wretched women to death for that offense,—almost the last instances of such a judicial murder in England. After the times of Coke and Hale, when their inadequate ideas were in part abandoned, the test of delusion was adopted; but, as Judge Doe says, it was never heard of in the law before the year 1800, and was not a part of the common law of England when that common law was adopted in our American Constitution. This test, as shown elsewhere, was first proposed by Erskine, in his defense of Hadfield; and this brilliant plea of a somewhat rhetorical advocate, which has no authority in law whatever, is now claimed in some courts to be a legal test. By what means it has acquired this sanctity, since it was first evolved by Erskine, it would indeed be hard to say. It has the sanction merely of a usage of about one hundred years.

554. All symptoms and all tests are matters of fact.—In *State* v. *Pike*,[55] the court, Chief Justice Perley, charged that "neither delusion, nor knowledge of right and wrong, nor design and cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintance, or to labor or to transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury." Judge Doe was one of the justices who presided over this trial, and the above language is in accord with all he wrote on the subject of criminal lunacy. It is simply a reiteration of his opinion in the case of *Boardman* v. *Woodman*, and is an explicit statement that the tests or symptoms of disease are not questions of law, but questions of fact; just as much so in insanity as in poisoning.[56] He says that the legal profession, in profound ig-

[55] 49 N. H. 402, 6 Am. Rep. 533.

[56] Judge Doe's opinion in 49 N. H. 408, 6 Am. Rep. 533, is the most learned, most critical, and most scientific statement on the subject of criminal lunacy that has ever been delivered from the bench, either in this country or in England. It is too lengthy for quotation,

norance of mental disease, have assailed the experts, who know all that is known on the subject of insanity, as theorists and sentimentalists, who are attempting to override settled principles of law; whereas, in fact, the legal profession are invading the province of medicine, and attempting to install old, exploded medical theories in place of facts established in the progress of scientific knowledge.[57] This impartial judge announced to his own *confrères* of the bench and bar that they would escape from a false position when they withdrew into their own territory. To this trenchant opinion he was led by a firm conviction that it was not the business of courts to decide scientific questions: such evidence they must take from experts in science.

555. The legal definition of insanity is an anachronism.—With unsparing pains Judge Doe exposes case after case in which courts have ignored the scientific evidence, and charged the jury that the legal test was the knowledge of right and wrong. It is a common practice, says Judge Doe, for experts, under oath, to inform the jury that such knowledge is not a true test of insanity, and then for the judge, who is not under oath, to tell them that it is. Here the judge usurps the place of a witness, and announces as a fact what is merely a worn-out definition of the English common law. It is the same with Erskine's test of delusion: Judge Doe proves that it has no legal sanction but the usage of a century, and cites expert opinion to show that it is not necessarily present in a criminal lunatic. Thus he exposes the fallacy of the whole legal position,—a fallacy due to the persistence of courts in confusing a question of fact with a question of law. "There is no legal guilt," he says, "in a homicide solely caused by a mental disease:" and this *dictum* of the wise New Hampshire judge is the only possible test in a case of criminal lunacy.

556. The so-called legal tests criticized from the bench.—In the case

but it should be carefully read by every student of this subject, especially by the lawyers, and more especially still by the judges, who are called upon to preside at the trials of the criminal insane. It is an admirable compound both of a judicial charge and a scientific discourse. The man who wrote it had an insight into the subject of insanity that would do credit to a trained alienist. The keynote of the discourse is that insanity is a question of fact, for the jury, and not of legal tests, for the judge; that the so-called legal tests were incorporated in the common law from medical opinion when it was in a crude state; and that they are not law at all. He also discusses at length the right of nonexperts to testify to insanity from their own knowledge of facts, and he dissects, without mercy, that antiquated legal *dictum* that a person cannot stultify himself by pleading his own insanity. In conclusion he sums up the whole question when he says: "The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact." We do not doubt that Justice Doe will take high rank in the future as one of the very first judges who saw the subject of criminal lunacy in its true light.

[57] *State* v. *Pike*, 49 N. H. 438, 6 Am. Rep. 533.

of *State* v. *Jones*[58] the subject of criminal lunacy was again reviewed by Justice Ladd, and again the so-called legal tests of insanity were subjected to a luminous criticism. The conclusions are similar to those given in the former case by Judge Doe.[59] The whole history of the tests for insanity, from the time of Hale, was reviewed by Judge Ladd, in a masterly manner. The conclusion to be derived from this able paper is that, while most of the courts have professed to adhere to the traditional tests, they have nevertheless allowed themselves much latitude, and the consequence is that the legal tests and definitions are deprived of both consistency and authority. Coming from the pen of a judge, this criticism is destructive of all claims for these tests that they are binding on American courts. The rules in the *M'Naghten Case* are declared "to utterly fail;" and an examination of American cases does not, in Judge Ladd's opinion, lead to more satisfactory results.[60] For Judge Ladd the testimony of experts must outweigh all the convenient formulas and arbitrary dogmas laid down by lawyers and judges, from the time of Hale to the present.[61] For him insanity is a disease,—a pathological process,—to be proved by "all the facts bearing on the question, to be collected from every asylum for the insane throughout the world;" and he would probably have agreed with Judge Doe [62] in quoting, with disapproval, the opinion expressed by a Lord Chancellor of England[63]

[58] *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242.

[59] The court held in 50 N. H. 369, 9 Am. Rep. 242, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty, by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant.

"Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact, for the jury.

"Insanity is a mental disease,—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife,—if the killing was the product of mental disease in him,—he is not guilty. . . . Insanity is not innocence unless it produced the killing of his wife.

"If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible is a question of fact. Whether, in this case, the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

"Whether an act may be produced by partial insanity, when no connection can be discovered between the act and the disease, is a question of fact."

[60] *State* v. *Jones*, 50 N. H. 388, 389, 9 Am. Rep. 242.

[61] *State* v. *Jones*, 50 N. H. 395, 9 Am. Rep. 242.

[62] *State* v. *Pike*, 49 N. H. 437, 6 Am. Rep. 533.

[63] Hansard, C. L. XV. 1297.

in the House of Lords, on the 11th of March, 1862, that "the introduction of medical opinions and medical theories into this subject had proceeded upon the vicious principle of considering insanity as a disease!" That insanity is indeed a disease, even if an inconvenient one, and that its presence and symptoms are to be determined on the evidence, as questions of fact, and not according to arbitrary and erroneous definition by the courts, are most conclusively shown in this able array of opinions by the learned and wise New Hampshire judges.[64]

557. Striving after an impossible test.—The above review of judicial opinions in America proves, in a striking manner, that there is no unanimity among the judges, and that most of them are still striving after an impossible test. It is to this futile search that the confusion and the error are due. Insanity cannot be reduced to a formula, to suit the law. It is entirely too complex to be included in an *a priori* definition. It can only be studied by the inductive methods of science,—by marshaling all its symptoms, and deriving, from a comparison of them, a conception of individual cases. Mr. Bishop was right when he said that no test has been found because no test exists. Judge Doe was wise when he declared that mental disease is not a question of legal definition, but a matter of fact; and Sir Matthew Hale was far in advance of his age when he wrote that the problem is "a fact, triable by jury." [65]

[64] Judge Doe's opinion of "a progressive science" is given as follows, in *Boardman* v. *Woodman*, 47 N. H. 150:

"If we are to take judicial notice of a fact as settled by the scientific knowledge of experts, we must recognize the fact, as established by the unanimous medical authorities of our day, that there is a mental disease sometimes called moral insanity, and that delusion is not the test of it. Hale and Coke adopted the received medical opinion of their day, and Nicholl professed to adopt that of his time, which was in conflict with the former. If we go back to 1826, or 1800, for medical information, we might, with equal reason, go back to the physicians of Hale's time, or to Galen or Hippocrates. If we are to follow a progressive science it is not necessary to follow at a greater distance than did Hale and Nicholl. If it is necessary that the law should entertain a single medical opinion concerning a single disease, it is not necessary that that opinion should be a cast-off theory of physicians of a former generation. That cannot be a fact in law which is not a fact in science; that cannot be health in law which is disease in fact. And it is unfortunate that courts should maintain a contest with science and the laws of nature, upon a question of fact which is within the province of science, and outside the domain of law."

[65] "When he (Goethe) is told such a thing must be so—there is immense authority and custom in favor of its being so—it has been held to be so for a thousand years,—he answers, with Olympian politeness, 'But is it so? Is it so to me?'"—Matthew Arnold.

CHAPTER XXIX.

THE METAPHYSICAL CONCEPTION OF INSANITY.

558. The spiritual theory.
559. Among the ancients.
560. The wide prevalence of the spiritual conception.
561. The distinction between body and mind.
562. The metaphysical impulse.
563. Subtle questions, of more than speculative interest.
564. The curious tricks of metaphysics.
565. Evil effects on jurisprudence.
566. In English law.
567. Refinements and definitions.
568. A recent product of metaphysics.
569. But artificial psychiatry is not confined to lawyers and the courts.
570. Monomania is an invention of the etymologists.
571. Moral insanity is a product of dialectics.
572. It is also a boomerang.
573. Insanity not an abstraction, but a disease.

558. The spiritual theory.—By the metaphysical conception of insanity I understand that view which regards insanity as a manifestation of disordered mental functions apart from any consideration of disorder of the organic brain. It is the spiritual theory of insanity as against what may be called the materialistic theory. It is based upon the conception that mind and matter are two things entirely distinct, and, in a sense, even antagonistic.

559. Among the ancients.—This theory of the distinction of mind from matter has been inherited from a remote ancestry, and is inextricably interwoven in both metaphysics and theology. It probably took its origin among very primitive men, and can best be explained by Herbert Spencer's "ghost" theory. As soon as the primitive man began to have bad dreams, and to believe that what he dreamed was true, he became a believer in ghosts; and with a belief in ghosts he laid the foundation for all the spiritual theories of succeeding ages; and at the very foundation of them he placed the doctrine that mind is an entirely different entity from body. This belief, in a vague and mystical way, must have far antedated literature. One of the earliest appearances of it in primitive history anywhere was in that very

ancient Hebrew record called the book of Samuel, where the witch of Endor, at the solicitation of King Saul, makes the ghost of Samuel rise from the ground.[1] The Homeric poems, which are probably nearly contemporaneous with the earliest Jewish annals, also contain references to a belief in ghosts, as in the death of Rhesus,[2] stabbed, as he slept, by Tydides; or in the dream of Penelope,[3] or in that most dramatic book in the Odyssey, where Ulysses descends into hell, and holds converse with the shades. Pope, in commenting on a passage in that book, says it "affords full evidence that the ancients believed in a partition of the human composition into three parts: the body is buried in the earth; the image descends into the regions of the departed; and the soul, or the divine part of man, is received into Heaven, or returns to the deity whence it emanated."

560. **The wide prevalence of the spiritual conception.**—To trace the history and development of these spiritual conceptions would be to traverse the whole domain of philosophy and theology. It is enough to say that these ideas were most fully developed by the Greeks,—that wonderful people who cast in imperishable forms so many of our fundamental ideas, and expressed them in language which is still the current terminology of our modern thought and our modern science. The Hebrews themselves never advanced beyond the most primitive ghost theory; for in all their ancient literature there is a marvelous absence of the fully developed idea of the immortality of the soul. But the Greeks never ceased to elaborate the idea of the "psyche;" and their speculations, often fanciful, reached their highest flight in the *Phædo* of Plato,[4] that treatise on immortality which Cato read the night before he killed himself.[5] From the Greeks what had been a philosophical speculation passed to the Christians as a dogma of faith.

561. **The distinction between body and mind.**—The idea of the distinction between body and mind, or between matter and spirit, is so ingrained in all modern thought that it is almost impossible to dissociate it from our way of thinking and talking without doing violence to our logical processes, and without offending our most cherished prejudices. Modern psychology, which is the science that concerns us here, and which is the least well established on a purely scientific basis of all our medical sciences, has received its full share of this in-

[1] 1 Samuel, xxviii.

[2] Just then a dreadful dream Minerva sent;
A warlike form appeared before his tent,
Who seem'd a visionary steel his bosom tore;
So dreamed the monarch, and awaked no more.
Iliad (Pope), Bk. 10.

[3] Beautifully illustrated in Flaxman's Designs. Odyssey, Bk. iv.

[4] Works of Plato, translated by Cary.

[5] Plutarch, Life of Cato.

heritance, and is so permeated with metaphysical distinctions that one of the most accurate of modern psychologists, John Locke, could say that he could conceive of mind acting without matter as easily as he could conceive of matter acting without mind.[6] But he evidently deceived himself with an antithetical phrase. I venture to say that there are few persons who have critically studied mental pathology, and whose minds are trained to scientific methods, who will agree with Locke that the mind can be conceived of as acting without a material brain. It were as easy to conceive of light without a luminous object, or of an electric current without the cell or dynamo which gives it origin.[6½]

562. The metaphysical impulse.—That Locke's view, however, has been the prevalent one among modern psychologists, is not difficult to demonstrate. Most of those who have written under the metaphysical impulse assume or imply on almost every page, that matter and mind are distinct substances. Thus, Sir William Hamilton, one of the most representative writers of this school, includes his psychological writings in a treatise which has the general title of "Metaphysics," —thereby showing his conviction that mental phenomena are apart from and above the physical or physiological phenomena. "Mind and matter," he says,[7] "are only two different series of phenomena or qualities. Mind and matter, as unknown and unknowable, are the two substances in which these two different series of phenomena or qualities are supposed to inhere. . . . The distinction of two substances is only inferred from the seeming incompatibility of the two series of phenomena to coincide in one." There surely could not be a more unequivocal statement.

It was the part of Bishop Berkeley to attempt to reconcile these seeming irreconcilables, and this he did by resolving everything into ideas. As we know substance only by its qualities, so we know mind only by its qualities; but as the qualities of matter are only known to us as they become ideas in our minds, therefore there is nothing, after all, in the universe but ideas. Thus he attempted to get rid of that inconvenient thing which we call "matter." From such eminent writers as these, modern psychology has largely accepted its fundamental principles.

[6] An Essay Concerning Human Understanding.

[6½] See Huxley's Essay on "The Physical Basis of Life," in his Lay Sermons, p. 120. Let anyone attempt to define "matter" and "spirit," and he must see how absolutely impossible it is to make a philosophical distinction between them.

[7] The Metaphysics of Sir William Hamilton. Collected by Francis Bowen. Cambridge, 1866.

563. Subtle questions, of more than speculative interest.—If these subtle questions were merely of speculative interest, I should not consider them appropriate for discussion here; but the fact is undoubted that we have imported some of these refinements and distinctions into our medical sciences,—especially such sciences as take note of the physiology of the brain, and more particularly the science of psychiatry. One cannot advance far in psychiatry, and especially in medical jurisprudence, without constantly coming in contact with terms that are essentially metaphysical; terms which evade him like a will-o'-the-wisp if he attempts to apprehend them at any true worth, or to resolve them into anything like a clinical entity. This is a weakness from which medical science has long been trying to free itself: we are gradually getting rid of the "humours" and "vital principles" which formerly paraded through our medical literature, but we have not yet fully learned that the so-called mental functions are not distinct individualities, each with its own array of ills.

564. The curious tricks of metaphysics.—This infirmity plays curious tricks with some medical writers. Carpenter, the physiologist, makes a most fantastic attempt to reconcile "mind" and "matter," as though they needed any reconciliation. He states[8] that "mind" is a "force," and that "forces" can be conceived of as independent of matter—instead of the true statement (proved by all knowledge of physics) that any and all forces are but manifestations of matter. This is but a restatement by Carpenter of the dual theory, that mind and matter are two distinct substances; and renders any rational theory of mental pathology absolutely impossible. It is but a short step from such a theory to the doctrine of Mrs. Eddy, that disease is only a mistaken judgment, and that in fact physical disease is inconceivable as acting in the domain of pure mind. It is impossible to conceive how it happens, if mind and matter are distinct substances, that a dose of morphin produces sleep, or alcohol intoxicates, or the poison of typhoid fever throws all the mental functions into the confusion of delirium.

565. Evil effects on jurisprudence.—But it is in the medical jurisprudence of insanity particularly that we can trace some of the evil effects that have come from a metaphysical conception of mind and its disorders. This is an eminently practical subject, and should not be obscured by a mere display of dialectics. The problems involved in the jurisprudence of insanity are problems of fact, not of theory.

[8] Principles of Human Physiology, Philadelphia, H. C. Lea, 1868; Of the Mind, and Its Operation, p. 537.

But the confusion which has too often reigned in this province is due, in part, at least, to the fact that a metaphysical conception of the subject of mental disorders has been held by some medical and by many legal writers. The situation may be stated about as follows: The mind, being a distinct substance, is regarded as composed of certain elements or organs; such as the "will," the "memory," the "imagination," the "intelligence," the "moral sense," and the "emotions;" and these elements or organs are then erected into distinct entities themselves, each capable of being diseased separately and apart from its fellows. This is, in every sense, a very crude, even gross, conception. As the body has its several viscera, so the mind has its viscera; and as the liver can be diseased apart from the heart, so the moral sense can be diseased apart from the intelligence. This analogy is hardly based on exaggeration. Such an analysis of the mental functions is entirely academic, and there is no reason to suppose, but every reason not to suppose, that it represents any subdivision of the nerve cells in the cerebrum. That it has had great sway, however, in formulating the legal tests for insanity, is unquestionable.

566. In English law.—It is difficult to ascertain when and where the first legal definition of insanity was given in the English law. Neither Littleton,[9] Coke,[10] Fitzherbert,[11] nor Hale,[12] who are among the earliest authorities, give anything but their own opinions, so far as we can judge from the text of their writings; but, as they were all great authorities on the common law, and evidently well saturated with legal tradition (which passed for common law), they apparently gave what passed for judicial opinion on the subject in their day. They made but little attempt at an analysis of insanity. Coke got little farther than to quote from Littleton, and to tell us that the proper term in law for insanity was *non compos mentis*. Fitzherbert, who wrote early in the sixteenth century, lays it down that an "ideot" is one who knows not to tell 20 shillings, or who is his father or mother, nor knows his own age. But if he knows letters, or can read by the instruction of another, then he is no "ideot." This was a test of *non compos mentis* based simply on the amount of elementary knowledge a person might possess. Lord Chief Justice Hale made the astonishing division of the subject into two parts,—his total and partial insanity,—and he is the earliest legal writer who attempted a metaphysical analysis of the mental functions. Under partial insanity he includes those who have "a particular

[9] Co. Litt. Lib. III. Chap. VI. § 405.
[10] 2 Co. Litt. 246, 247*a*.
[11] Nat. Brev. p. 233.
[12] 1 P. C. Chap. IV.

dementia in respect of some particular discourses, subjects, or applications." This, he says, "is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason;" and he expressly says that "this partial insanity seems not to excuse them in the committing of any offense for its matter capital." According to this definition, so long as the faculty of "reason" retains any power to act, the disturbance of other "faculties," such as the emotions of grief and fear, does not render a man irresponsible. The distinction is entirely a metaphysical one, and, if taken literally, would exclude all melancholiacs and all delusional lunatics from the category of the criminal insane. There is no paranoiac or melancholiac who does not retain some power of reasoning.

567. Refinements and definitions.—It was not until somewhat later, when insanity began to be more in evidence in the English courts, that the incentive was more generally felt to attempt to analyze and define mental phenomena, in the hope of determining precisely where that subtle quality lay which we call human responsibility. One of the early cases, often quoted, was that of Edward Arnold, tried in 1724, for shooting at Lord Onslow.[13] Arnold was evidently insane; and in the charge to the jury Mr. Justice Tracy used a terminology which may, in a sense, be called classic, however much we may differ with it, because it has been repeated and used and followed in innumerable courts, both in England and America, for almost two hundred years. To exempt a man from punishment he must be "totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such an one is never the object of punishment." He must also not be able "to distinguish between good and evil." This was the first statement, I believe, of the celebrated test of the knowledge of right and wrong. This *dictum* of Justice Tracy implies that the "memory and understanding" are distinct parts of a man's mind, and that it is possible for these two distinct entities to be totally destroyed or cut out, just as a man's arm or leg could be taken away from him. Such a conception is metaphysical, and could only arise from a process of personifying the mental functions, and speaking of them as though they were distinct parts, separable from the rest of the mind. But we know as a fact that there are no lunatics who are "totally deprived of understanding and

[13] *Arnold's Trial*, 16 How. St. Tr. 695.

memory." Not even the lowest types of dementia or the worst forms of raving mania are in such a condition. For those who have the slightest acquaintance with mental pathology, such a condition, in a criminal lunatic, is inconceivable.[14] To deprive a man totally of memory and understanding he would have to be put into a state of profound unconsciousness. To suppose that the memory or the understanding could be thus obliterated, apart from the other mental functions, it is necessary to soar aloft into the region of mere abstractions, and to contemplate the several parts of the mind as so many individualities. Such language is not the language of science.

568. A recent product of metaphysics.—One of the latest products of this metaphysical theory of mind is that extraordinary psychosis known as "emotional" insanity. Mr. David Dudley Field, a very able New York lawyer, was as responsible for this as any other writer I know of. In 1873 he attempted to clarify the subject of insanity for the special benefit of the courts,[15] and decided that there were four kinds of insanity,—perceptional, intellectual, emotional, and volitional. This division is entirely academic, and is founded on the ordinary academic analysis of the mental functions. It divides the mind off into a series of distinct and separate territories, and then fences in these several artificial psychoses each in its own paddock. It is as neat and precise as can be,—the only trouble with it is that there is nothing corresponding to it in the domain of actual facts. Mr. Field fails to tell us very plainly what emotional insanity is,—he is only positive about one thing, and that is that emotional lunatics should all be hanged. So it seems a pity that he invented these poor cranks only to string them up on a gibbet. From his meagre attempts at psychological analysis, however, it is evident that Mr. Field confuses emotional disturbances with delusions,—in other words, he wanders from the emotional paddock into the intellectual paddock. It is almost needless to say that there can be no such thing as a purely emotional insanity, if by that term is meant an insanity in which the emotions alone are affected. It is impossible to conceive of an emotion without an act of the intelligence,—the two modes of cerebral action are not separable. The analysis is only possible by means of a metaphysical abstraction, which separates the emotions from all other mental phenomena, then endows them with a distinct personality, and then makes that personality the subject of

[14] This was forcibly pointed out by Erskine in his speech for Hadfield. *Hadfield's Trial*, 27 How. St. Tr. 1281.

[15] Emotional Insanity, 7 Alb. L. J. May 3, 1873, p. 273.

disease. No more mischievous distinction was ever made than this; and it is worthy of remark that this term has been more abused by the lawyers and the courts than by the doctors. It is a favorite psychosis to be urged in behalf of a popular favorite,—some interesting criminal who has enlisted on his side the public sympathy. Such cases were those of Sickel, Walworth, Nutt. As has been said of another artificial psychosis, by a shrewd writer in the Law Encyclopedia: "It is a term invented by ingenious lawyers, to afford to the jury a safe bridge upon which to pass from a disagreeable technical duty to the accomplishment of their desire, when the accused has killed some one who, according to the consensus of opinion, ought to have been killed." It is surely justifiable to hammer such psychology with a maxim from Aristotle, and to say *stultum est absurdas opiniones accuratius repellere,*— it is foolish to repel absurd opinions too carefully.

569. But artificial psychiatry is not confined to lawyers and the courts.—Marc,[15½] who is one of the older French authorities in medical jurisprudence, attempts to show that insanity is a disease of "the will." "If the action of a lunatic," he says, "is not imputed to him as a crime, it is because he is presumed to have acted involuntarily." This is just as unscientific as to erect an emotional insanity. It depends on the same kind of academic analysis. An "insanity of the will" does not exist if by this is meant the freedom of the other faculties from disease. An act of the will always presupposes an intellectual concept; and this is usually associated in the insane with an emotion; the whole mechanism is disturbed, not only one part of it.[15⅔] To say otherwise is to indulge in scholastic, not clinical, psychiatry, and the idea of Marc, that insanity is a loss of will, would only be true if lunatics were reduced to the state of automata, or mere machines. Every practical alienist knows that this is not so. Le Grand du Saulle, who has subjected Marc to a very searching criticism on this point, shows that the will alone was not involved in the very cases which Marc brought forth as examples. For instance,

15½ De la Folie, Considerée dans ses Rapports, avec les Questions Médico-judiciaires, Paris, 1841.

15⅔ Sir Fitzjames Stephen (History Crim. Law, Vol. II. Chap. XIX.) always insisted that "loss of self-control" should be made an element in the test for criminal lunacy. But that is not quite the same thing as saying that insanity consists in a disease exclusively of "the will." Loss of self-control, especially when such loss is caused by insanity, implies much more than a defect in the action of any one faculty of the mind. For instance, when a man is impelled by a delusion, he may not have power to control himself by the usual standards of conduct, but it is not his will alone that is affected. With such an interpretation of the term, Justice Stephen's test is much nearer the truth than most legal tests.

a woman became melancholy and taciturn, then had spells of excitement, turned against her husband, and ended by believing that she was the daughter of Louis XVI. and Marie Antoinette. Yet Marc finds in this typical case of delusional insanity a primary affection of the will! In fact, as Du Saulle says, the will was not only not alone diseased, but even more nearly sound than the other faculties. This is a striking instance of the evils of trying to erect metaphysical types of mental disease on any one or other individual mental faculty. So far from being abolished or impaired, the will, or the firm intention to act in response to a delusion, is one of the clearest characteristics of some lunatics.

570. Monomania is an invention of the etymologists.—The term "monomania" is one of the best illustrations of the facility with which mere terms can be made to do service as actual things in the science of psychiatry. Originally proposed by Esquirol, that great master in our science, this term has been made to do duty by standing for many impossible things. The history of the term itself, and the criticisms which have been evoked by it, are admirably described by Dr. Spitzka[16] in his work on insanity. As the etymology of the word signifies, monomania is a form of insanity in which a patient is supposed to be insane only on one subject. From this conception, which is, in a sense, proper enough, it is easy to form the idea that a man is insane in only a limited territory of his mind, or only in one little corner of it, and to hold him responsible for what happens in the open territory. The conception thus fitted in very accurately with Lord Hale's definition of "partial" insanity, and these two terms have conjointly been responsible for much confusion and not a little injustice in English and American courts. The attempt has been made many times to lay down the rule that a monomaniac's crime must be traced to the "one idea" upon which alone he is supposed to be insane. It is as though a lunatic's mind were ninety-nine parts sound and one one-hundredth part diseased; and the insane acts must all be shown to issue from this little patch of infection. To perform such impossible feats of psychological analysis is the part imposed on the expert. It were as reasonable to say that a patient with typhoid fever, or with Bright's disease, or with tuberculosis of the lungs, was only "partially" ill because all his organs were not equally involved, or to indorse the diagnosis which Hamlet made of his own case:

> I am but mad north-northwest;
> When the wind is southerly I know a hawk from a hand saw.

[16] Insanity. New York. 1883.

571. Moral insanity is a product of dialectics.—Moral insanity is the subject around which have waged more dialectic battles than about any other term in psychiatry. It is only necessary to mention the names of Rush and Pritchard, of Winslow, Ray, and Maudsley, as the advocates of this psychosis, to dignify the contest. The conception is based upon a purely academic analysis of the moral functions as distinct from all other mental functions, and upon the claim that these moral functions can be diseased separately and apart from the others. I suppose that the best refutation of this thesis is based upon a criticism of the cases which these eminent writers bring forward to illustrate and support it. I have been at pains to go over these cases, and I am prepared to claim that there is not one of them which, if critically inspected, supports the claim. Nothing can show more clearly how inadequate the term is than the array of all sorts of lunatics who have been marshaled to support it. Cases of melancholia, of maniacal exaltation, and especially of paranoia, have been made to do duty here, until the result is a complete confusion of any rational scheme of nosology. The fault lies in the attempt to divide the human mind into compartments, and to inclose in each compartment its appropriate diseases. The attempt, being an essentially metaphysical one, will fail, and already has failed, for little now is heard of moral insanity; and I do not know of an instance for many years in which this defense has been urged successfully in a court of law.[16½] It is, however, more than a mere dialectical question: it does, or has done, great harm by depriving some paranoiacs of a just defense. It should be recognized that none of these patients are merely affected in their moral sense, but that the intelligence, as an integral part of mental phenomena, is always and necessarily involved.

572. It is also a boomerang.—Moreover, the magnifying the moral sense as a criterion in insanity acts like a boomerang on expert testimony, and leads directly to the test of insanity which has been imposed by so many courts. This is the test of the knowledge of right and wrong. This test is no more illogical, but in fact it is of the same sort, as the doctrine of moral insanity. Both are based upon the conception of the moral sense as a sort of separate organ in the human mind. If this organ is diseased, the patient is insane; if it

[16½] Taylor (Med. Jur. 11th Am. ed. p. 677) gives references to some cases in which moral insanity has been recognized in the courts. See also Justice Doe in *Boardman* v. *Woodman*, 47 N. H. 150, for a judicial recognition of this mental disease.

is not diseased, he is legally responsible. Since Mr. Justice Tracy, in the case of Arnold, first promulgated this test, it has gone a course through every English and American court for nearly two hundred years. It was sanctified by the opinion of the English judges in the celebrated *M'Naghten Case,* and starts up to confront every expert witness who goes on the stand in a case of criminal lunacy. It almost evades analysis; for there is probably no lunatic, unless he be a hopeless dement or in a complete delirium, who has not some perception of right and wrong. It in no sense touches the point at issue in any case; and the reflection is a curious one, that, although sane men have been arguing for ages about what really constitutes the distinction between right and wrong, the knowledge of this distinction should be made the test for a poor lunatic.

573. Insanity not an abstraction, but a disease.—In conclusion, insanity is a disease, not of abstract mental qualities, but of the organic brain cells; and a disease in a nerve cell is not likely to respect scholastic distinctions. As Le Grand du Saulle[17] has wisely said: "In spiritualizing insanity too highly one arrives at false medical consequences. It is not as a philosopher that one should study insanity, but as a physician. By way of the clinic one arrives more surely than by all the seductive theories at scientific applications which mark progress."

[17] Traité de Médecine Légale, deuxième ed. Paris, p. 689.

CHAPTER XXX.

THE SCIENTIFIC CONCEPTION OF INSANITY.

I. In general.
574. Insanity is a disease.
575. The scientific conception stated.
II. Causes of insanity.
576. Heredity.
577. The difficulty of ascertaining heredity.
578. Statistics not always reliable.
579. Two modes of transmission.
580. Heredity is not a fixed rule.
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I. In general.

574. Insanity is a disease.—For the scientist, insanity is a physi-

cal disease. It is an affection of the organic brain in the same sense that a fever is an affection of the body. No longer is it permissible to say that insanity consists merely in an aberration of the understanding, and that the causes which produce it belong to an order of phenomena that have nothing to do with the laws of matter.[1] We no longer stop seriously to consider the opinions of Heinroth and other extremists of the spiritual school, who said that insanity never depends on a physical cause,—that it is not a disease of the body, but a disease of the mind. To such absurdities did those zealots proceed in their aversion to materialism that they proclaimed that insanity is never hereditary, "because the thinking ego, the soul, is not hereditary."[1½]

575. The scientific conception stated.—The scientific conception of insanity is just the reverse of this.[1⅔] In not a few cases the scientist can demonstrate infallibly the lesion in the brain which causes insanity; and if, in a large proportion of cases, he cannot reveal the actual organic changes, he is quite convinced that merely his methods are at fault, and not his reasoning. If he cannot observe minute changes in the living structure of the brain, it is not because such changes do not occur. The physiological processes in a nerve cell cannot be exposed under a microscope any more clearly than can the chemical reaction between an acid and a base; but there is no more reason to doubt the one than the other. We cannot trace the electric current by any change that it leaves in the wire that transmits it, but we do not doubt its material quality. So in the physiology and pathology of the brain,—we have to do with a physical science. In the medical jurisprudence of insanity we deal with matters of fact and with the facts of matter. This is no idle play upon words: if the one term is legal, the other is scientific.

From the scientific standpoint we study insanity, first, in its causes; and, second, in its pathology.

II. The causes of insanity.

576. Heredity.—The first great cause of insanity is heredity. Ri-

[1] This was the definition of Leuret (quoted by Ribot, Heredity, p. 120).

[1½] Huxley has written a lecture on "The Physical Basis of Life" (Lay Sermons, N. Y. 1871), in which he shows how baseless and unphilosophical is the objection to the biological sciences on the score of "materialism." This term is used freely by many persons who apparently have never attempted the impossible feat of defining "matter." Let them read Huxley, and, better still, David Hume.

[1⅔] Buckle (History of Civilization, Vol. I. p. 658) points to the work of Pinel, Georget, and Esquirol, as marking an epoch in recognizing that mental diseases are subject to natural law,

bot[2] has defined heredity as "that biological law by which all beings endowed with life tend to repeat themselves in their descendants." It is a universal law of organic life. Without it there could be no perpetuity of organic forms; everything would fall into confusion and anarchy; species and genera not only could not exist, but they never could have been evolved. Heredity is the starting point of evolution, and, at the same time, the preserver of the animate kingdom. It binds together, directs, and perpetuates all the forces of life. Moreover, while it is the most conspicuous force in nature, —always active, always present: now in the generation of a worm, and again in the birth of a human being,—it is by far the most mysterious, and the most unlikely to be speedily understood.

But if heredity is thus the preserving and salutary law of organic matter, it is also a blind tyrant, and one which acts often with the precision of a relentless fate. It imposes upon its victim the defects as well as the endowments of preceding generations, so that the sins of the fathers are visited upon the children to remote generations. This is the lesson of mental pathology.

577. The difficulty of ascertaining heredity.—It is not easy to arrive at positive conclusions about the prevalence of heredity in insanity. This is for two reasons: In the first place, many persons are ignorant of their family histories. Few individuals, even the best born, can tell of what diseases their grandparents died; and when the inquiry is carried farther back, the results are entirely negative: the history of hereditary disease is soon involved in an impenetrable cloud. And yet, by a careful study of documents and traditions, we can sometimes catch a glimpse through rifts in this cloud. We may have the advantage, moreover, of the records of asylums and hospitals, which often reveal a hidden or lost history.

In the second place, many insane persons, and more especially their friends, conceal a family history of insanity, or seek to gloss it over. This is a common trait of human nature. Physicians know full well how cautiously they must receive the statements of relatives on this delicate subject. A gentleman who had always supposed that he had an exceptionally good family history was elected a manager of the Pennsylvania Hospital for the Insane; having his attention thus called to this subject, he looked up the records, and was surprised and chagrined to find that within a century he had had a number of blood-relatives immured in that institution.

just as are all other phenomena. See his footnotes.

[2] Op. cit. p. 1.

578. Statistics not always reliable.—For these two reasons statistics are not always as reliable as could be desired; and it is probable that heredity is a much more prevalent cause of insanity than the figures show. We are, in other words, obliged to study the subject of heredity at comparatively short range; but, even with this limitation, the results are significant in the extreme.

579. Two modes of transmission.—Insanity may be transmitted in two ways: It may be transmitted directly from an insane ancestor, or it may be conveyed by transformation, or from an ancestor who had been afflicted with some other grave nervous disorder, such as neurasthenia, hysteria, epilepsy, or alcoholism. This is an indication that the neurotic taint is fundamental, and that from this foundation the insanity evolves. Thus, it may be the product of an evolution acting through generations. Georget observed many years since in the Saltpêtrière at Paris that hysterical women had among their near kindred not only hysterics but also epileptics, hypochondriacs, lunatics, and the deaf and dumb. Briquet[3] demonstrated the truth of this fact by a statistical study. His first table showed that 351 hysterical women had 1,103 near relatives whose histories could be traced. Of these relatives there were 214 hysterics, 13 epileptics, 16 insane, 14 with convulsive diseases, 3 somnambulists, and 12 with other nervous affections,—a result of 25 per cent. His other table showed that healthy, nonhysterical women had but 2 1/8 per cent of neurotic relatives. His table was composed of hysterical patients, but it illustrated a law of heredity that applies as well to insanity. I once saw a young woman, an only daughter, with hysterical paralysis, who afterwards became insane. Her only brother was an epileptic, her father was a chronic inebriate, and her mother had the marked eccentricities of a mild grade of paranoia. This transformation by heredity of one nervous disease into another is in accord with the constitutional taint; this weakness or defect of the nervous system is a complex, not a simple, phenomenon.

580. Heredity is not a fixed rule.—But heredity does not act with mathematical precision. Given an insane parent, it does not follow that all the children will inevitably be insane. Neither does it follow that the heredity is necessarily shown from parent to child through a number of generations. It is comparatively rare, even in cases in which there is a well-marked family history of insanity, to observe that the transmission follows unerringly the line of lineal

[3] Traité Clinique et Thérapeutique de l'Hystérie, Paris, 1859, p. 79.

descent. The collateral branches must always be searched to make the investigation complete. This fact is usually recognized even in the courts. The phenomenon called "atavism" is sometimes seen, in which the transmission is from grandparent to grandchild, the intervening parent escaping. Bucknill has attempted to belittle the importance of heredity, and has argued that, if insanity be so easily transmitted, so many children would not escape. It would be as reasonable to argue that all the children in a family should have the same stature or the same color of hair. The law of variation goes side by side with the law of heredity; this is universally recognized. But a positive fact is worth more than many negative ones, and the accumulation of positive facts, proving heredity in insanity, is so vast as not to be shaken by such a sophistical argument. This truth is shown in cases in which mere physical defects are transmitted. The Colburn family, during four generations, presented many cases of sexdigitism (a supernumerary finger and toe); but not all members of the family had this abnormity, and, in fact, it tended to decrease in succeeding generations.[4] Dr. Bucknill would scarcely maintain that this freak of nature was not hereditary, so far as it went.[5]

As every succeeding generation has a new admixture of blood, it is evident that no two generations, or no two collateral branches even of the same generation, have the same hereditary factors. Hence, variations occur; but the insane streak, like a discolored thread in the texture of a garment, can often be traced with certainty.[6]

581. Heredity is to be traced through all the lines of descent.—The error is often made of attempting to trace heredity backward through only one line of descent. When discordant results are obtained, the cry is raised that there is nothing in this doctrine. Eminent and virtuous men often have unworthy sons. "By what freak of nature," exclaims M. Ribot, "did two fools like Paxalos and Xantippos, and a maniac like Clinias, spring from Pericles?" Thucydides had one son who was silly and another who was stupid. Germanicus, wise and humane, had for a son the infamous Caligula; Vespasian had

[4] Burdach, Physiologie, Vol. II. p. 251.

[5] I have seen an instance of this polydactylism in a cat transmitted to only one kitten in a whole litter. It was evidently hereditary in that kitten. For an instance in which six fingers were hereditary, see the London Lancet, October 22, 1904, p. 1168.

[6] The relation of heredity to genius does not fall within the scope of inquiry in these pages. Galton's book on Hereditary Genius is an example of the statistical method. He found, for instance, that of 286 English judges (from 1660 to 1865) 112 had one or more illustrious kinsmen,—a ratio exceeding 1:3. This was a striking result, for such a ratio is, of course, much higher than for the population in general.

Domitian; and, greatest contrast of all, Marcus Aurelius, statesman and philosopher, had the degenerate Commodus. Neither Shakespeare nor Goethe had a descendant worthy of his name. But to this argument it is easy and pertinent to reply, that the sons of these great men derived one half of their heredity from the maternal side, and that in none of these cases has the result of an exact study of all the contributing factors come down to us.

582. Criminality and insanity.—The relation of criminality to insanity is revealed by a study of heredity. It is not uncommon to find these two stains in the same family. The same is true of inebriety and insanity. Howe,[7] in his study of idiocy in Massachusetts, found 114 idiots whose parents were known to be habitual drunkards; 211 with near relatives either insane or idiotic; 49 with one near relative idiotic; and 50 whose parents, one or both, were either insane or idiotic. These various departures from the norm proceed often from a common ground of degeneracy.[8]

583. No distinct type of hereditary insanity.—Although heredity is such an important factor in the causation of insanity, it does not determine any one particular form of insanity; a form, for instance, which can be called hereditary, as distinct from other forms. In other words, there is no special hereditary insanity. Heredity shows itself in various forms, although it is more common in what is called the degenerative group. Morel, who wrote so much on degeneration in insanity, was inclined to contend for such a special heredity form, but he has not been followed by others. Krafft-Ebing,[9] in this connection, points out the distinction between an hereditary predisposition, and an hereditary defect. In the case of a mere predisposition, the attack of insanity does not differ from an attack of nonhereditary insanity, except that it may occur at an early age, after accidental causes, with abrupt onset, and usually with a favorable termination; but in the case of an hereditary defect, or degeneracy, the form of insanity is more grave, more deep-seated, and more unfavorable.

The records of the notorious Juke family for seven generations, including 540 persons of direct descent from, and 169 related by marriage to, one "Margaret" and her drunken husband, reveal 280

[7] Reports, 1848, p. 45.

[8] "The heredity of alcoholism is now beyond dispute. It is no mere dream of an abstemious enthusiast, but the operation of a natural law; no fanciful creation of a nephalian brain, but an acknowledged fact."—Kerr, Inebriety, p. 157.

[9] Lehrbuch des Psychiatrie, also Traité Clinique, traduit par Laurent, p. 198.

paupers, 140 criminals and prostitutes, encompassing 115 different kinds of crime, including highway robbery and seven murders, incurring a cost estimated at $1,308,000. These records do not show the proportion of insane persons, but it must have been very considerable.[10]

584. A matter of statistics.—The exact relation of heredity to insanity is a matter of statistics.[11] Reports vary. Maudsley says that from one fourth to one half of the insane have the hereditary taint. Sankey says one fifth, but this is far too low. From a report made to the French government, in 1861, it appeared that 530 out of 1,000 insane patients had a history of heredity.[12] Such reports have different values in different countries, according to the accuracy with which cases are studied. Griesinger claimed that in the Orient many of the wandering mendicants and religious fakirs are insane persons.

585. The influence of race and nationality.—This is discernible. It is well known that the Jews are particularly subject to nervous disorders and insanity. The struggle for existence in our modern civilization levies a heavy toll on the human brain. Insanity seems to increase with the progress of the years. The insane in the United States, in 1860, numbered 1 to every 1,310 of the inhabitants; in 1870, 1 to every 1,100; in 1880, 1 to every 570. Between 1850 and 1880 the population doubled, and insanity increased six fold. In the decade from 1870 to 1880, the increase in population was 30 per cent and the increase in insanity was 155 per cent. In England and Wales, in 1859, there were 186.7 insane per 100,000 of population, as against 279.4 in 1880; and in Scotland 157 as against 217 per 100,000 of population. Schooling, of the Royal Statistical Society, declares that 1 in every 306 of the population in Great Britain is insane.[13] These figures are somewhat disquieting, but it must be borne in mind that in the last half-century the care of the insane has

[10] Drähms, The Criminal, p. 137. The original study of the Jukes Family was by R. L. Dugdale, and was published in the 20th annual report of the New York Prison Commission, reprinted by Putnam's Sons. See also a curious little book by A. E. Winship (1900) on "Jukes-Edwards," in which a contrast is made between the descendants of the Jukes, and the descendants of the great theologian, Jonathan Edwards. The Edwards family has furnished many prominent persons in the state and in education.

[11] Hagen, Statistische Untersuchungen über Geistes krankheiten, 1876. Statistics of insanity are to be gathered from the reports of asylums, census and health reports, etc. They are thus widely scattered. They require too much space to be included at any great length in the text.

[12] Ribot, op. cit. p. 131.

[13] Drähms, op. cit. p. 181. This work contains many statistics.

greatly improved, and a much larger proportion of these patients are now in asylums, and therefore counted, than was formerly the case.

586. The influence of sex and age.—This is also described, but these are predisposing rather than exciting causes of insanity. Women run a special risk in pregnancy, child-birth, and lactation;[14] while men are more exposed to the struggle for existence and to excesses in the use of alcohol and in venery. Children do not often go insane, but puberty is a critical period in hereditary cases, and old age has its special form of dementia. These two factors, sex and age, act in many and various ways, but usually in a subordinate rôle to more active and exciting causes.

587. Occupations, climate, and seasons.—Among the predisposing causes are also occupations,[15] and the influence of climate and seasons. These are worthy of full consideration in an exhaustive study of causes, and are given due place in the schemes of those who have written fully on etiology, but for our present purpose it is only necessary and possible to allude to them in passing.[15½]

588. Religion often a potent cause.—The influence of religion is a subject of importance, but care should be observed to avoid a common error in this respect. Many insane persons are disturbed or alienated on religious topics, but it does not follow therefore that religion is the sole cause of the insanity. The insane evolve their delirious ideas from their environment. The morbid disturbance, often induced by heredity, furnishes the true soil in which religious delusions flourish. A woman may hear a particularly lurid sermon on hell-fire, and immediately conceive the delusion of the unpardonable sin; but a strict inquiry might show that she had previously been suffering with the incipient symptoms of melancholia. In such a case the sermon is a contributing cause of an outbreak of insanity, but not its essential cause. On the other hand, abnormal religious excitement, or depressive orthodoxy taken too seriously, is doubtless responsible for much disorder of mind; and whether we call it an essential or only a contributing cause, the fact remains that supernaturalism in religion must bear its share of responsibility for the causation of insanity.[16] So intricate, however, is this subject that we

[14] Lloyd, Am. Syst. of Obstetrics, Vol. II. p. 545.

[15] Lloyd, The Diseases of Occupations, 20th Cent. Pract. of Med. Vol. III. p. 309.

[15½] Krafft-Ebing, in his Lehrbuch, has given a most careful and detailed study of the causes of insanity, and those readers who wish to pursue this subject are referred to that work, or its French translation.

[16] Fiske, Myths and Myth-Makers.

should not forget that many mystics, bigots, and fanatics are by nature ill-balanced, and that if religious excitement is sometimes the cause of insanity, so, too, on the other hand, is insanity sometimes the cause of religious excitement. There is historic ground for believing that Mahomet was neurotic, or even worse, to begin with. A common cause of hysteria in all ages has been religious emotion.[16½] This is seen in this country, among the devotees of the more emotional sects. It is not uncommon to observe this cause among negroes (and even white people) in their camp-meetings and revival services. These epidemics of hysteria, complicated sometimes with insanity, assumed immense importance and great proportions during the middle ages; their history has been written by Charcot and Paul Richer.[16⅔] They depended largely on one principle, which ought never to be forgotten, and which still has importance every day,—the principle of imitation.[17]

589. The influence of alcohol.—Among the exciting causes of insanity alcohol takes front rank. Since Magnus Huss, a Swedish physician, wrote his classical work on chronic alcoholism,[18] this poison has been widely recognized as of the first importance. Among the ancients the use of alcoholic drinks was widely prevalent, but the ancients had, as a rule, only the fermented juice of the grape. It was not until the eleventh century that the process of distilling the spirit of wine was discovered by the Arabs, who gave to this fluid the name of alcohol.[19] The process of distilling alcohol from many and various substances, and putting it upon the market at a low price, is largely a modern art; and therefore the use and abuse of strong alcoholic drinks give a special character in this age to the dis-

[16½] A very instructive book is by Regnier on Hypnotism et Croyances Anciennes (Paris, 1891), in which the pathology of religious emotion is traced through many of the ancient rites.

[16⅔] Les Démoniaques dans l'Art (1887); Les Malades et les Difformes dans l'Art (1889); Études Cliniques sur la Grande Hystérie ou Hystéro-Épilepsie (2d ed. 1885). Richer's treatise (Études Cliniques sur l'Hystéro-Épilepsie, ou Grande Hystérie, Paris, 1881) contains a vast amount of information, and is illustrated with original drawings by the author. See also Mills' articles on Hysteria and Hystero-Epilepsy in Pepper's Syst. of Medicine, Vol. V. pp. 205–288, for many references to historic and epidemic hysteria.

[17] Text-Book of Nerv. Dis. edited by Dercum, art. "Hysteria," by Lloyd, p. 93.

[18] Alcoholismus Chronicus, Stockholm, 1852.

[19] The statement in the text follows the ordinary opinion, but Berthelot has written a learned essay on "La Découverte de l'Alcool" (Science et Morale, Paris, 1897, p. 352), in which he refutes this opinion that alcohol was discovered by the Arabs. The first savant who speaks of alcohol is Arnaud de Villeneuve, in 1309. Berthelot also says that this substance was not isolated by the ancients. But the Arabs of the middle ages seem to have had the art of preparing a strong alcoholic drink, even if they did not learn how to distil the pure spirit itself; and the name is unquestionably of Arabian origin.

cases caused by chronic alcoholism, which they presumably did not have, at least to so great an extent, among the ancients. In 1857 Morel, a French alienist, wrote a systematic treatise[20] in which he demonstrated that alcohol is the cause of a chronic degeneration in the nervous system, which shows its effects not only upon its immediate victims, but also upon their descendants through several generations. It is not too much to say that Morel's book pointed the way for the scientific study of this subject which it has ever since received.

Alcohol is a direct poison to the nervous system, but it acts also upon the blood vessels, the stomach, the kidneys, the liver, and the connective tissue. Its effects are of two kinds: immediate or acute, and remote or chronic. The immediate effects are well known to all, but the chronic effects may escape the observation of those who are not trained in the study of disease. It is these chronic effects, however, which are of the greatest importance in medico-legal studies. They are not sufficiently apprehended in courts of law, for the courts are too apt to confine their attention to the acute effects. It is futile here to attempt a full discussion of this subject; moreover, it will be treated more in detail in the chapter devoted to alcoholic insanity. It suffices to say that alcohol may cause a variety of mental diseases. For instance, as an acute poison, it causes delirium tremens; while as a chronic poison it causes forms of systematized insanity with delusions, and contributes also to general paresis. Finally, it is a large factor in heredity, as already explained, and may thus act as a cause of idiocy and imbecility in the offspring, or of a chronic degeneration upon which, as a foundation, various kinds of alienation, such as periodical insanity, paranoia, epilepsy, etc., may be firmly fixed.

590. Alcoholism and crime.—Chronic alcoholism has also a close relationship with crime, both in the individual and in his descendants. In the San Quentin state prison, in California, 49 per cent of the inmates were habitual inebriates at the time of commitment; in Auburn penitentiary, in New York state, 42.78 per cent; in Joliet, Illinois, 20 per cent.[21] Of hereditary insanities and epilepsy in the Elmira Reformatory, N. Y., there were found 11 per cent, while drunkenness was hereditary in 37.6 per cent and doubt-

[20] Traité des Dégénérescences, Paris, 1857.

[21] Drähms, op. cit. p. 137. See also Havelock Ellis, The Criminal.

ful in 51 per cent.[22] Such figures are strongly suggestive of a relationship not only between alcoholism and criminality (which is, of course, a matter of common observation), but also between alcoholism and hereditary criminality. This is a much more intricate subject. Marro has estimated that more than 40 per cent of criminals are descended from drunken parents. Heredity by transformation is also seen among inebriates, as in cases in which the offspring of a chronic drunkard is born an idiot, or becomes epileptic or insane.

The medical jurist should not forget that alcohol may be merely a contributing or complicating cause in some cases, as, for instance, where, in a pre-existent case of melancholia, an alcoholic debauch throws the patient into an agitated, or stuporous, state; or in a case of mania, in which alcohol may induce an attack of acute fury. In such cases criminal impulsive acts are not to be estimated as merely the results of drunkenness.

591. The influence of infectious diseases.—Next in importance to alcohol is infection. By this term is meant the action of a germ or microbe, or of some agent, yet unknown, which acts like a germ. This is a very modern field for investigation. The science of bacteriology is still young; nevertheless, it has made extraordinary progress, and it has already thrown not a little light on the causation of insanity. This is not the place for mere speculation, but it is fair to assume that in the process of blood-infection, or blood-poisoning, will yet be found the true explanation of many of the insanities which, for so long a time, have been called functional. The term "functional" merely hides our ignorance: it is intended to apply to that class of diseases in which the actual organic process eludes our researches,—that is all; but it is in just this class that we begin to see that we have a wide field for the action of microbian bodies. Such mental diseases or disorders as accompany the infectious fevers—the delirium, for instance, of typhoid or typhus fever—present us with a type in which we unquestionably see the intoxicating action of microbes, or their toxins, on the brain.[23] From this it is not a wide step to infer that other delirious forms of disorder are also caused by infection, even though the exact agent is not yet discovered in every case. Such mental diseases as melancholia, mania, confusional and stuporous insanity, and acute delirium, are examples. This whole

[22] Report of 1893. The reports of this institution are admirably compiled and have great scientific value.

[23] Kraepelin, Einfless acuter Krankheiten, etc. Arch. f. Psych. u. Nervenk. 1882.

subject is more fully discussed in the chapters devoted to those diseases. Among the common febrile diseases which sometimes lead to insanity are typhoid fever, pneumonia, malaria, erysipelas, typhus fever, cerebro-spinal fever, and influenza. Septic conditions, such as occur in surgical operations and in childbed, are also responsible. Another wide field is that of auto-infection, in which the system becomes surcharged with the products of intestinal decomposition or the vitiation of other secretions.[24] In this field we seem to be almost about to return to the doctrines of the ancients, who found the causes of most diseases in certain "humours" in the blood, and who named melancholia from the "black bile" which they imagined to be present. But the difference is that in modern times we have more scientific ground for our opinions.

592. Syphilis as a cause of insanity.—Syphilis is a most active poison to the nervous system, and its mode of action is well understood since the researches of Heubner.[25] It acts primarily upon the inner coat of the blood vessels, and spreads thence, causing often an exudate which involves the nerve tissue. The disease of the vessels obstructs the flow of blood, and thus affects injuriously the brain. More recent investigations have added to our knowledge in *minutiæ*, but the opinions of Heubner in the main hold true as to the mode of action of the syphilitic poison. But the exact or exciting agent of syphilis is not yet known, for no microbe has been isolated to which the disease can be ascribed. It is possible that the infecting agent, whatever it be, acts not only upon the coats of the blood vessels, but also by some toxin circulating in the blood, and thus brings about direct degeneration of nerve cells and fibres, as is seen in locomotor ataxia and, to some extent, in general paresis. This poison, whatever it is, has the faculty of picking out certain nerves or certain bundles of nerves, and leaving the rest of the nervous system untouched. Thus, it seizes upon the posterior columns of the spinal cord in locomotor ataxia; again, upon the optic nerves; and it seems to have a special predilection for the third nerve, or the one which supplies some of the muscles of the eye. So true is this that Ricord said that "syphilis sets its sign manual upon the third nerve." This poison is active in the causation of general paresis; also of many diffused or localized lesions of the brain and spinal cord, which start in foci of inflamed blood vessels, as explained above; but it is in general paresis espe-

[24] Berkley's Mental Diseases, p. 361.

[25] Die Luetische Erkrankungen der Hirnarterien, 1874. See also his paper in Ziemssen's Cyclopedia, Vol. XII. Of American papers, see Dercum, Text-Book of Nervous Diseases by American Authors, p. 699.

cially that syphilis makes itself known in mental pathology. Some German writers take the extreme view that syphilis is the only cause of paresis, and one eminent German went so far in support of his opinion as to inoculate some general paretics with the virus of syphilis; and because it did not "take," he concluded hastily that his opinion was correct. Opinions differ widely on this question: there are extremists on both sides; but the general opinion is in favor of syphilis being an active, but not the only, cause of the disease. To detect syphilis, or to draw out a history of it, is often difficult, and extremists have plenty of room either to affirm or to deny that the disease exists in every paretic patient. It is better to wait for more light. Clouston[26] claimed to have found only sixteen cases of syphilitic insanity in more than three thousand insane patients in the Royal Edinburgh Asylum, but whether this argues in favor of the morality of the Scotch, or of defective observation, is perhaps an open question. On the other hand, Douse made the astounding statement that, of ten thousand patients under his care in the Central London Sick Asylum, three fourths were the subjects of acquired or inherited syphilis; but these apparently were not all mental cases.

593. The various metals.—The mineral poisons, such as lead and mercury, can cause forms of delirium. In lead poisoning, especially, a very grave mental disturbance, known as lead encephalopathy, occurs.

594. Moral and emotional causes are sometimes active in insanity.—Among these are shock, fright, remorse, grief, and shame. Such causes act with greatest force in persons who are predisposed by heredity, or weakened by accident or disease. The depressive delusions of the melancholiac may have a basis in fact. The puerperal patient may be overwhelmed by the loss of her infant, or, in cases of illegitimacy, by the shame of her situation. When mental shock, as great fright, is associated with physical shock or injury, as in railroad accidents, the mind may be thrown into a state in which a genuine insanity results. Among these causes may be placed great political and religious crises, such as the French Revolution. During and after that social upheaval many cases of mental disturbance occurred that could be traced directly to it.[27]

595. Injury to the brain.—This may cause insanity, as was recognized by Lord Chief Justice Hale.[28] These traumatic cases are of

[26] Clinical Lectures on Mental Diseases, p. 311.

[27] It is hardly necessary to remind the reader of Carlyle's dark pictures in his French Revolution,—those historic silhouettes on a background of so much that was abnormal.

[28] 1 P. C. Chap. IV.

great importance in suits for damages. Hadfield, who shot at the King, and was defended so ably by Erskine, had been severely wounded in battle.[29] Junot, one of Napoleon's generals, was seriously wounded in the head at Lonato; he afterwards went insane and killed himself.

596. Miscellaneous causes.—Among special causes may be briefly mentioned imprisonment, especially solitary confinement; military service and war, especially in foreign and tropical countries, as has been illustrated among the American troops in the Philippine Islands; celibacy, which seems to act as a predisposing cause; and exposure to the sun, or sunstroke.

597. Disturbed nutrition of the brain.—In fine, any cause which predisposes the brain to, or directly excites, an injurious alteration in its nutrition, as by overwork, exhaustion, poisoning, or profound emotional disturbance, may be conducive to an attack of insanity. And this is in accord with the principle which was stated at the beginning of this chapter, that insanity is a disorder of the organic brain.

III. The pathology of insanity.

598. A purely technical subject.—In a medico-legal work it is not desirable to enter at great length upon the discussion of purely technical scientific subjects. From its very nature the pathology, or morbid anatomy, of insanity, is a technical subject. It cannot well be described in language that is free from purely scientific terms, or in a way that is clearly intelligible to lay readers. Nevertheless, in order to present a scientific view of insanity, it is essential to refer briefly to this subject. By "pathology" is meant the science which treats of the morbid processes in the body: it is the reverse of physiology, which treats of the normal processes. By "morbid anatomy" is meant the science which treats of the organic changes which occur in the body as the results of morbid processes. The two terms, "pathology" and "morbid anatomy," are often used interchangeably; but there is a practical distinction.

599. Functional and organic diseases.—As stated elsewhere, diseases are usually distinguished as functional and organic. By the former is meant a disease of which the pathology, or exact morbid process, is obscure, and in which there are no organic or anatomical changes that can be detected. By the latter is meant a disease in which the

[29] *Hadfield's Trial*, 27 How. St. Tr. insanity, see Index-Catalogue, Vol. VI. 1281. For bibliography of traumatic p. 985.

pathological process has left changes in the anatomical structure which are appreciable. A mere neuralgia is a functional disease: a tumor of the brain is an organic one. But this distinction is arbitrary, and merely draws the line between what we do not know, on the one hand, and what we do know, on the other. The so-called functional diseases are doubtless due to changes in the vital tissues; but these changes are so minute, or so transient, or so inaccessible, that they are not revealed to science. An intoxicating dose of alcohol, or a poisonous dose of morphin, acts profoundly on the nerve cells, and may even destroy life; yet a single poisonous dose leaves no changes that can be detected by the most searching and exact methods known to science; but the long-continued use of alcohol does leave changes that can be observed. The inference is that the difference is merely one of degree. Therefore, it may be stated as a rule, that the so-called functional diseases are merely organic diseases that are still unknown.

600. A sign of the progress of mental pathology.—The progress of mental pathology has been marked in part by the transferring of some of the functional insanities into the group of the organic insanities. In some cases, however, the knowledge of the pathology may advance farther than the knowledge of the morbid anatomy. For instance, in a case of blood-infection, if certain microbes were found constantly, they might be accepted as causes of the disease, even though they left no distinct changes in the anatomy of the brain; just as in a case of poisoning by morphin there would be no doubt of the pathological cause, even though no anatomical changes could be discovered. Not a few of the insanities are still in this position: there is evidence of their being caused by infection, although that evidence is not clearly seen in anatomical changes. In some of these cases, however, as in acute delirium, anatomical changes which are the evidences of inflammation are found in the brain.[29½]

601. The morbid anatomy.—In some forms of insanity the morbid anatomy is very manifest. General paresis is a striking example. So well known is the morbid anatomy of this disease that in any given case it can be predicted before death with reasonable accuracy what the morbid changes will be found to be. But the exact pathology is not so clearly known; for instance, we do not know precisely what the morbid agents are, although there is good evidence that syphilis,

[29½] The writer has seen a case of appearance of being overwhelmed with acute delirium cause death in less than a poison.
three days. The patient had all the

alcohol, and exhaustion are all active causes. Neither do we know precisely just how they act. After death we see the ruins which the disease has left: it is like gazing upon the havoc left after a conflagration; but the conflagration itself we have not been able to see during life, although we may judge very accurately of its progress by the symptoms which the patient presents.

602. An obscure problem.—One of the most obscure problems in mental pathology is that of heredity. Although heredity, as already stated, is a universal law of organic matter, its secret cannot be read in the anatomical structure. There is no power of the microscope that will reveal this occult power of the cell. Biologists believe that it is inherent in some way in the vital cells; in fact, it is not possible to believe otherwise; but its manner of acting is a profound mystery. The embryo develops unerringly after the pattern of its parent. Mammal begets mammal; bird begets bird. Darwin was driven to the theory of "pangenesis," according to which the various cells give off minute particles which all go to form the offspring; but this is speculation.[29 2/3] In this obscure territory it is possible that we shall never have a clear light. Certainly at present we do not know, and cannot demonstrate, the process of heredity: we only know the facts.

It is no exception to this rule that idiocy, often with profound deformity of the brain-structure, is the result sometimes of inebriety in the progenitor. In such cases the deformity itself is not transmitted, but a perverted nutrition of the cells, which leads to the deformity in the embryo.

603. The organic changes in the brain.—Such organic changes as are already known in insanity are numerous and varied. They consist in inflammation and other changes in the blood vessels, in the connective tissue which supports the nerve cells, in the nerve cells themselves, and in their numerous branches. These changes, without exception, indicate a destructive process.[30]

604. The general law of mental pathology.—Therefore the general law of mental pathology may be stated as follows: Insanity is the result of a perversion of the nutrition of the brain cells, and this perversion tends to a destruction of the nerve elements. Recovery indicates a successful resistance of the brain cells to a destructive process.

605. Bacteriology and insanity.—Bacteriology offers a large field for the investigation of this destructive process. The germs of

[29 2/3] Shute, Organic Evolution, pp. 66, 68, 69, 71.

[30] Berkley, op. cit. p. 325.

disease, which, in such large number and in such variety find access to the blood, are doubtless responsible for many perversions of mental functions. It is here that science, with profound hope, awaits new light on the causation of mental disease, and, at the same time, new indications for successful treatment.[31]

606. Conclusion.—In conclusion it may be reaffirmed, in the language of Ribot,[32] that insanity is a material disease. "The idea of a mental disease independent of all organic cause is a theory so unintelligible that the spiritualists themselves have rejected it, and it is now generally admitted that the cause of madness is always to be found in a diseased state of the organs; insanity, like other maladies, is a disease physical in its cause, though mental as regards most of its symptoms." This is the scientific conception of insanity.[33]

[31] The best works in the English language on the pathology and morbid anatomy of insanity are Bevan Lewis's Text-Book of Mental Diseases, 2d ed. 1899, and Berkley's Treatise on Mental Diseases, 1900.

[32] Op. cit. p. 120.

[33] In closing this chapter a short historical digression may be allowed in favor of the French Revolution as a cause of curious mental phenomena and even of insanity,—a subject which was referred to in passing in the text (§ 594). During the Great Terror there was a morbid doubt in everybody's mind about everybody else and about everything. According to Carlyle, Desmoulins came to doubt the sincerity (four years after the event) of those who rose at his voice in '89, and stormed the Bastile; he had a morbid suspicion which amounted almost to a delusion. Carlyle calls it preternaturalism of suspicion.

Charlotte Corday was not without her imitators, one of whom was Cécile Rénault, who tried to kill Robespierre (Carlyle, French Rev. Bk. VI. Chap. III.)

The characters of Marat and Robespierre present many aspects of mad fanaticism, if not strictly of insanity. (See the latest apologist for Marat, Ernest Balfort Bax, in his Life of The People's Friend, Boston, 1901.)

After the Terror it became a custom of women of society and fashion to appear "in an interesting condition;" and if they were not really so, they stuffed and padded with pillows so as to present the appearance. This was supposed to typify the desire of all good women to repopulate the land which had been depopulated by the guillotine.

The imprisoned, and even the condemned, amused themselves with mock trials, and even with mock executions with the guillotine (as by "over-turning chairs"), and personated Tinville and others, whom they handed over to an improvised Devil. Goethe made observations at Argonne on the "canon-fever," which was a sort of neurasthenic condition.

CHAPTER XXXI.

THE CLASSIFICATION OF INSANITY.

607. Classification cannot be ignored.
608. There are varieties of insanity.
609. Methods of classification.
610. The best method is a mixed one.
611. A hint for classification.
612. Still another fact.
613. Acquired insanity.
614. An anatomical basis.
615. Krafft-Ebing's scheme.
616. Easy to criticize.
617. Several objections stated.
618. Classification not a medico-legal subject.

607. Classification cannot be ignored.—Mr. Wharton,[1] like many other legal writers, advocated the unsound theory that a classification of insanity is unnecessary; that insanity is only one disease. He was here not even abreast of Coke,[2] who, two hundred years before, had proposed a scheme of classification which, with all its faults, had the merit, at least, of recognizing that there are varieties of mental disease. But Mr. Wharton's attitude has been the attitude of the vast majority of legal writers, for they have treated the subject of insanity as though it were capable of being limited to a very few and very simple definitions.

608. There are varieties of insanity.—Insanity is not one, but many. The only difficulty is in defining just how many. Hence, the subject of classification is one of peculiar difficulty, and this is so because our knowledge of all forms of insanity is not yet complete. In order to classify properly we should require very exact knowledge of the causes and pathology of the various kinds of insanity; for instance, we should need exact knowledge of the morbid processes in the organic brain which cause the various derangements of the mental functions which we call mental diseases. Our knowledge in this

[1] Med. Jur. Vol. I. by Wharton & Stillé, p. 253, 4th ed.

[2] 2 Litt. 247*a*.

respect is not yet complete, but it is advancing, and is more complete for some forms than for others.

609. Methods of classification.—Several methods of classification[2½] are possible:

First, the etiological method,—or according to causes. This method is not at all satisfactory, because the causes of insanity are numerous and complex, and cannot always be unraveled. Moreover, different causes may produce similar results, or the same cause may produce different results, or many causes may combine to produce one form of disease. Thus we have alcoholic insanity, syphilitic insanity, puerperal insanity, etc.[2⅔]

Second, the pathological method,—or according to the morbid process in the brain. But here we meet with an obstacle in the fact that our knowledge is not yet complete. In some cases there in an inflammation or infection; in others, a degeneration of tissue; in still others, an hereditary defect in development. If we had exact knowledge, this method would be the most scientific.

Third, the clinical method,—or according to symptoms. This consists in grouping the insanities according to the character of the mental disturbances, without regard to causation or pathology. Thus mania forms one group, melancholia, another.[3]

610. The best method is a mixed one.—All these modes have been advocated and used, but none of them has the unanimous indorsement of alienists. They are merely tentative, and subject to alteration and improvement.[4] The best method for the present is the mixed method, in which all the above methods are utilized. In order to understand the advantages of such a composite method, it is necessary to consider briefly the present state of the science of psychiatry.

611. A hint for classification.—The first great fact in psychiatry is heredity. Many persons are born to be insane. They are marked

[2½] "The condition common to . . . classification is to comprehend everything and to suppose nothing."

"We may classify objects arbitrarily in any point of view in which we are pleased to regard them. But a natural classification can only proceed according to the real nature and qualities of the objects."—Fleming, Vocabulary of Philosophy, art. "Classification."

[2⅔] This method has been much used by British alienists, following Skae. It has led to a listing of more than twenty forms of insanity, many of which are identical. It is one of the most objectionable of all schemes.

[3] No notice is taken above of the method of classifying insanity according to the mental faculties involved. Thus, we should have emotional, intellectual, volitional, and moral insanity. For reasons which are hard to understand, Dr. Maudsley has given the weight of his great authority to such a scheme. But such a plan is metaphysical, not scientific, and is criticized elsewhere in these pages.

[4] Krafft-Ebing, Traité Clinique de Psychiatrie, traduit par Laurent, Paris, 1897, p. 339.

from their mothers' wombs with a fatal tendency to degeneracy. Therefore, these patients are constitutionally affected; their mental impairment is not acquired from causes acting temporarily, but it is the logical result of a badly constructed nervous system; it is evolutional and inevitable. Our asylums bear eloquent testimony to the truth of this doctrine. There is thus fixed by nature a great subdivision of the insane,—those who are constitutionally affected: such as the monomaniacs or paranoiacs. This fact supplies at once a hint for classification.

612. Still another fact.—Another fact, closely allied to the foregoing, is that, in a certain large class, the brain does not develop; the patient never acquires a normal mental strength; he is weak-minded from birth. This class constitutes the great subdivision of the idiots, —a subdivision which has been recognized in the law from a remote period.[5] They were called *fatui* or *stultes naturales,* or natural fools.

613. Acquired insanity.—Again, persons who are quite healthy and of good heredity may acquire some forms of insanity, just as they may acquire a fever or other form of ill health. Given the appropriate causes, the natural results will follow. Thus, there is a large group of the insanities which are not necessarily hereditary, but which arise from temporary or accidental causes. They may or may not be fatal; they may or may not lead to permanent and incurable forms; they are, in fact, often curable. Moreover, these affections have no recognized pathology as yet: the underlying anatomical changes in the brain are still unknown, or, at least, only approximately known. Hence, they are styled functional disorders; but this term, it must be noted, is only provisional, for every disease must have an anatomical basis. A functional disease is merely one in which this anatomical basis is still unrecognized. This group is called the psychoneuroses. It includes the great majority of the acute insanities, such as mania and melancholia.

614. An anatomical basis.—Finally, there is a group of insanities in which there is a recognizable anatomical basis. The members of this group depend upon organic changes in the brain, which have been studied, and which are as well recognized in some cases as the pathological changes of pneumonia. Such mental diseases are general paresis, syphilitic insanity, and chronic alcoholic insanity. They hold an assured scientific position, because the lesions underlying

[5] Statute de Prerogativâ Regis, 17 Edw. II. A. D. 1342.

them can be seen and examined. They occupy a position in which it is to be hoped that all the insanities may one day be included,—the day when the anatomy of insanity will be fully demonstrated.

615. Krafft-Ebing's scheme.—Upon the foundations of these distinctions Krafft-Ebing, an eminent German alienist, has based a scheme of classification which is, on the whole, the most satisfactory that has yet been suggested.[6] It is as follows:

A. Insanities of the developed brain.
  1. Diseases without anatomical changes, or functional diseases.
    (1) Psychoneuroses: diseases of the brain otherwise normal.
      1st. Melancholia.
      2d. Mania.
      3d. Stupor.
      4th. Confusional insanity.
    [These forms may lead to chronic insanity and terminal dementia.]
    (2) Degenerative insanities: diseases of the brain constitutionally predisposed to insanity.
      1st. Reasoning insanity.
      2d. Paranoia (corresponding to monomania).
      3d. Periodic or circular insanity.
      4th. Insanity engrafted on the great neuroses, such as neurasthenia, hysteria, epilepsy, and hypochondria.
  2. Diseases with recognizable anatomical changes.
      1st. Acute delirium, or Bell's mania.
      2d. General paresis, or dementia paralytica.
      3d. Cerebral syphilis.
      4th. Senile dementia.
      5th. Alcoholic insanity.
B. Arrest of development of the brain.
      1st. Imbecility.
      2d. Idiocy.

The above scheme is somewhat condensed from Krafft-Ebing's original. It is also very slightly modified, and the terminology has been translated so as to conform with our American usages. The main features of the original, however, are preserved.

616. Easy to criticize.—It is not difficult to raise objections to the classification of Krafft-Ebing. That classification is not perfect; and, in fact, in the present state of the science of psychiatry a perfect scheme is not possible, for reasons which have already been indicated; but it is a good, practical scheme, and as such it is adopted here.

[6] Op. cit. pp. 346, 347.

617. Several objections stated.—There are several objections, however, which may be briefly indicated. In the first place, the psychoneuroses are not entirely without known anatomical basis. Recent investigations have tended to show that in some forms of mania and delirium there are changes in the nerve cells, due to infection, which are recognizable.[7] There is good reason to hope that in time great advances will be made in the study of the morbid anatomy of the so-called psychoneuroses, and that many of these forms may yet have to take their places among the organic insanities.

The distinction between the degenerative insanities, on the one hand, and the psychoneuroses, on the other, is too absolute in Krafft-Ebing's classification. Heredity, or a constitutional taint, is a not unimportant factor in some of the latter group. Mania and melancholia, especially the latter, are often found in patients in whom heredity is well-marked, and in whom the *stigmata* of degeneration are not wanting.

These are the two chief grounds of criticism of Krafft-Ebing's plan. On the other hand, that plan has the great merit of being elastic, or readily adjustable. It admits easily of the introduction of new forms; and new forms of insanity will doubtless be recognized and demonstrated as science advances. The general principles underlying the scheme of the German alienist are correct; the working of the scheme is, in the main, admirable.[8]

618. Classification not a medico-legal subject.—There has been no attempt in this chapter to give an exhaustive *résumé* of the subject of classification. That subject is not particularly a medico-legal one. All that has been attempted has been to indicate the outlines of the subject, and to introduce a good working scheme. English and American alienists have not been foremost, or altogether happy, in their

[7] See, especially, Berkley, Treatise on Mental Diseases, and Bevan Lewis, Text-Book on Mental Diseases. These two works are especially rich in pathological studies of insanity.

[8] There is a tendency at present in America, under the leadership of Kraepelin, the German alienist, to break down some of the time-honored distinctions between the various psychoneuroses. Thus, a "manic-depressive" type of insanity is described,—a form in which depression and exaltation are confused. (Thompson, Abstract in Boston M. & S. Journal, November 24, 1904, p. 570.) This form seems to be intended to take the place of mania, but some of its advocates balk when asked to affirm that there is no pure melancholia. Consult Adolph Mayer's chapter in the 4th edition of Church & Peterson's Nervous and Mental Diseases, for a discussion of recent views of European specialists.

attempts at classification. Our progress in this not unimportant field has been due largely to French and German psychiatrists.[9]

[9] The following works are valuable for reference on this subject: Krafft-Ebing, Lehrbuch der Psychiatrie; also in a French translation by Laurent, Traité Clinique de Psychiatrie; Spitzka, Insanity; Stearns, Lectures on Mental Diseases; Sankey, Lectures on Mental Disease; Régis, Manuel Pratique de Médecine Mentale; Kraepelin, Psychiatrie.

Not a little sarcasm has been wasted on the subject of classification in insanity; nevertheless, as in any of the sciences, such as botany and zoölogy, this subject will always retain its importance. Buchez, quoted by Régis, has said: "When they think they have finished their studies, the rhetoricians construct a tragedy and the alienists a classification." This witticism may divert us, but it will not turn us aside.

CHAPTER XXXII.

MANIA.

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I. The medical aspects of mania.

619. The disease defined.—Mania is defined by Krafft-Ebing[1] as

[1] Traité Clinique de Psych. p. 381. Traduit par Laurent, Paris, 1897.

an affection in which there is an alteration of the self-consciousness, with a feeling of gaiety and an acceleration of the mental acts. Mendel[2] gives a better definition than Krafft-Ebing when he says that mania is a functional mental disease, characterized by a morbid acceleration of the ideas, and by increased irritability of the motor centers of the brain. In other words, mania can be described as a disease which is marked by exaltation, incoherence, and motor excitement.

620. Mania the opposite of melancholia.—Mania is usually described as the opposite of melancholia. The one is marked by excitement: the other by depression. The one is characterized by gaiety: the other by despondency. In mania there is a wider range of ideas, and these may become confused: in melancholia the ideas are limited in range, and become fixed, as delusions.

621. Exaltation is a prominent symptom of mania.—The patient is excited and often gay; he is as one who is mildly intoxicated with alcohol. The emotional tone in the early stages is good-humor: the patient laughs promptly, jokes easily, and is readily satisfied with himself and the world. In spite of this fact, however, he does not bear crossing, and his emotional instability is often shown by the quickness with which he resents opposition or coercion. A part of his emotional excitement is a pronounced egotism. He is often too well satisfied with himself to be either rational or agreeable. The maniac, in fact, as in most forms of insanity, has a well-marked disturbance of his sense of the ego, or his self-consciousness. With him this takes the form of a vanity which sometimes approaches to coxcombry. He is self-assertive and self-confident. A very marked feature of this gaiety is that it has no relation with the facts of life: the patient is quite oblivious of the lack of harmony between his feeling of well-being and the realities of his case. His fortunes may be at a low ebb, yet he is gay. His friends may show the greatest apprehension over his state, yet he is undismayed. The asylum may open to receive him, yet he will continue to enjoy life. In the worst cases the gaiety may lead to extravagant actions, such as shouting, dancing, and singing. In mild cases, or in the early stages of severe cases, an excessive loquaciousness is a marked symptom.

622. Acceleration of the ideas in mania.—But although it is true that gaiety predominates in many cases, it is an error to say that it prevails in every case of mania; and therefore Mendel is correct when he does not include it in his definition, but says merely that

[2] Die Manie, quoted by Krafft-Ebing.

mania is marked by acceleration of the ideas and irritability of the motor centers.[2½] Gaiety is not necessarily the prevailing tone in every case, for some maniacs are irritable and ill-natured almost from the start; while others are merely vain and offensive. Following Mendel, we should say that excitement of the brain generally, with acceleration of ideas, and great motor activity, is the essential condition in mania. The emotional disturbance is a part of this general excitement, and, while usually joyous, it is not necessarily so, but depends for its tone on the prevailing range of the morbid ideas.[2⅔]

The excitement shows itself in acceleration in the formation of ideas. The maniac's mind is active and quick. His thoughts range over a wide territory, but they are usually not under the control of common sense. The association of ideas is complex, but the coherence of ideas is not sound. This leads to erratic conduct and rambling speech. Not unusually the perceptions are accurate and the wit lively, so that the patient may appear to have a superficial brilliancy. He is capable of sarcasm, of wit, and of invective, but he is quite as capable of folly, verbiage, and insult. The maniac is not capable of sustained thought, of rational converse, except within a limited range. He soon exceeds the bounds both of reason and of civility. As his mind becomes more impaired, he misinterprets his own thoughts, and begins to form delusions; but these delusions are usually as fleeting as his ideas. In other words, the patient does not develop fixed and systematized delusions; he has not sufficient coherence of ideas for this. Incoherence, in fact, becomes sooner or later a marked feature in some cases. The ideas are formed rapidly, but they are not permanent. New concepts crowd out the old ones. The mental state is kaleidoscopic, except that there is nothing particularly beautiful about it.

623. The moral faculties in mania.—The moral concepts are, of course, equally impaired. At first unconventional, the maniac soon becomes unrestrained. He may be reckless, thriftless, even dishonest; and he is not unusually vulgar, immodest, indecent, and profane. In the early stages extravagance with money may cause serious embarrassment. The patient may even steal, but he does this not so

[2½] Thus, too, Esquirol said that mania was a chronic cerebral affection, ordinarily unattended by fever, and characterized by perturbation and exaltation of the sensibility, the intelligence, and the will (Des Maladies Mentales, Paris, 1838); and Ball defines mania as characterized by delirium, hyperexcitation of the intelligence, and a tumultuous desire for movement (quoted by Régis, Méd. Mentale). In neither of these definitions is gaiety mentioned as essential in mania.

[2⅔] Régis, Ment. Med. translated by Bannister, pp. 150, 151.

much with malice aforethought as from the mere impulse to appropriate what does not belong to him. The sexual instinct may be increased, and is often uncontrolled. Sexual ideas may predominate in the mind, and find expression most flagrantly in word and deed. There may also be excess in the use of alcohol, tobacco, and food. The affections are much involved in mania. The patient becomes quite indifferent to the ties of friendship and family. The anxiety and grief of those nearest to him make no impression on him. Parents, wife, children, are soon out of mind. At his worst he is quite incapable of realizing the impulses of love or solicitude. He may even be cruel in speech and conduct, but his motives are fleeting. He has no enduring resentments.[3]

624. Motor excitement.—In mania we see motor excitement as a result of the excitement of the brain. The patient is restless: his muscles react to every varying phase of the mental disturbance. If he is on his feet, he paces to and fro; if he sits or reclines, he is ill at ease: his arms and hands are in frequent movement, or his whole body may be tossed about. The muscles of his face are especially mobile, and portray the ever-changing thoughts and emotions within. In the more excited cases, the patients gesticulate. Clouston[3½] relates the case of a young woman in whom the motor disturbance was almost automatic. The patient, when left alone, would make faces, jump about, tear her clothes, turn heels over head, scream, pick her skin, and masturbate without erotic feeling. In the midst of all this, if one addressed her, she would sit up and talk quietly and intelligently. Picking at the skin, biting the nails, and otherwise maltreating the person, are sometimes done as acquired habits, especially in the more advanced cases. Clouston calls this pseudo-automatic form "muscular mania;" and draws attention to the fact that the intellectual powers may not be so much involved as the motor functions of the brain.

625. Hallucinations in mania.—Hallucinations of sight, hearing, smell, and taste are not uncommon in mania, but, as in the case of delusions, they are not at all persistent, unless it be in chronic cases. The patients hear voices or see faces. They sometimes smell and taste disgusting objects. One of the author's patients believed that some one grabbed her by the arm in the dark; and this encouraged

[3] M. Ribot (Psychology of the Emotions, pp. 224, 225) agrees with Krafft-Ebing that the two series of phenomena —the intellectual disorder, on the one hand, and the emotional excitement, on the other—are due to one and the same cause; *i. e.*, a deep-seated pathological process in the brain. The attempt of some writers to separate the two, or to explain one by the other, is entirely artificial.

[3½] Clinical Lectures on Mental Diseases, 1st ed. p. 132.

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her in the delusion that some one was under her bed at night. When talking of these things, she laughed and looked foolish, and seemed half-ashamed of them.

626. The conduct is affected.—The conduct in mania is such as would be expected from so protean a disorder. In the early stages, as already said, the patient may be extravagant and wasteful. Money and property are not safe in his hands. He shows a complete change of character. His moral sense is perverted: from being a man of good repute, he may become one who seriously compromises his character. He may drink to excess; and it is more than probable that he will indulge in sexual debauchery. The maniac is most loquacious. He is often not a little boastful. He is always, even at his best, on the verge of saying, or is actually saying, something inconsequential or erratic. Sometimes he has a craze for scribbling,—a veritable *cacoethes scribendi*,—which vents itself in long-winded letters.[3⅜] Some maniacs are mischief-makers in a mild way. They have an instinct for annoying and insulting people; and, while not capable of very elaborate schemes, they resort to petty means of offense. These patients are not always in good humor; they can quarrel, scold, and fight; and they are capable of acts of violence, mostly from passion, which may bring them to the notice of the law. The maniac is not choice in his language: he swears proficiently; and even women of refinement use vulgar and indecent words.

627. The physical disorder.—The physical symptoms in mania are usually well-marked. In early cases the patient may have a vigorous appetite, but, in spite of it, he loses flesh. In time he runs down, becomes haggard and even emaciated; he has a disheveled and unkempt appearance, and in fact is quite indifferent to his toilet and to the question of clothes. There may be some febrile reaction in very acute and violent cases. Insomnia is marked.

628. Impulsive acts.—The maniac sometimes acts impulsively. Deeds of violence are thus committed. In a case of puerperal mania, known to the author, the patient, without warning or provocation, flung a heavy inkstand at her husband's head. The patient may suddenly decamp and wander away without aim.

629. Severe cases.— In severe cases the excitement and incoherence increase rapidly to a high degree. The patient becomes noisy, violent, and destructive. Singing, shouting, swearing, pray-

[3⅜] The *insanabile scribendi cacoethes* of Juvenal, 7, 52,—not confined to maniacs.

ing, and quoting poetry are indulged in with abandon. The violence is not premeditated, but is the reaction of the badly disordered brain. Destruction of furniture and clothing, breaking windows, and fighting the attendants, are signs of the tumultuous thoughts. Incoherence of speech is now very marked. The association of ideas is broken up, but by carefully following the language it is possible sometimes to trace out the prevalent mental concepts. In this stage the consciousness and memory are greatly impaired, and to the patient, on recovery, much of the period of the disease remains a complete blank.

630. The mode of onset.—The onset of mania is not usually abrupt, although exceptions to this rule occur. Nevertheless, the disease may declare itself rapidly. In the early stages, when the patient is still only mildly exalted, acts of medico-legal import may occur, and give rise to nice questions of responsibility. There may be an initial period of depression, in which the patient is anxious and weeps.

It is not an uncommon observation, in fact, that a melancholic status is the immediate forerunner of an attack of acute mania. In a literal sense, as Shakespeare has expressed it, "melancholy is the nurse of frenzy," and marks that initial period during which the patient still has enough self-consciousness preserved to be aware of impending suffering and illness,—something amiss or awry in the mental fabric,—before the personality is lost in the agitation and incoherence of the maniacal processes.[4] In puerperal cases this precedent stage of depression may be short, and may escape the observation of nurses and friends; or it may be noted that the patient becomes irritable and moody, and apt to find fault easily and unreasonably. At this period she becomes the creature of uncontrollable impulses; and it is especially under the spell of this melancholic humor that she may do injury to herself or her babe. Some sudden act of this kind is occasionally the first symptom which abruptly intrudes itself upon the notice of unobservant attendants, and forces upon them the alarming conviction that their patient has become a maniac.[4½]

631. The distinction between mania and melancholia ignored.— As explained elsewhere, the combination of the symptoms of melancholia

[4] Krafft-Ebing, op. cit. p. 385. Bevan Lewis (Text-Book of Ment. Dis. 2d ed. pp. 196, 197). The latter writer describes this *stadium melancholicum*, and says it is the usual feature at the onset of mania. But Spitzka (Insanity, 1883, p. 137) does not agree that this initial stage of depression is truly melancholic.

[4½] Am. Syst. of Obstetrics, Vol. II. art. "Puerperal Insanity, etc." pp. 567. 568.

Chronic Mania (Chapin).

and mania, as seen in some patients, has led some alienists, notably Kraepelin,[5] to seek to break down the distinction between these two diseases, and to include them in one,—a so-called manic-depressive type; but this is too radical.

632. The mode of termination.—The termination of mania may be in recovery, in death, or in chronic deterioration. After recovery some patients enjoy a more or less prolonged period of good health, only to break down in another attack. These cases of recurrent mania are exceedingly dangerous to the patient's mental integrity, and may ultimately lead to chronic mania. In chronic mania the symptoms of exaltation and incoherence, but with less emotional disturbance, are continuous, and modified in various ways. There is usually a progressive failure of the mental faculties. Memory, self-consciousness, intelligence, the affections, and the moral sentiments are all impaired. In this stage the patient may develop delusions which are fixed, but not well-systematized. These delusions are usually rather expansive and grandiose, and lead to corresponding eccentricities in dress and manners. In most asylums there are old chronic maniacs who are noted as the odd characters of the institution. Garrulous, delusional, and decked in odd raiment, they lead a prolonged and quite harmless existence. The final stage is one of terminal dementia, in which the mind is hopelessly wrecked.

633. Examples of the abuse of the term.—No account is taken in this chapter of the group of so-called insanities which are called "kleptomania," "pyromania," "dipsomania," and kindred terms. These terms denote special tendencies or symptoms rather than distinct clinical forms of mental disease. Moreover, they are not especially associated with true mania. They are examples of an abuse of the word "mania," which has grown out of the custom, in former times, of grouping many diverse kinds of insanity under this head. This is not the place, therefore, to discuss these somewhat artificial terms and the impulses which they are made to stand for; they will be noted in their appropriate places. It is enough to say here that a prejudice, not unwarranted, has been aroused against them by reason of the abuse, and even absurdities, to which they have contributed. Nevertheless, when properly used, these terms have a legitimate meaning. They stand for certain morbid prepensities or impulses. Thus, "dipsomania" is an uncontrollable impulse to drink, which has significance in alcoholic insanity; and "kleptomania," or a morbid

[5] Psychiatrie, 1903.

impulse to steal, is found in some degenerates, and in other examples of genuine insanity.[6]

II. The medico-legal aspects of mania.

634. The incipient stages.—It is in the incipient stage of mania that the question of legal responsibility is most likely to arise; but the cases in which genuine maniacs have figured in courts of law are not numerous, for the simple reason that the maniac, when his disease is once well declared, is so obviously insane that no question is raised about his lack of accountability. Moreover, the patient in this disease is not in a condition of mind to form a determination to commit an act in its nature criminal. He acts from impulse. His deeds of violence are rather in the nature of accidents; and he is seldom homicidal, even by accident.

635. Mania is a much abused term in medical jurisprudence.—This term has been abused both by the lawyers and the doctors. Griesinger[7] protested against this tendency when he advised against the introduction of various obscure forms of mental peculiarity into the class called "mania." From the way some writers use the term we might suppose that any patient who displayed a little excitement could be included under this head. Of all such writers, Ray[8] especially has contributed to this confusion. In his treatise, which has been so widely read in this country, and has so many excellences, he practically places all forms of insanity under the head of "mania," which he subdivides into intellectual and moral mania. This is, in effect, to deprive the term of all distinctive value; and is not in accord with correct usage. The proof of this is found in the fact that it has led Ray himself into much error, especially in his description of cases and his medico-legal conclusions.

636. Its greatest abuse.—The greatest abuse of the term "mania" has been in behalf of those persons who have committed crime under great emotional stress. It is not difficult to confuse, in the minds of a court and jury, the emotional excitement of an injured husband with the general excitement of a case of mania. There is necessarily no real analogy between them, however. The one arises from a real

[6] Régis describes these impulses under the head of the Neurasthenias (Mental Med. p. 274); but they are certainly not confined to neurasthenia as we use the term in America. For a full discussion of the kindred, but wider, subject of obsessions, see Séglas, Leçons Cliniques sur les Mal. Ment.; also see page 713 in the present work.

[7] Mental Pathology and Therapeutics. Eng. trans. pp. 212, 213.

[8] Med. Jur. Insanity, 5th ed. 1871.

wrong: the other from a pathological process in the brain. The one is natural and, in a sense, normal: the other is morbid. The one displays the full force of intention, of choice, of malice prepense: the other is the fleeting impulse of a mind disjointed and out of order. The one is deliberate: the other spontaneous. The results, also, are different; for the normal man, having accomplished his purpose, is no longer excited; whereas the course of the maniac's disease is in no wise affected by the ebullition of his wrath.[8½]

637. Emotional insanity.—Emotional insanity is only another term for these cases of transitory rage. As an example of the tendency to open the door of escape for criminals who have the popular sympathies, the case of Whitler[9] is to the point. The accused was tried in Philadelphia for killing a man whom he found in adultery with his wife; and Judge Ludlow charged the jury that it would be for them to say whether "the frenzy which would take possession of a man under the circumstances would be tantamount to insanity." This was great latitude to leave to the jury; and they were not hampered with the ordinary tests of right and wrong.[10]

Walter B. Mitchell, Esq., counsel for Whitler, reminded the court that, although it had been held, as long ago as the *Manning Case,* that where a person had found another in the act of adultery with his wife, and killed him in the first transport of passion, the offense was merely manslaughter, and that courts had so held from that time down, nevertheless "no jury had ever convicted a husband of any offense, under such a state of facts, either in England or this country, from that time to this, although more than two hundred years had passed since that decision, and as many as twenty-five persons had been tried for the murder of the seducers of their wives." He added that "the licentious age of Charles II., in which adultery was no offense, was not the source from which either courts or juries should, at this period of civilization, look for light to determine what was the proper and just punishment of the adulterer, or the offense of his slayer." All this may be true, but it is no reason for not calling things by their proper names. The avenging husband may be acquitted on the score of justifiable manslaughter, if that is what

[8½] The distinction between insanity and the passions was clearly recognized by the Roman law. See Morel, Traité de la Médecine Légale des Aliénés, Paris, 1866.

[9] *Com.* v. *Whitler,* 2 Brewst. (Pa.) 388.

[10] It is significant that in *Whitler's Case* Judge Ludlow had nothing to say about the "knowledge of right and wrong," or "the nature and quality of the act." It is fair to ask, would such latitude have been allowed the jury in any case but one which always evokes universal sympathy, and for an offense for which no man has been found guilty for more than two hundred years?

is wanted, but let not his wrath be called a case of emotional insanity or frenzy. The responsibility for such an acquittal should not be put upon medical science.[11]

Dr. Ray[12] discourses at great length on the somewhat similar case of Mercer, who shot and killed Heberton, the seducer of his sister. Ray sees in the excitement, fury, and thirst for revenge in this young assassin the evidences of insanity; and accepts without demur the report of the symptoms from a newspaper. The fact that nothing more was seen of the insanity after the act of vengeance is glossed over by Dr. Ray, who describes the case under the head of mania. It does not correspond to mania, unless we accept the theory that mania can be caused by the seduction of a sister, can run its course in two days, and can be cured promptly by the assassination of the seducer.[12½]

638. Emotional disturbance is not necessarily mania.—Nothing can be farther from the truth than to suppose that a so-called emotional insanity has any real affinity to mania. Emotional insanity is an artificial psychosis in which it is assumed, quite gratuitously, that the only disturbance is in the emotions.[13] Now in mania, as we have already seen, an acceleration in the formation of ideas, leading to in-

[11] Some ancient codes, as of the Hebrews, certain of the Greek states, and the German tribes, recognized the law of vengeance. (Bémont and Monod, Medieval Europe, p. 27.) This is against the spirit of modern laws, but only in theory; for in practice it is often recognized. If there is no law for killing the adulterer, there is equity for it, and in such cases Public Opinion is always the thirteenth juror. The man who knows that "the fountain through which his current runs had been made a cistern for foul toads to knot and gender in," and is patient, is not tolerated in society. But if there is excuse for killing the seducer, there is no excuse for calling his slayer insane. In the *Sickles' Case* (which is the type of all such cases) the act was deliberate,—more than sixteen hours after the husband learned the truth of his wife's guilt. Says a legal writer, commenting on that celebrated case: "That it is right for the husband to slay his wife's seducer was the real defense, and insanity a mere ruse, to reach it, is evident from the entire conduct of the case, and made perfectly plain by the argument." And again: "The plea of paroxysmal insanity was merely used as a means of evading technical rules of evidence, and reaching a triumphant justification in spite of precedent, and in the face of law." (8 Crim. Law Mag. p. 234.) The defense of Sickles had been "instantaneous emotional homicidal insanity;" and it is to be hoped that such a defense in such a case will never again be supported by medical experts in this country. Let the law find its own way for acquitting these aggrieved men. Medical science is not to be made a catspaw of.

[12] Op. cit. p. 166.

[12½] "The ancients defined anger as a short madness; which would relegate it at once and entirely to the region of pathology. Without qualification, this formula cannot be accepted."—Ribot, Psychology of the Emotions, p. 223.

"There is no passion that so much transports men from their right judgment as anger."—Montaigne, Essays, "Of Anger."

[13] See paper by David Dudley Field (7 Alb. L. J. p. 273), in which this opinion is sustained.

attention, inability to concentrate the mind, incoherence, and even confusion, is one of the essentials. In other words, the disturbance of the intellectual concepts is fundamental, and the emotional tone, as was claimed by Mendel, is secondary, and dependent on the character of the ideas. It would be difficult, indeed, to understand how a profound emotional disturbance could exist in any disease without an affection of the intellect. Certainly such does not exist in true mania. But the attempt to construct a sort of emotional mania, distinct from an intellectual one, is not a new thing in psychiatry. Many years ago Pinel, the famous French alienist, described what he called *manie sans délire,* by which apparently he meant a state of exaltation without impairment of the intellect.[13½] In criticizing this doctrine, Griesinger[14] called attention to the fact that in no case of mania is the conscious thought, the intelligence, perfectly free from disorder. Pinel's doctrine cannot apply to genuine mania; and, in fact, his *manie sans délire* is either now generally rejected, or restricted to a form of insanity which belongs to the degenerative group, and has nothing to do with real mania. It is more nearly allied to monomania or paranoia.[14½]

639. Impulsive insanity and mania.—Much of this criticism applies also to the so-called "impulsive insanity," which some writers tend to confuse with mania. In mania we may say with truth that the patient often acts impulsively, but this does not give a warrant for including in the group of "mania" all persons who act from impulses. Normal minds may act from impulses, and so may other patients than maniacs. An impulse is merely a more or less involuntary reaction to a motive, or to a mental concept. Maniacs, doubtless, are very prone to them; but this is no reason for including among the maniacs all persons who act upon impulses. The term "impulsive" has no scientific merit as a designation for a special form of insanity, and should never be confused with genuine mania.[14⅔] In the *Walworth Case*[15] Judge Davis charged against impulsive insanity, but the jury rendered a verdict of murder in the second degree. This was against the evidence, and was a senseless verdict, and indicated that the jury simply acted from their

[13½] Traité Médico-philosophique sur l'Aliénation Mentale. Paris, 1809.

[14] Op. cit. p. 212.

[14½] See Falret ("La Manie, peut-elle exister sans une Lésion de l'Entendement?" in his Maladies Mentales, p. 449) for a criticism in which he combated Pinel's views.

[14⅔] "Impulsive insanity" was included in the classification of the International Congress of Alienists, in 1867. It was probably intended to apply to patients with obsessions, or morbid impulses, not to maniacs.

[15] *People* v. *Walworth,* 4 N. Y. Crim. Rep. 355.

sympathies. The defense had been uncontrollable impulse.[16] There is a form of insanity in which impulses, or obsessions, are much more likely to dominate the patient than in mania, and this is described elsewhere in these pages, in the neurasthenic group.[17]

640. Transitory mania and homicidal mania.—These are terms which have figured in the courts. They are intended especially for these cases of sudden rage, or the desire for revenge which leads persons to commit murder.[18] The limit of this doctrine is reached when it is claimed that a person who is acknowledged to have been sane just before and just after the act was insane merely at the moment when the act was committed. There is no support for such a doctrine in anything that is seen in actual cases of mania. This disease—mania—is not a matter of a few hours, minutes, or seconds. A reference to the natural history of the disease is sufficient to refute such a claim. These artificial terms are as much the invention of the lawyers, anxious to acquit their clients, as of the physicians who are anxious to help them to do it. "Transitory homicidal mania," says a legal writer,[19] "is a term invented by ingenious lawyers to afford to the jury a safe bridge upon which to pass from a disagreeable technical duty to the accomplishment of their desire, when the accused has killed some one who, according to the consensus of opinion, ought to have been killed."

It is not the part of science to aid and abet such schemes. Becker[20] says, however, that transitory mania is acknowledged in principle as an excuse for crime; but he gives few instances. It is usually, and

[16] "Irresistible impulse" has been rejected as no excuse in a large number of cases in American courts. By rights it should depend upon what the impulse is due to, whether it is a good defense. There are insane impulses; such, for instance, as arise from insane delusions.

According to the Penal Code of New York (§ 23) a morbid impulse to commit a criminal act, in a person who is capable of knowing that the act is wrong, is no defense. On this head consult *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275; *People* v. *Walworth*, 4 N. Y. Crim. Rep. 355; *People* v. *Coleman*, 11 Am. Rep. 731, 1 N. Y. Crim. Rep. 1; *Flanagan* v. *People*, 52 N. Y. 467; *People* v. *Waltz*, 50 How. Pr. 214; *People* v. *Carpenter*, 102 N. Y. 238, 1 N. Y. S. R. 648, 6 N. E. 584; *Moett* v. *People*, 85 N. Y. 379; *People* v. *Casey*, 31 Hun, 158; *Willis* v. *People*, 32 N. Y. 715.

None of the above cases was an example of mania in the strict scientific sense of that term. Becker (Med. Jurisp. For. Med. and Tox. Vol. III., p. 446) has an interesting chapter on what he calls "impulsive insanity," and has collected many cases in which the subject has been adjudicated in the courts; but from the scientific standpoint there is no such thing as a distinct group, to be called "impulsive insanity." Insane impulses may occur, as said above, in various forms of insanity, but they cannot all be grouped under one head, any more than the symptom "fever" could be made the ground for grouping together all forms of disease in which fever occurs.

[17] P. 713, *post*.

[18] *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

[19] 16 Am. & Eng. Enc. Law, 2d ed. p. 564.

[20] Witthous and Becker, Med. Jurisp. For. Med. and Tox. Vol. III.

justly, looked upon with suspicion;[21] and especially when made the shield for someone who has killed merely in anger or resentment. A type of such cases was that of Casey, a policeman, who killed a fellow officer deliberately, in resentment.[22] The defense was not allowed.

641. Epilepsy and mania.—In epileptic mania we have a very different affair. This is a distinct and important variety; but it is of such special significance that it requires a place by itself, and is described elsewhere in these pages. In this disease we may have a genuine transitory or explosive mania, but it is dependent entirely on the epileptic habit or diathesis, and is by no means the same thing as the "transitory" mania which is conjured up in court as a last resort for criminals.

642. Other forms.—The same may be said of the abrupt and sometimes quite transient delirium, or maniacal excitement, of fever, heat-stroke, and alcoholism.[23] Such phenomena are not properly included under the head of a mere "transitory" mania. It is better to call them by their proper names.

643. Puerperal mania.—The insanity which follows childbirth sometimes assumes the form of mania, and is frequently referred to as puerperal mania.[24] But many of these cases belong rather to the class called confusional insanity; and resemble delirium rather than mania proper. In the mania or delirium following childbirth there may occur impulsive acts of great violence and of tragic consequences. This disease has been recognized from a very early period of human history, and by almost universal consent it is regarded as one of the most pathetic of mental diseases. Pregnancy and childbirth have always been recognized as potent factors in causing changes in the nervous system.[25] Hippocrates[26] mentions the subject, and it was

[21] *People* v. *Osmond*, 138 N. Y. 80, 33 N. E. 739.

[22] *People* v. *Casey*, 2 N. Y. Crim. Rep. 187.

[23] Krafft-Ebing, op. cit. pp. 252–254.

[24] Lloyd, "Puerperal Insanity, etc.," in Hirst's American System of Obstetrics, Vol. II. p. 545.

[25] "The wife of Phineas, when about to be delivered, could not withstand the shock produced by the defeat and death of her husband, which soon deprived her of reason and of life. (1 Samuel, iv. 19, 22.) The fable of the insane Proetides, who spread their mental contagion to unhappy mothers, so that these killed their offspring, and fled into the wilderness, perhaps symbolizes, in an archaic form, the perversion of the maternal instinct which sometimes accompanies puerperal mania. Under the ancient Athenian laws the house of a woman pregnant or just delivered was guarded so jealously against intrusion that a murderer could not be seized who sought refuge there; and the Romans suspended a crown at the house of the confined, to indicate that it was a sacred asylum." From the author's article, in Hirst's System of Obstetrics, Vol. II. p. 546, 547.

[26] Works, translated by Adams. For a more complete bibliography, see Hirst's System of Obstetrics, loc. cit.

treated by many of the early moderns. But Esquirol[27] was the first author who described this affection with proper system. Since his time it has been described in detail by many writers, especially Marcé,[28] and statistical papers have been contributed by Reid,[29] Tuke,[30] Schmidt,[31] Leubben,[32] Boyd,[33] McLeod,[34] and others. All systematic treatises on insanity give more or less attention to it.

644. The sudden onset of insanity after childbirth.—This disease may declare itself suddenly, and it usually begins during the first month after the lying-in. Impulsive acts are not uncommon in the beginning. These may be in the nature of assaults or even homicidal acts. Change of disposition, dullness, listlessness, and irritability are among the prodromal symptoms in cases that begin gradually. Fleeting delusions, hallucinations, excitement, and incoherence are seen. In the early stages there may be a period of initial depression, during which the patient weeps. The symptoms in the main are such as have been described in the preceding pages.

645. The causes of puerperal insanity.—The causes of puerperal mania are heredity, moral shock, exhaustion, and especially blood poisoning. The latter may be due to septic infection incident to the puerperal state. A large proportion of cases occur in primiparæ, or women with their first children; and not a few of them occur in women who bear illegitimate children. This latter fact is of medico-legal import with reference to the crime of infanticide. Esquirol noted this fact in a hospital which received the poor and abandoned cases of Paris. Clouston found about 25 per cent of his cases to be illegitimate; whereas the average rate of illegitimacy in Edinburgh, from which city and neighborhood many of his cases came, is only about one third of that. These figures are significant.

646. From the medico-legal standpoint, puerperal mania is a grave affection.—The greatest danger in these cases is infanticide. The patient may kill her infant from a sudden insane impulse. Dr. E. P. Townsend, of Camden, N. J., narrated to the writer the case of a young primipara, who, after a hard labor, in which forceps had been used, and during which she had nine convulsions, became insane and remained violent for nine days. There was then a remission, and the nurse, contrary to strict orders, placed the child in the mother's arms.

[27] Des Maladies Mentales, Paris, 1838.
[28] Traité de la Folie des Femmes Enceintes, Paris, 1858.
[29] Jour. Psych. Med. 1848.
[30] Ed. Med. Journ. May, 1865.
[31] Beitr. zur Kinntniss der Puerp. Psychosen, Berlin, 1880.
[32] Zur Stat. der Puerperal Psychosen, Halle, 1872.
[33] Journ. Ment. Sci. July, 1870.
[34] Brit. Med. Journ. 1886, Vol. II. p. 239.

Instantly the unfortunate woman killed the infant by dashing its head against the wall. Suicide may also occur in these cases.

Osiander[35] delivered a woman of twins, who was with difficulty restrained from throwing herself from a window. He had also seen another woman in labor who demanded that her abdomen be opened, and had procured a knife for that purpose. He cites the case of a negress, seized with maniacal excitement in the midst of a prolonged and painful labor, who opened her abdomen, extracted the child, and recovered. Klug (quoted by Marcé) reports the case of a peasant woman who, in an access of acute mania, endeavored to strangle her child immediately after its birth. Kraepelin had under his care a puerpera who threw herself out of a window. I once saw a case of attempted suicide in a woman four months pregnant, who had thrown herself out of a window, and who did not even abort as a consequence.

647. Responsibility in the childbearing woman.—The legal responsibility of parturient women in the various psychoses to which they are subject has been, and will continue to be, a nice question of casuistry for the courts. The unfortunate woman who kills her child in an access of acute mania, and the victim of melancholia who kills herself to escape the burden of her profound psychalgia, do not furnish complex problems to tax the judgment or the charity of mankind: the nature of their cases is too evident to admit of a doubt that reason has been dethroned. But there is a wide range of cases in which consciousness and reason are not so overwhelmed as in mania, or the emotions so depressed as in melancholia. They are the cases in which the whims and morbid dispositions of pregnant women, or the impulses and transient frenzies of parturient ones, place these patients on the border line, as it were, between sanity and insanity, or constitute such an indistinct type of alienation that, in the practical demands of medical jurisprudence, the opinions of physicians vary, and the jury is apt to decide the case according to their sympathies or the prevailing current of public opinion. Such cases are sometimes seen in young women, illegitimately pregnant, who commit infanticide. Fiction has portrayed these cases, and the public which has wept over the misfortunes of Effie Deans and Hettie Sorel is apt to have a ready sympathy, not inappropriate, for these interesting and appealing women.[36]

648. The responsibility varies.—I think the psychology in these

[35] Quoted from Jorg. Hirst's Syst. of Obstetrics, Vol. II. p. 586.
[36] Lloyd, "Puerperal Insanity," in

cases varies, and that the degree of guilt, therefore, is not measurable by any fixed rule. Some women entertain a strong aversion to their unborn babes; these are cases especially of illegitimacy, in which the mother comes to regard the infant as the source, the evidence, and the penalty of her own shame. In some peculiar circumstances this aversion is intensified, and cannot be corrected by any moral appeals. I once had under my care a young woman, of a highly respected family, who became pregnant by a negro servant. She had the most intense disgust for her unborn babe; would not speak of it or prepare for it; and after its birth refused persistently to see it, to nurse it, or to have it brought near her.

649. The social penalty.—When we consider the social penalty for such offenses we cannot wonder that some of these poor Magdalens, in a frenzy of terror and despair, unattended in the agony of their parturition, uncomforted and unsupported, either abandon their helpless offspring, or destroy them in a paroxysm of rage and fear. Such cases can scarcely be called instances of real mania, but they are cases which have often contributed to the annals of medical jurisprudence. Esquirol related the case of a girl who became illegitimately pregnant, did not conceal it, made preparations, and was confined alone during the night; on the following day she was found in her bed, and the child's body in the privy with twenty-one wounds from a pair of scissors. She avowed her crime, did not defend herself, showed no regret, but refused to eat. Esquirol supposed her to be insane; but the mental processes in such cases are probably such as arise from intense but temporary emotional excitement, and the measure of guilt must be left to the compromises and sophisms of the courts. Marcé gives a case from the assize court of Marne (1847), of a young woman who had killed her babe by tightening a cord around its neck; she claimed that she was out of her mind, and a compliant jury acquitted her. Boileau de Castlenau[37] gives the case of a young woman who mutilated her infant in a shocking way on the head, back, belly, and limbs, cutting off the head, and concealing the bloody fragments. The jury admitted the extenuating circumstances. This appears to have been merely a desperate and brutal attempt of the accused to conceal her shame. Some years ago a woman named Hester Vaughn was convicted in Philadelphia of infanticide, but public aversion to her execution was so great that the case was compromised, and the woman sent to England, whence she

[37] Ann. d'Hyg. Pub. et Méd. Lég. XLV. 437.

had come. It is not easy to measure such cases by an exact scientific standard. Some of these women are certainly not technically insane. Their cases are decided, not by an appeal either to science or to law, but to sympathy.

650. Insane impulses in puerperal insanity.—The impulsiveness of the acts of violence in some cases of puerperal insanity has been referred to.[38] This impulsiveness, however, while it may be very apparent in the act itself, does not prove that the suggestion of this act may not have lain in the mind for some time, and have been resisted and controlled by the patient until the will-power has suddenly given way before the pressure of a fixed idea. This is of importance in the legal aspect of these cases, because it may possibly be shown, as Taylor[39] suggests, that the patient knew what she was about, and had requested that the child be taken away from her lest she kill it. This superficial appearance of sanity might have some influence on the legal mind, and give rise to the specious reasoning that a patient who had such an accurate self-knowledge and prescience could not be irresponsibly insane. But such reasoning is false; the morbid impulse—the lurking idea—is in itself the symptom of insanity, and this may readily come within the patient's self-consciousness before her mind falls into the complete disorder of mania, or even in cases in which but very mild delirium follows; and the subversion of the patient's will-power to such an impulse in the commission of a criminal and unnatural act is only the outward evidence of the extent of her alienation. Morel relates a case of fixed idea in a young nursing woman, caused by her reading the reports of criminal trials wherein it was said that women were sometimes seized with the irresistible impulse to kill their children. She became so filled with this idea that her infant had to be taken from her. In those cases in which the impulsive homicidal act has been attempted or committed during the maniacal paroxysm, or just after it, as in Dr. Townsend's case, already narrated, it is possible that the deed is in response, sometimes, at least, to some such idea, which has lain fragmentary or confused in the patient's mind from an earlier period of her malady.

651. False accusations.—Some authors, among them McLeod, say these patients are prone to make unfounded accusations of assault and immorality, with much plausible and circumstantial detail. Tardieu rejected the claim of a transitory mania in these cases, and Legrand du Saull[40] says that the cases of pretended transitory mania

[38] See also *United States* v. *Hewson* (Brun. Col. Cas. 532).

[39] Manual of Med. Jurisp. Phila. 1873.

[40] Traité de Méd. Lég. p. 854, note.

which he had observed were allied to epilepsy. He evidently is sceptical about this psychosis. Rocher believed in a transitory mania during delivery, and says that the causes which produce it are shame over an illegitimate birth, heredity, and the extreme pains of labor. Among those who favor the existence of such transitory mania in childbirth are some of the most eminent alienists, such as Morel, Griesinger, and Kraepelin. According to Taylor, irresponsibility on the ground of transitory mania under these circumstances has not been admitted in an English court.

652. The delusions of puerperal patients.—Some of the most important questions in the medical jurisprudence of the puerperium arise in reference to the delusions or alleged delusions of the patient. These patients have been known to make unfounded accusations of immoral conduct, and sometimes even to implicate themselves. On the other hand, they have been known to make confessions which were true. The obligation to distinguish these cases is great, and the importance to the patient and her family cannot be overestimated. Insane persons may tell unpleasant truths, and interested friends may find it convenient to have such statements interpreted as delusions. A woman in a Pennsylvania town, in puerperal delirium, revealed the fact that she had another husband living. The most noted of these cases, among all *causes célèbres,* was the *Mordaunt Case*[41] in England. The wife of an English baronet confessed, soon after her confinement, and in the commencement of what appears to have been an attack of puerperal insanity, that she had been an unfaithful wife, and that the child was not her husband's. She implicated a number of men well known in the social world. A trial resulted, which was unsurpassed in the unsavory scandal and serious consequences which arose from it. The collateral evidence, which confirmed the patient's statements, and compromised her still more, does not appear to have been refuted. On the other hand, the testimony of eminent alienists leaves no doubt that after her confinement the patient sank into a state of delirium. The conclusion seems inevitable that the woman made a truthful confession in the initial stages of an attack of insanity. It would not do to conclude, however, that every woman should be believed in all she says in an attack of puerperal mania.[42]

[41] *Mordaunt* v. *Mordaunt,* L. R. 2 Prob. & Div. 103.

[42] In writing the foregoing pages on Puerperal Mania, I have made free use of my article on "Puerperal Insanity and the Insanity of Pregnancy and Lactation," in Hirst's American System of Obstetrics, Vol. II. p. 546, Phila. 1889, Lea Bros. & Co.

CHAPTER XXXIII.

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I. The medical aspects of melancholia.

653. Melancholia as contrasted with mania.—This disease is often described as the opposite of mania. It is marked by depression, whereas the latter is known by its exaltation. Clouston[1] gives the simplest definition when he says that melancholia is marked by mental pain (psychalgia); but he hastens to add that mental pain does not alone constitute melancholia. Normal minds may suffer intense mental pain, and yet not suffer from melancholia. Grief, anxiety, fear, remorse, despair,—none of these is melancholia, yet they are all examples of mental pain. To constitute a true melancholia (just as a true mania) there must be a pathological process in the brain itself; and this morbid process so affects the nutrition and action of the organ that a general sense of depression results. This depression has no necessary relation to anything without, as grief and other normal emotions have, but it arises from a disease within. In other words, it is subjective.

654. The sense of personal unworthiness.—But emotional disturbance, or depression, is not the whole of melancholia; hence the defi-

[1] Clinical Lectures on Mental Diseases, 1st ed. p. 53.

nition must include more. The ideas, or intellectual functions, are also involved. If the patient is sad, there must be something for him to be sad about. The morbid process interferes with the free action of the brain; ideas are not accelerated, as in mania, but the reverse. There is soon a subjective sense of limitation, of embarrassment, of debasement, of personal unworthiness. This is quite as essential as the mental pain. There has, indeed, been some futile discussion as to which of these two—the emotional or the intellectual disorder—is the primary one in melancholia; but Krafft-Ebing[2] has taken the most philosophic view when he says that neither is primary; that each is allied to the other. They are coexistent, and both depend on the same underlying disease in the organic brain. The attempt to dissociate the various mental faculties in insanity is purely academic.[2½] In the diseased brain there is not likely to be such dissociation. The emotions and the intelligence suffer together. So it is, at least, in melancholia.

655. The essential features of the disease.—It is in the sense of personal unworthiness that we probably see the essential psychic feature of melancholia. These patients have a painful sense of a limitation or debasement of the ego. The entire depression centers about this injured sense of self-consciousness. The pain or anxiety is not concerned with the outside world, but with the world within. The melancholiac does not worry or concern himself with the real affairs of life, but with the disorder of his own soul. Hence it happens that the patient, except in severe or advanced cases, is not deprived of the power of reasoning correctly about matters external to himself. He is not incoherent. It has even been said that the melancholiac is the least insane of all the insane; but such a statement must be taken with due reservations.

656. Delusions in melancholia.—The disorder of intelligence in melancholia is shown by the formation of delusions. Some authorities explain these delusions as the results of the interpretation by the patient of his own painful sensations.[2⅔] According to this view we must suppose that the patient, as it were, manufactures his delusions by a process of ratiocination. Such an explanation is far-fetched. It is more in accord with probability to suppose that the delusions are caused spontaneously, by the morbid association of ideas. However

[2] Traité Clin. de Psych. p. 350.

[2½] Spitzka, Insanity, p. 141; Griesinger, Mental Pathology and Therapeutics, p. 146.

[2⅔] Ribot, in his Psychology of the Emotions, has gone on the principle of separating too radically the emotions from the intelligence. His work is the fullest exposition of this subject, and is a mine of learning.

they arise, the delusions in this disease have always one characteristic that distinguishes them from the delusions in all other forms of insanity: they take their tone from the sense of personal abasement. The melancholiac, however he may reason about his own state, has always the belief that he is himself at fault. It is his own unworthiness, his own sin, his own imperfection, that lies at the foundation of his delusions. In this respect he differs profoundly from the maniac, who has a sense of personal exaltation; and from the paranoiac, who believes that he is unjustly persecuted. To understand fully the emotional reaction in melancholia, as well as the behavior and acts—especially the criminal acts—of the melancholy patient, it is necessary never to lose sight of this peculiarity of his delusional state.

The delusions vary as to their contents. In mild or early cases they are not systematized, and not revealed. The patient is reserved about them; he makes no confidants. He is not yet fully under their influence, and may control and even tend to correct them. Neither are they fixed, but vary from time to time. They are not yet concerned with the more serious problems of life; their details may be petty, and the patient himself is not yet fully convinced of their importance. In graver or more advanced cases, however, the delusions are more overwhelming, and may become systematized and fixed. There are two varieties of them especially,—the sexual and the religious; and there is usually an ethical element in them.

657. Sexual delusions.—Sexual subjects sometimes engross the mind of the melancholiac. The patient charges himself with sexual sins. These ideas may have a hypochondriacal tinge. The patient may believe that he has contracted syphilis; he becomes a syphilophobiac. This may, indeed, not be a delusion in itself, but the patient may draw delusional inferences from it. Not a few patients are convinced that they are ruined from the effects of masturbation; they believe that they are wasting away from an involuntary discharge of semen. These patients may resort to self-mutilation of the most shocking kind. I have seen two cases in men who had excised their testicles. The motive for this act may be self-protection: the patient wishes to be rid of the sources of physical weakness. In other cases, the motive is ethical: the patient plucks out the offending organ. It is self-punishment or self-sacrifice that impels him, or a religious craze, as in the well-known case of Origen, the Christian father. He followed the Biblical injunction somewhat too literally.[3] Asso-

[3] Theologians seem to differ with alienists about the act of self-castration. Thus, Mosheim, in his history of Christianity during the first three cen-

ciated with these ideas of sexual sin is a sense of profound degradation.

658. Religious delusions.—Religious topics are frequently the source of the delusions in melancholia. The patient is a sinner,—he has offended God,—he has forfeited his chances of salvation. In some cases the delusion of the "unpardonable sin" becomes fixed. There are few asylums that have not had their quota of unpardonable sinners. In severe cases the religious delusions may be exceedingly terrifying, especially in persons whose religious beliefs have been largely superstitions. The belief in a personal devil and his imps, and in a literal hell-fire, here finds its most revolting development. In the case of a lady, who has since recovered, the patient believed that the Devil took bodily possession of her; that he violated her person every night; that she was in hell; and that she was doomed forever. In such a case the mental state becomes a genuine delirium; the patient weeps and raves; she makes the most abominable disclosures of her delirious ideas, and she is as much excited and as difficult to control as a maniac.

659. Varieties of delusions.—Clouston[4] gives a list of more than fifty examples of delusions such as he has seen in melancholia, and he says the list does not exhaust his collection. Some of the commonest are a sense of impending calamity; of having committed murder, theft, or other grave crime; of being about to die; that he will never recover; a sense of having neither brain nor stomach; of having lost everything; of being a fish, or otherwise transformed; fear of being hanged; and, finally, of being dead.[5] It is impossible to complete

turies (Vol. II. § 27), comes bravely to the defense of Origen. "He was censured indeed by Demetrius and others for having emasculated himself; and I will not acquit him of all fault in that matter. But the fault itself is such as demonstrates the strength of his resolution, and his devotedness to religion; nor could it be committed by an ordinary man." On the contrary, as we have seen above, it is usually committed now-a-days by insane men, and very "ordinary" ones at that. Instead of an evidence of devotedness to religion, it is usually found, in this prosaic age, to be an evidence of an unsound mind.

Moulton, of the Pennsylvania Hospital for the Insane, has reported the case of an insane man who not only excised one of his testicles, but also amputated his penis, and threw it out of the window. The two self-mutilations were made at different times, and the second is not reported in Moulton's paper, "Attempted Self-Castration in an Insane Patient," in the Phila. Med. Journ., May 31, 1902.

[4] Op. cit. p. 88. It is a curious fact that there is no better agreement among the insane than among the sane about what constitutes the "unpardonable sin." Few lunatics agree on the subject. Some melancholiacs have the most trivial and preposterous notions about this theological nightmare, which seems to be well designed to drive weak-minded men crazy. Clouston says that dozens of patients had confessed to him that their "unpardonable sin" was masturbation. This shows of what material these delusions are made.

[5] One of the earliest recorded instances of insanity is that of Nebuchadnezzar, king of Babylon, who became a

this Anatomy of Melancholy. The delirious ideas are almost as numerous and varied as are the patients themselves; but underlying them is always the sense of personal unworthiness, with its corresponding emotions.[5½]

660. Hallucinations.—Hallucinations are not common in mild, or in the early stages of grave, cases, but they are not rare in advanced or severe attacks. In religious delirium, already noted, the patient may smell the sulphurous fumes of hell. Auditory and visual hallucinations are also observed, and disgusting hallucinations of taste. General sensibility may be impaired: there may be anesthesia, or loss of sensation; and paresthesia, or perversion of sensation.

661. The bodily condition.—The physical state of the melancholiac shares in the general depression. There is loss of appetite, even aversion to food; and in some cases the patient would not eat at all if not forced to. The tongue is coated, the breath foul, the bowels obstinately constipated. Sleep may or may not be disturbed; in the anxious and excited cases there is insomnia. Fever is not a symptom in melancholia, nor are there characteristic changes in the pulse.[5⅔] Séglas has noted an increased resistance to electricity in the skin and tissues, which seems to indicate great physical changes.

The attitude and demeanor are strongly suggestive of the mental state. The melancholy patient is apathetic, and the facial expression is dull and downcast. He takes no interest in things; does not read, as a rule, or occupy himself in useful ways, and he avoids society. He is, in a word, self-centered; he dwells constantly on his own unhappy state. His mind is pent up and hedged in.[6]

662. Forms of melancholia.—Melancholia may assume several forms, but these varieties are based upon merely superficial differences. At

one of the beasts of the fields (Dan. iv. 30). The delusion of being changed into a beast has been very common, and has received many fantastical names; thus, "zoanthropy," a beast-man; "lycanthropy," a wolf-man; and "cynanthropy," a dog-man. See Esquirol. Mental Maladies, Am. Trans., chapter on "Demonomania."

[5½] Burton, in his Anatomy of Melancholy, gives many kinds of delusions and morbid fears which he had gathered from old authors, showing, as Sankey observes, the universality of these characteristics from all time.

[5⅔] "My pulse, as yours, doth temperately keep time."—Hamlet, Act. 3, Sc. 4. But Hamlet's case was not one of melancholia.

[6] Aretæus has described this state as *Animi angor in una cogitatione defixus atque inhærens.*—anguish of mind, limited and inhering in one idea. *Angor* means literally a sense of constriction at the neck, which is a prominent symptom in many forms of mental excitement or distress. The word, or its derivatives, is still used by the French to describe a form of melancholia—*mélancholie avec angoisse précordiale*—in which there is an explosion of excitement, with oppression of breathing, and great disturbance of the mental faculties; also called *raptus melancholicus.* Régis. Practical Manual of Mental Med. Am. Trans. p. 172; Krafft-Ebing, op. cit. p. 359.

bottom the melancholic state is very simple, and it is very similar in all cases. Variations are due largely to the way the mind reacts to the painful disturbance within. This reaction naturally varies according to the intensity of the distress and the mental traits of the individual.

663. Agitated melancholia.—In some melancholiacs the mental pain is not borne patiently. The sufferer reacts to it by showing both mental and physical excitement. Instead of presenting the typical picture of apathy, depression, and sloth, he displays great activity. He walks the floor, gesticulating and wringing his hands; he weeps, raves, and accuses himself. He is the picture of despair, and the spokesman of it, too. This form is called agitated melancholia,—*melancholia agitata*,—and its chief significance, from the diagnostic standpoint, is that it may easily be mistaken for mania. But this mistake will not be made by experienced observers; the emotional state is entirely different from that of mania: it is the state already described as mental pain.

664. Stuporous melancholia.—In some patients the state is exactly the reverse of excitement. The mental disturbance is so profound, owing to the intensity of the emotional shock, that the patient is overwhelmed by it. He is plunged into a condition of stupor. The mental reflexes are abolished. The mind is oblivious of, or indifferent to, its surroundings. The patient may be mute for days or even months; no urging, no appeal, can induce him to speak.[7] He is as one who does not hear. The face is a blank. All spontaneity is gone. Food is ignored, and the patient requires to be fed by force. The consciousness and memory are much impaired, and to the unfortunate patient, when he recovers, the period through which he has passed may appear as a horrid dream or nightmare. This condition is called "stuporous" or "atonic" melancholia,—*melancholia attonita*. It requires to be distinguished from dementia, which it closely resembles, but from which it differs in the important fact, among others, that the patient may recover.[7½]

[7] Stearns (Lectures on Mental Diseases, p. 157) refers to a case of melancholic mutism in which the patient had not spoken a word for twelve years, and yet recovered.

The English physician, Burrows (Commentaries, etc. pp. 263, 264), relates this incident: He was visiting a French asylum, and became interested in a patient who had not spoken since her admission, a long while before. He approached and spoke to her, when she suddenly spat at him, exclaiming in unmistakable English, "Get out, you d——d English rascal!" The attendants, who had never before heard the sound of her voice, were amazed, for they had never suspected that the patient was not a Frenchwoman.

[7½] Krafft-Ebing, op. cit. p. 372. The first observer who clearly pointed out the radical difference between stuporous

665. Hypochrondriacal melancholia.—In this form the patient has delusions that he is diseased or affected in body; he is poisoned, or infected with vermin, or loathsomely diseased; his arm may be turned to glass, or his sexual power abolished. But if he entertains ideas of persecution, these differ from those of the paranoiac in the fact that the melancholiac believes that his misfortunes are deserved; whereas the paranoiac is convinced that he is persecuted unjustly. This distinction has great medico-legal importance.

666. The termination of melancholia.—Melancholia may terminate in recovery, in death, or in chronic and incurable insanity.

667. Chronic melancholia.—In chronic melancholia the intensity of the mental pain gradually diminishes with the progressive loss of the mental integrity. The patient may continue for years to entertain depressive delusions, but he seems in time to accommodate himself to them: their force is spent; and while he still displays, as by the force of habit, his melancholic demeanor and speech, in a sort of automatic way, he is really more comfortable in mind than he looks. But the mental faculties are permanently impaired. I knew of one old lady in an asylum, who had believed for thirty years that each day would be her last,—that she would die before the morrow,—and yet she led a quiet and even contented life.

668. Infection as a cause of this disease.—The opinion prevails among some alienists that melancholia is due to an infection of the blood, and that this infection has its origin within the body itself; in other words, that it is an auto-infection. The material for this infection may be elaborated in the stomach and bowels by a process of faulty digestion. These ideas are somewhat speculative, and seem to take us back to the ancients, who traced melancholia to a perverted state of the bile; from which, indeed, the disease derived its name (*μελας*, black, and *χολη*, bile). Bouchard and other French writers are especially identified with these views of an auto-infection. They say that gastrointestinal affections are very common in melancholia, and in this they are undoubtedly correct. Dilatation of the stomach, impaired digestion, fermentation of undigested food, torpid bowels,—these are the chief symptoms upon which they rely. Betencourt Rodriguez[8] wrote on the influence of auto-intoxication and dilatation of the stomach in melancholia, and good results have been

melancholia and imbecility, stupor, etc., was Baillarger, Ann. Méd. Psych. 1843.

[8] International Congress of Mental Medicine (1889). See also the thesis by Chardon on "The Influence of Infectious Diseases on the Development of Mental Disorders," Lille, 1889–90; also thesis by Feyal, Lyons, 1890, and the writings of Régis (Méd. Mentale).

claimed from washing out the stomach, and stimulating the intestinal tract. If these views should prove correct, they would prove that melancholia is one of the toxic insanities; and we should no longer be justified in claiming that it is a purely functional insanity, or an insanity without a pathology.[9]

II. The medico-legal aspects of melancholia.

668½. Melancholia is a form of "partial" insanity.—In this disease, as has been pointed out, the intelligence is often not seriously involved. The morbid process centers upon the depressive ideas; but in grave cases these deliria so overpower the mind that the patient practically has no thought for aught else. He may be perfectly aware of himself and his surroundings; he may even have his moral sense; but everything is as nothing to him compared with the overwhelming sense of personal abasement. For the medical jurist this is the keynote of melancholia: it reveals the motive for the patient's insane acts. Melancholia thus answers to the "partial" insanity of Sir Matthew Hale,[9½] which included persons who "discover their defects in excessive fears and griefs, and yet are not wholly destitute of the use of reason." But Hale committed the great error of saying that such an insanity does not excuse a person "in the committing of an offense for its matter capital." We shall see.

669. Suicide is a common danger in melancholia.—The melancholy patient may commit suicide, or homicide, or both; but, of these two acts, suicide is far the more common. Suicide is an ever-present danger in melancholia. More suicides occur in this disease than in any other form of insanity,[10] and a large proportion of all cases of suicide occur in melancholiacs. Suicide, in fact, is a logical sequence of melancholia. It is a result to which the disease directly tends. The mental suffering is full of the suggestion of self-immolation as the only way out. The act itself may be impulsive or deliberate. The impulse may arise from the sudden suggestion of the moment; as the sight of a convenient instrument, or a good opportunity; but even in such cases the idea has evidently long been dormant in the mind. The deliberate cases are very common, and very persistent. After one failure the attempt will be made again. Many patients are reticent on the subject; others talk about it. The latter are often said to be the less likely to do it; but there can be no greater

[9] See chapter on "Classification," in the present work.

[9½] 1 P. C. Chap. IV.

[10] Morselli, Suicide, p. 282.

mistake. The wife of a melancholiac told his physician that the patient had been talking suicide; the physician reassured the wife by saying that persons who talked about it seldom did it; but within twenty-four hours the patient shot himself.

670. The mental state in suicides.—The psychology of suicide is a profound study, and nowhere more so than in melancholia. Why should a patient who believes that he is doomed to everlasting perdition kill himself? He seems to be merely anticipating his doom, or else not to believe in the reality of it. But there is no doubt of his belief; for he kills himself because of that very belief, according to which, by that very act of self-destruction, he sends himself straight to Sheol.[10½] If it were possible in this world to try him for his deed, his defense could not be that he did not know the nature and quality of the act, for he knew it only too well; but such a case illustrates with peculiar force the power and unreason of an insane delusion. Such a delusion is able to overcome not only the instinct of self-preservation, but also the horror of hell-fire.[11]

671. The right-and-wrong test as applied to suicides.—Again, the suicide of a melancholiac in some cases destroys the value of that precise test of right and wrong upon which the law insists. Some of these patients resist suicide for a long while, and they even display moral scruples; others, it is true, are not thus scrupulous, for their minds are in fact incapable of moral perceptions. But in the former cases, the act of suicide is done deliberately, in spite of the moral promptings, and by a patient who is already overwhelmed with a sense of moral turpitude. In other words, in spite of the fact that the patient is morbidly sensitive to his own imperfections, he is incapable of moral control over his own impulse to commit what he may consider a great sin. According to the legal test, some of these patients (although not all of them) are guilty of what we may call "suicide in the first degree," because they know the distinction between right and wrong, even though they have not power to control their conduct accordingly.[11½]

[10½] "Etsi mortem timent tamen plerumque mortem concisecunt." This is quoted by Burton (Anatomy of Melancholy), who says it was original with Hippocrates but is given in the words of Galen. See Sankey, Mental Disease, p. 112.

[11] Cowper, the poet, who attempted suicide, wrote to a friend: "Could I be translated to paradise, unless I could leave my body behind me, my melancholy would cleave to me there." Letter to Lady Hesketh.

[11½] We are not concerned here with the ethics of suicide; we merely discuss the jurisprudence of it. For the former subject Fleming's Moral Philosophy, p. 233 *et infra*, may be consulted with profit. Pythagoras is represented by Cicero (De Senectute) as saying that "no one should depart from his station without the command of his general; that is,

672. The medico-legal importance of suicide.—At first thought it may seem that suicide is not a subject of medico-legal importance. If a man kills himself, that is the end of him; the law can have nothing to do with his case. But this view is too narrow, for suicide comes under the cognizance of the law in more ways than one. According to the common law,[12] suicide is a felony; and the consequences of it were once very serious; for it was followed by a forfeiture to the King of all the goods and chattels of the suicide.[13] The body of the suicide, with a stake driven through it, was buried in the highway; but, by the act 4 Geo. IV., 52, this barbarity was abolished, and the body was merely denied the rites of Christian burial.[13½] Mr. Christian solemnly advised that the body of the suicide be delivered to the surgeons for dissection, as he imagined a check would thus be placed upon this crime. This reminds us of the ancient Greek tyrant who put an end to an epidemic of suicide among the young women of Miletus by ordering that the naked body of the next victim be exposed in the market-place.

673. Among the ancients.—Suicide appears to have been legal among most of the people of antiquity.[14] Neither Moses nor any other of the Old Testament authors once mentioned suicide as immoral or illegal.[14½] The Greeks seem, however, to have had some prej-

God." Plato has said (Phædo): "In this life we are placed in a garrison, from which we must not retire." But the cynics furnished their disciples with reasons for suicide, and Hegesias wrote several books to prove the utter worthlessness of life; "and so powerful," says Butler (Hist. of Philosophy, Vol. I. p. 459), "was the melancholy rhetoric of this advocate of the grave, that an Egyptian king was obliged to prohibit the publication of his discourses." The stoics argued that a man was at liberty at any time to terminate his bodily life. But "I would rather die by the wickedness of another than by my own," said Darius, whom the sages of Greece and Rome called a barbarian. Among the best modern writings on the subject are Reflections sur le Suicide, by Madame de Staël, and Essays on Suicide and Immortality, by David Hume.

[12] 4 Bl. Com. 189. According to Strahan (Suicide and Insanity), forfeiture was an old Roman law, and in the time of Henry III. it applied to both real and personal property, which escheated to the Crown or to the lord of the manor. But in the matter of freeholds the law fell into disuse, although it applied in case of personal property until 1870, when all forfeiture for felony was abolished.

[13] Forfeiture of property, as a punishment for suicide, was abolished in England by the act 33 & 34 Vict. chap. 23.

[13½] Hale (1 P. C., Chap. XXXI., 411–418) expounds the old law on suicide, especially as to forfeitures. Among other things he says that if a man give himself a mortal wound and die "within a year and a day" of that wound, he is *felo de se*. The inference would seem to be that if he died of the wound after a year and a day, he would not be accounted a suicide. Hale says also that the finding by a coroner's inquest that a man was a suicide was traversable. When forfeitures were involved, this was a matter of great importance. For other details, see footnote to the American edition of Hale, by Stokes and Ingersoll. Also Hawk. P. C., Chap. XXVII.

[14] Strahan, op. cit. See also Lecky, History of European Morals, Lond. 1869. Vol. I. pp. 223 *et seq.*; and Vol. II. pp. 46–65.

[14½] The present writer follows literary usage merely when he speaks of Moses as an "Old Testament author."

udice against it, and the Athenians cut off the hand with which the deed was done. The custom of burying the body after sunset was also of Athenian origin. The Romans, as is well known, resorted readily to suicide, and to this day we give the name to it of the "good old Roman way."

674. Bracton's statement.—According to Bracton,[15] if a person accused of felony committed suicide through fear of being hanged, or of some other punishment, his act did not avoid a forfeiture of his land; but if the suicide was done in a frenzy, or impatience of grief, or by misadventure, it was otherwise. This was a recognition of insanity as a cause of, and excuse for, suicide. (See footnote 91, *infra.*)

675. The law in America on attempt to commit suicide.—In the United States forfeitures are not allowable;[16] therefore, in this country, suicide is not punishable. But the attempt to commit suicide, which at common law was a misdemeanor,[17] is also so considered in some of our American states. Apparently, however, there is no uniformity among us on this subject. In Massachusetts it is not a statutory offense,[18] while in New York it is against the Penal Code.[19] The law in the other states varies or is silent. In Pennsylvania there seems to be some doubt whether an attempt at suicide is punishable.[20]

676. If a would-be suicide kills another person, he is guilty of homicide.—It has been decided that one who attempts to kill himself, and accidentally kills another instead, is guilty of criminal homicide. This is based on the principle that if a person, in the perpetration of a criminal act (such, for instance, as burglary), kills another person even accidentally or unintentionally, he is guilty of murder. It is therefore necessary to show that suicide is a criminal act; otherwise the accidental killing of the other person is not a crime. In the case of Mink,[21] in Massachusetts, a woman attempted suicide by shooting herself with a pistol, just after being rejected by her lover. The man attempted to prevent her, and in so doing was accidentally shot by her, and killed. The effort was made to show that, as suicide was not a crime, according to Massachusetts law, therefore the prisoner

It seems well determined by the higher critics that the various codes in the Old Testament date from many centuries after Moses.

[15] De Legibus, fol. 130.

[16] 24 Am. & Eng. Enc. Law, p. 490.

[17] *Reg.* v. *Doody*, 6 Cox, C. C. 463; *Reg.* v. *Burgess*, Leigh & C. 258, 32 L. J. Mag. Cas. N. S. 55, 9 Jur. N. S. 28, 7 L. T. N. S. 472, 11 Week. Rep. 96, 9 Cox, C. C. 247.

[18] *Com.* v. *Mink*, 123 Mass. 422, 25 Am. Rep. 109.

[19] *Darrow* v. *Family Fund Soc.* 42 Hun, 245; *Meacham* v. *New York State Mut. Ben. Asso.* 46 Hun, 363.

[20] Ashman, "The Legal Aspect of Suicide," in The Polyclinic, Feb. 1888.

[21] *Com.* v. *Mink*, 123 Mass. 422, 25 Am. Rep. 109. In a lengthy and learned opinion by Chief Justice Gray, this whole subject of the criminality of suicide is reviewed, with numerous references.

was not guilty of any offense; but the court held that by the law of that state suicide was deemed a crime, as *malum in se,* and that, inasmuch as a person who, attempting to commit a crime, kills another even accidentally, is guilty of criminal homicide, therefore the prisoner was properly convicted of manslaughter.

677. Accidental suicide while attempting to commit a felony.—If a man attempted to kill another, and accidentally killed himself, as by falling on his own sword, or upon the sword of his adversary, he was, according to the old common law, guilty of self-murder, and subject to its penalties; such as forfeiture.[22] This was according to the principle, already mentioned, that if a man, in attempting to commit a felony, committed murder even accidentally, he was guilty of the latter crime. But the forfeiture extended only to the personal estate of the suicide; therefore no will of a *felo de se* that devised personal property was good, no matter how long beforehand it had been written.[23]

In *Reg.* v. *Gatherode,* 1839, the prisoner attempted to drown himself; another man jumped into the water to save him, but lost his own life in the attempt. Gatherode was thereupon convicted of murder.[24] It is indeed riding a legal principle to death to apply it in such a case; and there is small wonder that good legal authorities have demanded that most of the laws concerning suicide be abolished.

678. Cases of double suicide.—But the nicest questions arise in the cases of double, or mutual, suicide, in which one of the parties survives. Not a few such cases have occurred and have come before the courts. It has been quite generally held in law that "if two persons enter into an agreement to commit suicide together, and the means employed to produce death prove fatal to one only, the survivor is guilty of murder." Two men agreed to commit suicide together, and each took laudanum in the presence of the other, from the effects of which one died, while the other recovered. The survivor was found guilty, and sentenced to be hanged, but was respited.[25] In another case, in which a man and woman had agreed to throw themselves into the water together, she drowning, but he being rescued, it was held that if the deceased threw herself into the water by encouragement of the prisoner, and because she thought he had set her the example, in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was

[22] 1 Hawk. P. C. Chap. XXVII. § 4.
[23] 2 Bl. Com. 499.
[24] Westcott, Suicide, p. 48.
[25] *Reg.* v. *Jessop,* 10 Crim. Law Mag. 862. A valuable note is appended to this report, in which the laws of various American states as to suicide are referred to.

doubtful whether the deceased did not fall in by accident, it was not murder in either of them; and the prisoner was recommended for a pardon.[26] This sounds like Dogberry justice; and shows how courts, as a rule, are averse to the extreme penalty in these cases, even while they insist on the legal principle.

679. The guilt of the survivor.—It seems like a harsh rule in such cases to hold the survivor guilty of murder, when it is considered that the suicide of the other party was a perfectly voluntary act on his or her part. The question, also, of the exact nature of the crime is not an easy one to determine. Was the survivor guilty of murder, or merely of being an accessory to an act of suicide? In the case of Blackburn,[27] in Ohio, it was conceded by the court that suicide was not a crime by the laws of that state, and therefore there could be no accessories or principals in the second degree in suicide. It would seem, therefore, that the true nature of the crime could only be murder on the part of the survivor, even though the act of the other party was voluntary, and perfectly within his rights; for it must have been within his rights, if there was no law against it.[27½]

680. The psychology of double suicide.—If we attempt to analyze the psychology of these cases of double suicide, we are met by some strange difficulties. In the first place, there must always, it would seem, be a prime mover in such a case. The suggestion probably does not arise spontaneously in both minds at the same time with equal force; one party is probably the stronger in will-power and initiative; the suggestion comes from one, before it has time to dominate both. But it is by no means certain that the guiltier of the two, if we may distinguish the degrees of their culpability, will always be the sur-

[26] *Rex* v. *Tyson*, 1 Russ. & R. C. C. 523. See also *Reg.* v. *Alison*, 8 Car. & P. 418; and 1 Hawk. P. C. 78.

[27] *Blackburn* v. *State*, 23 Ohio St. 146.

[27½] A recent case (*Burnett* v. *People*, 204 Ill. 208, 98 Am. St. Rep. 206, 68 N. E. 505) was not strictly a case of attempted double suicide. A man and woman, paramours, being drunk on retiring, she took morphin, he dissuading her. In the morning he discovered her dead, and in his alarm he then took morphin, but was resuscitated. There was no evidence that the man either administered, or advised the woman to take, the drug with murderous intent, except that he had purchased morphin for her while he was very drunk. It seems that she had been in the habit of using it. The man's attempt at suicide was after the woman's death. The supreme court held that the proper count was, first, murder, and, second, persuading to murder; but reversed the judgment of guilty for error. The law as to accessory and principal was also discussed. Most of the evidence was based on a confession wrung from the defendant while still intoxicated with alcohol and morphin. See also *Reg.* v. *Stormonth* (Q. B. Div.) 61 J. P. 729, for a somewhat similar case, in which the woman died, but the man recovered, and was tried and convicted, but his sentence was afterwards commuted. (N. B. When a man and woman, both drunk, shut themselves up in a room, take opium, and one dies, it is hard to determine just what happened.)

vivor. The weaker of the two may survive. The law, of course, cannot be expected to make such distinctions, provided both parties are of sound mind, but if one of them could be shown to be a victim of melancholia, and that one should be the survivor, the case would have a clear medico-legal significance. Two young women of Philadelphia threw themselves together from a ferry-boat into the Delaware river, and were drowned; the circumstances seemed to indicate that one of them had induced the other to join her in the act. Misery loves company. There is ground for supposing that such a case might present the elements of morbid or insane example. Epidemics of suicide have occurred.[28] Suggestion is a powerfully impelling force to it.[29] Melancholiacs, as is well known, sometimes commit the act on the impulse of the moment, from the mere suggestion presented to their minds by a favorable opportunity; as, by the sight of a knife or an open window. It is quite conceivable that one melancholiac might induce another to commit suicide in one of these double acts.

681. Double suicide in mother and child.—Among the most distressing of these cases of double suicide are those in which a mother persuades a child to join her in this desperate deed. Such an act is most unnatural, and at once raises the suggestion of insanity in the mother. A French alienist, Garnier,[30] reports two instances of this sort. In one case a woman and her child, a girl aged twelve years, threw themselves into a river, but both were rescued. The woman was found, on medico-legal inquiry, to be "neuropathic," and addicted to alcohol; and was not punished. The other case was in a widow who induced her son, a boy aged ten years, to join her in inhaling the fumes of carbon monoxid. Both were found unconscious, and the mother was restored, but the child died. The woman was declared, upon examination, to be suffering with melancholia. The tender age of these children would probably exempt them from punishment in any country, while the unnatural character of the act in a mother raises the presumption, in medicine, if not in law, that the woman is irresponsible. Such cases also illustrate how, in a case of double suicide, the suggestion may come from one of the parties, and be imposed on the other.

682. Assisting in any way to commit suicide is a crime.—Persuading, advising, and abetting another to commit suicide, is a crime; as,

[28] Winslow. Anatomy of Suicide. Chap. V. "Imitative or Epidemic Suicide."

[29] Moreau, De la Contagion du Suicide, Paris, 1875. Also Mabille (Ann. Med. Psych. 1891, 7 S. XIV. 229), who reports the cases of three sisters who committed suicide. A New England family is on record with more than twenty cases.

[30] Ann. d'Hygiène, Paris, 1891, 3 S. XXV. 202.

for instance, where a father encourages a son, convicted of a capital crime, to kill himself.[31] Such cases have occurred, but they would not be of special medico-legal significance unless it were attempted to be shown that the father was suffering with "impulsive" or "emotional" insanity. In the case of Jewett, in Massachusetts, in 1816, the condemned man was advised by a fellow prisoner, named Bowen, to kill himself, and thus cheat the gallows. Jewett did so by hanging himself in his cell; and the court decided that Bowen's act was an act of murder.

683. The principle of husband's control.—A curious twist of the law was seen in a case of double suicide that happened in the reign of James I. A man and his wife decided to die together, and together they took poison, from which he died, but she recovered. She was tried for the murder of her husband, and was acquitted; but solely on the old principle that, being the wife of the deceased, she was under his control, and had acted upon his suggestion, and therefore was not a free agent.[32] Here the law, nearly three hundred years ago, recognized the psychological principle, already referred to, that in such an act the controlling motive may proceed from one of the parties, and not from both of them equally. But the law would probably not recognize this principle in any relation except that of husband and wife; and therefore takes too narrow a view of human nature, for the principle can act with equal force in other relations.

Strahan refers to the case of a well-known literary man, suffering with an incurable disease, who killed himself by shooting. His wife aided him to prepare for the act, by removing his false teeth, and in other ways; and afterwards avowed her complicity, and defended it. She was not prosecuted, but she was technically guilty, unless on the old principle of husband's control.

684. The refinements of the law on the subject of suicide.—The refinements of the law on this subject of suicide are apparently endless. According to an old English authority,[33] if A gives a bottle of poison to B, with instructions to deliver it to C, who is intending suicide, and C thereupon drinks the poison in the presence of B, and dies in consequence, B is guilty of murder, as a principal; while A, who instigated the crime, but was absent at its commission, will be merely an accessory before the fact. Aside from its refinements, however, the law which holds a person responsible for instigating another to

[31] 24 Am. & Eng. Enc. of Law, p. 490.

[32] See *Reg.* v. *Alison*, 8 Car. & P. 418, for reference to this case.

[33] Cited by Judge Ashman, "The Legal Aspect of Suicide," in The Polyclinic, Phila. Feb. 1888, p. 245.

commit suicide is a just and salutary one, for it might easily occur that a designing party would induce or encourage an insane person to kill himself. A criminal intent might be concealed; and in view of the ease with which these unfortunate melancholiacs yield to suggestion, the deed might be left to appear as entirely the spontaneous act of the invalid.[33½]

685. The futility of laws against suicide.—The opinions of jurists hardly vary to-day about the barbarity of inflicting a so-called penalty for suicide. It is impossible to penalize a man who is dead. All that the law can do, and all it ever intended to do, was to wreak its vengeance on his property, his dead body, and his reputation; and it was instigated to do this by the sentiments, largely clerical, of the darker ages. The Church fulminated against suicide, and the hand and spirit of the Church are visible in the denial of Christian burial.

686. Christianity condemned suicide.—Christianity early came to denounce suicide as a "deadly sin;"[34] and the Council of Arles, in 452, forbade it under all circumstances. The early Christians, in their extreme fanaticism, had indeed courted martyrdom to the extent sometimes of deliberately sacrificing their lives;[35] and some were even guilty of suicide; but the prejudice of the Church was gradually roused against it, and finally to a high pitch.[35½] Some of the early fathers had defended self-destruction under special circumstances, as, where a virgin killed herself to escape ravishment; and St. Palagia was canonized for having thrown herself from the house-top to preserve her virginity. St. Augustine, however, condemned even this "virgin suicide," as it was called, and his extreme pietism gave the tone to much of the thought of the Middle Ages.[36] By the 10th century the civil law, following the lead of the Church, had made suicide a crime in England. The Christians surpassed all others in dis-

[33½] And yet, in the case of *Reg.* v. *Leddington* [1839], 9 Car. & P. 79, where the prisoner was charged with feloniously inciting and procuring a woman to commit suicide, Baron Alderson told the jury: "You have no authority to inquire into this charge; this is a case of suicide, and the prisoner is charged with inciting it; that is a case that, in law, we cannot try. The prisoner must be acquitted." He quoted no law or authority.

[34] Strahan, Suicide and Insanity, London, 1893. This little work, written by a barrister-at-law, contains much curious information.

[35] Gibbon, Decline and Fall.

[35½] "Among the early Christians those persons who exposed themselves to death in their attempts to deface or demolish the idols of the heathens were forbidden to be numbered among the martyrs. And the *circumcelliones*, who, out of a desire for martyrdom, would provoke others to kill them, or, being disappointed in that, would do so themselves, were reckoned no better than madmen."—Fleming, Moral Philosophy, p. 237. See also Mosheim, History of Christianity, Vol. II. p. 439.

[36] Consult Lecky, History of European Morals, Vol. II., pp. 46–65; also Westcott, Suicide, London, 1885.

honoring the body of the suicide. It was dragged through the dust at a cart-tail; it was hung on a gibbet, head down, and then thrown to the beasts as carrion; the church-yards were closed to it, and a stake was driven through it when it was buried at a cross-roads,—an outrage which was done in England, says Mr. Strahan, as late as 1827. Clergymen and priests have, until very recently, refused to officiate.

687. Public opinion is more tolerant.—An enlightened public opinion would to-day no more tolerate the forfeiture of a suicide's property than it would permit a stake to be driven through his body, or than it would fail to visit condemnation on the "churlish priest" who should refuse to officiate at the burial.[37] It is idle to say that the motive in forfeiting a suicide's property was a benevolent one, or intended solely to deter others from the act. The motive was a priestly one; and was the expression of outraged priestly authority. Its utter cruelty and senselessness in striking at a dead man's family were highly characteristic; and an eminent writer like Blackstone[38] does little credit either to his profession or himself in apologizing for such law.

688. Laws against suicidal attempts also useless.—Almost the same criticism can be leveled against any law to punish an attempt at suicide; and the futility of such a law is shown by the fact that prosecutions for this act are now seldom heard of.[39] Judge Ashman[40] has pointed out how unphilosophical it is to inflict a penalty for such a deed.[41] When a man proposes to depart from this world by killing himself, he generally has, or thinks he has, good cause for being dissatisfied with life. If he fails in one attempt at self-destruction, he is almost sure, sooner or later, to make another. This is the teaching of experience, as every psychiatrist knows. What, then, is to be gained, either as a corrective for himself or as an example for others like him, by making this world a still more unendurable place by holding him up to public obloquy? Such a law puts a premium on

[37] The popular detestation of the priests who refused "Christian burial" to the body of a suicide is shown in the grave scene in Hamlet, where Laertes tells the priest, "A ministering angel shall my sister be when thou liest howling." Act V. scene 1.

[38] 4 Com. 189, 190.

[39] Recently (May, 1904) a man was haled before a New Jersey judge for an attempt at suicide, but was not tried for his offense.

[40] "The Legal Aspect of Suicide," in The Polyclinic, loc. cit.

[41] Of 743 insane criminals in Broadmoor Criminal Lunatic Asylum in England, thirteen were committed for attempts at suicide. No details are given, but it is probable that some of these lunatics were considered dangerously insane on other grounds than mere suicide. Nicholson, "Criminal Lunacy in England," in Allbutt's Syst. of Med. Vol. IX. pp. 444, 445.

suicide. The truth is that suicide is the last appeal which a man makes to fate: no human tribunal has jurisdiction.[41½]

689. Suicide and life insurance.—In the matter of life insurance the act of suicide has medico-legal import for the alienist in so far only as it raises the question of insanity.[41¾] In equity, if not in law, as Westcott observes,[42] such a death, if caused by insanity, should not vitiate a policy; and, according to Judge Ashman,[43] in many of the American states, including Pennsylvania, only criminal acts of self-destruction, and not those which are uncontrolled by the will, vitiate a policy of insurance.[44] In English law, however, there seems to have been some confusion and diversity of opinion. In the case of *Borradaile* v. *Hunter*[45] the insane person drowned himself; and the court charged that the policy must be void if the deceased jumped into the water, intending to kill himself, and knowing that this action would kill him; and left it to the jury to determine whether he could distinguish right and wrong. This was simply reiterating the tests so often used in homicide cases. The question of self-control, of the impelling power of disease, was ignored. In the case of *Clift* v. *Schwabe*,[46] the deceased drank sulphuric acid and died, evidently insane. Justice Cresswell held that the word "suicide," used in the policy as a vitiating condition, meant criminal self-destruction; and the jury found that death occurred during insanity,—meaning that the policy should not be void. On appeal, some judges held that the policy was void even if the deceased was insane; but the minority were of contrary opinion.[47] Westcott says that, as the law stood in 1885, where the suicide was insane, the policy was not avoided, unless by special condition of the policy.[48] A condition supporting the insurance in the event of suicide during insanity would not be void in law; but a condition supporting the insurance even if the assured killed himself while in his sound mind would be void in law, as against public policy.[49] But according to Westcott, a condition avoiding the policy in case the assured should "commit suicide," "die by his own hand,"

[41½] *Quem Deus vult perdere prius dementat.*

God maddens him whom 'tis his will to lose,
And gives the choice of death or phrensy —choose! —Byron.

[41¾] For a complete discussion of the legal phases of this question, see *ante*, §§ 248–255.

[42] Suicide, p. 52.

[43] Op. cit. p. 247.

[44] *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743; *Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236.

[45] 5 Mann. & G. 637, 5 Scott N. R. 418, 12 L. J. C. P. N. S. 225, 7 Jur. 443; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623.

[46] 3 C. B. 437, 2 Car. & K. 134, 17 L. J. C. P. N. S. 2.

[47] Westcott, op. cit. p. 53.

[48] *Horn* v. *Anglo-Aust. Ass. Co.*

[49] For an American case, see *Ritter*

or "perish by his own hand," includes all cases of voluntary death, whether the person be sane or insane. This might properly raise the question of the meaning of the word "voluntary;" for suicidal melancholiacs are sometimes so impelled by their mental disease to kill themselves as to have lost self-control.

690. Voluntary or involuntary suicide.—But it seems to be understood in the courts that when the words "voluntary or involuntary" are used, as applied to suicide, parties are precluded from setting up the condition of the mind, and arguing from it that the act was involuntary.[50] In other words, the word "involuntary" does not refer here to a pathological condition, but to accident.

691. The law in America.—In America there is already a very full literature on this subject, embodied in a large number of case-reports.[51] The comparison with English law is rather favorable to the American courts. It seems to be held in England that all that the contract requires is that the act of self-destruction be voluntary, and the wilful act of a man having sufficient powers of mind to understand the physical nature and consequences of such an act, and having at the time a purpose and intention to cause his death by his own act. Whether he was capable of understanding the moral nature of his purpose is not relevant. This construction has been followed in Massachusetts, but rejected by the Supreme Court of the United States in favor of a more liberal construction. For instance, if the reasoning faculties of the insured are so far impaired that he is not able to understand the moral character of the act, and its nature, consequences, and effects, or if he is impelled thereto by an insane impulse which he has not power to resist, his death is not to be regarded as within the contemplation of the parties to the contract, and does not avoid the policy.[52]

Thus, the Supreme Court held in a recent case[53] that, although there had been considerable doubt at one time as to what extent suicide avoided a policy, the question was no longer an open one in that court since the decision in the leading case of Terry.[54] Mr. Justice Davis, for the court, said that in that case the words intended to avoid the policy were "shall die by his own hand;" and the court had held that they referred to an act of criminal self-destruction, and did not

v. *Mutual L. Ins. Co.* 109 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

[50] *Edwards* v. *Travelers L. Ins. Co.* 20 Fed. 661.

[51] See *ante*, §§ 248–255.

[52] Am. & Eng. Enc. of Law, p. 75.

[53] *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918.

[54] *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236.

apply to an insane person who took his own life; but in the case then under consideration, that of Bigelow, another question arose, and that question had reference to the right of a company to insert, as a vitiating clause, the words "shall die by suicide (sane or insane)." Justice Davis held that the company had just as good a right to make this condition as it had to make any other condition; as, for instance, that the policy should be void in case the insured died by the hand of the law, or by accident while intoxicated, or to discriminate against hazardous occupations. According to this decision, therefore, if the contract includes as a condition that the policy is to be void in case of suicide "whether sane or insane," the policy will be avoided; but a mere reference to suicide, without the words "sane or insane," will not avoid a policy if it be proved that the insured was insane when he killed himself.

But even when the words "sane or insane" are used, it seems that some courts will uphold the policy if the insured was in such a state of mind as to be unconscious of the physical consequences of the act which caused death.

692. What constitutes a criminal intent in suicide.—The confusion on this subject is almost as great as on the subject of homicide, and mostly from the same causes; *i. e.*, the various definitions of what constitutes a voluntary act, or, in other words, a criminal intent. Nothing could be more irrational to the mind of an alienist than the English law as stated above. All that is requisite to constitute responsibility, according to that law, is that the suicide should have mind enough to know the physical nature and consequences of the suicidal act. It would indeed be difficult to imagine a man committing suicide in any mental state whatever who did not understand that the deed he was about to do would kill him. The very act of suicide presupposes that much knowledge. According to the English doctrine there can be no such thing as insane suicide. Every person who kills himself must know to that extent what he is about to do. It is to be noted also that the English law puts aside any consideration of a knowledge of right and wrong, which it makes a cardinal test in cases of homicide. Such distinctions are beyond the ken of scientists, who get their ideas of insanity from the hospitals rather than from the courts.[55]

693. The better psychiatry is the better law.—The American decision, that an insane impulse to suicide is a valid ground for upholding a policy, is better psychiatry, and therefore it ought to be better

[55] *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755.

law. As we have already seen, the melancholy patient is usually impelled to suicide by a mental sense of great suffering. To use a metaphysical expression, the will is overthrown; that is to say, the patient is driven by the impelling power of disease to kill himself. There may be no systematized delusion; or, if there be, it may be concealed, and the patient may retain his moral sense intact; but he is just as truly impelled to kill himself as a normal man is impelled involuntarily to withdraw his finger from a flame. In either case it is the recoil of suffering. Who shall measure such an act with an academic test?

694. The proof of suicide.—There are some minor legal points of importance, usually with reference to the proof of suicide during insanity. Thus, the burden of proof requires that the insured must be shown to have been insane at the time of the act: it is not sufficient to prove that he was insane at other times, especially at times remote from the act. Again, as suicide raises no presumption of insanity, as we have already seen, so neither does insanity raise a presumption of suicide.[56] For instance, if an insane person be found drowned, there is no presumption that he killed himself. In any case of death the presumption in law is in favor of natural causes, or of accident; not of suicide.[57] The latter must be proven. The verdict of a coroner's jury that the insured killed himself while insane does not estop the defendant from showing the fact to be otherwise.[58] The courts are thus ready to discredit the hackneyed and unscientific findings of coroners' juries on this subject. Finally, the question is one of fact, to be determined by the jury; not a question of tests.[59]

695. Can a man contract that he will never go insane?—It is not easy to see why there should be any difficulty in deciding that, in a case of suicide from insanity, the policy should hold in spite of any conditional clause in it. Certainly it is a principle in law that an insane man is not to suffer for his disease. *Furiosus solo furore punitor,* says Coke,[60] quoting a civil law maxim, and, in simple equity, this principle should stand in the matter of life insurance. A man cannot contract that he will never go insane.[61]

696. Suicide raises no presumption of insanity.—That the law does

[56] *Walcott* v. *Metropolitan L. Ins. Co.* 64 Vt. 221, 33 Am. St. Rep. 923, 24 Atl. 992.

[57] Leading cases on this point are *Connecticut Mut. L. Ins. Co.* v. *McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. 444; *Ingersoll* v. *Knights of Golden Rule*, 47 Fed. 272.

[58] *Zimmerman* v. *Masonic Aid Asso.* 75 Fed. 236.

[59] *Germania L. Ins. Co.* v. *Ross Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488, and other cases.

[60] 2 Co. Litt. Lib. III. Chap. VI.

[61] See Bunyon, Treatise on Life Insurance.

not presume, from the mere act of suicide, that insanity exists, is shown in cases in which contracts and wills have been sustained, although the parties making them committed suicide within a brief period thereafter. In the case of *M'Adams* v. *Walker*[62] a marriage was upheld although the bridegroom killed himself the same day. In *Burrows* v. *Burrows*[63] a will was sustained although the testator killed himself three days after signing it. In the case of *Chambers* v. *Queen's Proctor*[64] a will was upheld, although the testator committed suicide the day after signing it, and was proved to have suffered with delusions three days before death.[65] These cases are a sufficient indication to experts not to rely exclusively upon the act of suicide as an evidence of insanity. This act is not of necessity such an evidence, and no more so in science than in law. A sane man might conceivably kill himself on the day of his wedding, or on the day of his signing his will; and the law is unquestionably right in declining to accept the mere act as proof of insanity, without corroborating evidence. But where this act is immediately preceded by delusions, as in one of the above-mentioned cases, the evidence of its being the deed of an insane man is greatly strengthened.

697. The findings of coroners' juries in cases of suicide.—In its medico-legal aspects suicide is thus seen, from what precedes, to have great significance; and this fact was recognized by Blackstone[66] when he wrote:

"The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroners' juries are apt to carry it, *viz.:* that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all; for the same argument would prove every other criminal *non compos,* as well as the self-murderer. The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, which is necessary . . . to form a legal excuse. And, therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man."

In this passage the eminent commentator has confused some truth with not a little error. He is doubtless right when he denies that the very act of suicide is an evidence of insanity, and no such proposition is now entertained by the best alienists. The vicious custom of al-

[62] 1 Dow, P. C. 148.
[63] 1 Hagg. Eccl. Rep. 109.
[64] 2 Curt. Eccl. Rep. 415.
[65] Westcott, op. cit. pp. 56, 57. See also *Steed* v. *Calley,* 1 Keen, 620; *Reg.* v. *Rumball,* and *Reg.* v. *Farley,* quoted by Westcott.
[66] 4 Com. 190.

lowing this subject to be decided by a coroner's jury has been strongly condemned by Judge Ashman,[67] who says that the old law permitted this "most irregular body of officials in the world" to find a suicide to be a felon, and guilty of murder, or else a lunatic, and innocent, and this at a time when the former verdict carried with it a forfeiture of goods. But a suicide is not necessarily either a felon or a lunatic. Surely the English law never put itself in a worse position towards insanity than when it allowed such a delicate question to be determined by such a tribunal, and necessarily in the absence of the person whose estate and reputation were in jeopardy; and even now, when only reputation is at stake, such a tribunal is a poor one indeed to have the decision of such a question. Under the old law the motive of the coroner's jury was doubtless often a humane one, as by finding the suicide insane his property was exempt from forfeiture; but this doubtless promoted the erroneous popular opinion that suicide is in itself an evidence of insanity. From the scientific standpoint the whole procedure is unreliable and antiquated. Such verdicts have little, if any, scientific value.[68] All suicides are not insane, but many of the insane become suicides.

698. An academic question.—As for the test of right and wrong in cases of suicide, upon which Blackstone insists, it has little, if any, applicability in such cases, and is now, since forfeitures are abolished, merely an academic question. All alienists know that many suicidal melancholiacs can distinguish right and wrong well enough, but that they are impelled to the act of self-destruction by their mental suffering; and, in some cases, even against their avowed principles. In fact, melancholia furnishes an especially good illustration of the fact that a knowledge of right and wrong is not a true test of responsibility.

699. The real problem in suicidal melancholia.—In any case in which suicide, or an attempt at suicide, comes to the attention of the law, as in any of the instances above mentioned, the medico-legal problem rests largely on the question of the person's sanity. This is, of course, entirely a question of fact, and should be determined according to the evidence. It has already been pointed out how fallacious the ordinary tests, such as a knowledge of right and wrong, or a knowledge of the nature and consequences of the act, might be in melancholia. The whole problem in melancholia is a simple one,

[67] Op. cit.

[68] "Jeremy Bentham remarks that jurors do not hesitate to violate their oaths, . . . by finding suicides to be *non compos*."—Westcott, Suicide, p. 47.

and is merely this: Was the patient the victim of such mental suffering because of his disease as to be impelled to the act of self-destruction? It matters not, as a question of fact, whether he could distinguish right and wrong, even with reference to the act, or that he had full knowledge of the nature of the act and what its consequences would be,—as, for instance, with reference to his life insurance,—if he were so overwhelmed with despair as to be impelled to take his own life. The true test, rather, is self-control; and the accuracy of this test, upon which Sir Fitzjames Stephen[69] insisted as the correct one in all cases of insanity, is nowhere so strikingly shown as in suicidal melancholia. In the language of Lord Denman:[70] "If some controlling disease was, in truth, the active power within him, which he could not resist, then he will not be responsible." These words, which were spoken of a homicide, have still greater force when applied to a suicide from melancholia. Such is the impelling power of this disease that its victim may kill himself in spite of his moral promptings; and even hurl himself irresistibly to his doom in spite of his belief that he but anticipates the perdition which is the phantasm of his disordered mind. The attempt to reduce such madness to fixed rules—to limit it by the conventional tests of our courts of law—is both futile and unjust.

700. The presumption of sanity.—The law will doubtless insist in such cases, as in all other cases, that the presumption of sanity holds until evidence is shown to the contrary. Blackstone[71] has correctly stated this maxim when he implies that the act of suicide, in itself, is not an evidence of insanity. To this statement few, if any, scientists will object, although they may see cause to make exception of some cases in which the act of suicide, from special circumstances attending it, is so extraordinary and unnatural that it suggests insanity. But a presumption in law is, after all, merely a working hypothesis. It is always open to attack, and is liable to be broken down; so that, as Lord Brougham[72] said, the presumption constantly shifts from one side to the other, according to the weight of evidence. For instance, in science, if strong evidence were adduced in favor of the person's insanity, that fact would raise the presumption that the act of suicide was the result of the disease. It is therefore incumbent upon experts to base a diagnosis upon all known previous symptoms, rather than upon the mere act of suicide itself. For instance, in Garnier's cases,

[69] History Crim. Law, loc. cit.
[70] *Reg.* v. *Oxford*, 9 Car. & P. 525.
[71] 4 Com. 190.
[72] *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947.

already cited, in which the mothers had induced their children to join them in the desperate act, that astute expert did not confine himself to a statement of the unnatural character of the act, but analyzed the histories of these women, and demonstrated that they were irresponsible. The inference, then, was practically certain that their acts were the results of disease, even if it had not been possible to trace the act directly to an insane motive.

701. The relation of the suicidal act to a delusion.—This certainly would be the scientific inference; and the law itself would hardly insist, in such a case, on the principle which it applies in homicidal cases, that the act must be directly traced to a delusion. To trace such a direct relation might be impossible in some melancholiacs, because of the reticence of these patients. Here, again, melancholia runs counter to the law, for it demonstrates that from the very nature of some of these cases the immediate motive for suicide cannot be exposed. Few persons can read accurately the thoughts of a melancholy patient; the springs of action are often concealed deep in the gloomy recesses of the mind; the inferences as to conduct must rest on the mere general appearance of mental suffering. But if this be true of suicide, why may it not also be true of homicide? If a delusional lunatic kills, his act may not always be traced more directly to his delusions than the suicide of a melancholy patient can always be traced to the controlling ideas. The one patent fact is that the mind is unsound; and the inference is that its actions are perverted; for, as Lord Brougham said, the mind is one and indivisible; and, as Lord Lyndhurst[73] put it, the mind cannot be at the same time both sane and insane, for if it is partially impaired it is unsound.

702. The present doctrine of English law.—According to a recent writer[74] the true doctrine of the English criminal law at present would be, perhaps, as follows: If suicide affords any presumption of insanity, it is of insanity at the moment only; and even then, if not supported by other evidence, it is not enough to exculpate.[75] This may be good law, but it is hardly good science; for, while of course the immediate presumption is in favor of insanity only at the time, and no inference can be drawn, without other evidence, of a more remote antecedent insanity, yet the fact is that in the vast majority of insane suicides the insanity has existed for some time prior to the act. The preponderance of evidence would be so great in favor

[73] *Dew* v. *Clark*, 3 Addams, Eccl. Rep. 79.

[74] Prescott, op. cit. p. 48.

[75] *M'Adam* v. *Walker*, 1 Dow. P. C. 187.

of the latter position that it would at once constitute a presumption in the mind of an alienist; but the law shows, in this matter, its precise methods, and its demand for evidence step by step, and expert witnesses must be prepared to meet this demand; therefore it is really useless to deny that the act of suicide, if it raises any presumption at all in favor of insanity, affords a presumption of insanity at the moment only. More could hardly be expected; and even this much is against the principle announced by Blackstone. If more were allowed, there would practically be no limit, and it would be proper to presume a suicide to have been insane for an indefinite time merely from his one act. To establish an antecedent insanity, therefore, requires evidence, and properly so.

703. Some legal opinions differ.—But legal opinions differ on this subject, as is shown by Strahan,[76] who advises that a law be enacted declaring that all attempts at suicide be considered in themselves evidence of insanity, and that the offender be sent to a madhouse. One finds it difficult to accept such a proposition seriously. It is against both law and science; for, as Blackstone properly said, suicide is in itself not evidence of insanity. It requires corroborative proof. Therefore it is still more strange to have Strahan inveigh against coroners' juries for finding all suicides insane. One would suppose that this custom was just what he wanted.

704. In cases in which suicide is a crime, insanity exculpates.—If suicide is a crime, the person is innocent until found guilty, and the same is true of the attempt at suicide, if this be a misdemeanor. But if the accused is insane, his insanity operates as an excuse, just as in any other crime or misdemeanor. Hence, an insane man is guilty of no offense under any law in committing suicide, or in making the attempt; and this applies to all instances mentioned above; as, for instance, the accidental killing of another person instead of himself; or the joining in a double suicide, of which he is the survivor; or the instigating another person to commit suicide; or in the matter of life insurance. Hence, the subject has very wide importance in medical jurisprudence.

705. The difficulty of diagnosis in some cases of insane suicides.—From the medical standpoint, however, it may be a matter of extreme difficulty in some cases to establish the pre-existence of insanity in a suicide. All suicides are not insane, and even in those who are so, it is not always easy to prove it. In the cases of melancholia, which are the most numerous, the evidence of depression, as described in the

[76] Op. cit.

preceding pages, must be sought; but systematized delusions are not always present in melancholia, and their absence is no proof that the patient was not irresponsible. The degree of mental pain, the loss of self-control, are the more exact tests. Moreover, delusions may be concealed by melancholy patients: the fact that they are not expressed is not evidence that they are not present. In short, the evidence of the insanity must be based upon a study of the symptoms in each individual case.

706. The study of statistics of insane suicides.—The statistics of suicide have value for the medical jurist in so far as they show the prevalence of various forms of insanity as causes of this act; and the most reliable statistics show clearly (what would, indeed, be expected) that melancholia is by far the most common pathological cause of suicide. Thus, the statistics of Saxony[77] for thirty years, from 1847–76, reveal that of insane suicides 66.6 per cent of men, and 63.5 per cent of women, were suffering with melancholia; and the statistics of Prussia for nine years, 1866–75, show 67 per cent of men and 66 per cent of women. Next in frequency comes mania; while imbecility, idiocy, and religious excitement figure in the list. Thus it appears that the alienist has good reason to claim that a study of the facts raises a presumption, by a ratio of 2 to 1, in favor of any particular case of insane suicide being an example of melancholia; and even more than this, because, even in mania, imbecility, and idiocy, the act may arise from a melancholy impulse, such as is not unknown in those states. But the greatest objection to statistics is, that they are founded on cases some of which have been badly observed. The diagnosis may not be equally reliable in all cases which are included in the tables. Moreover, statistics lead us too much to ignore the individual, whereas it is the individual that the law is concerned with.

The nature of the average cases of suicide, as they occur in a large general class of people, is shown in a peculiar light by statistics. The following are from the Chief Medical Examiner of the Royal Arcanum, a beneficial order.[78]

[77] Morselli, Suicide, p. 282.

[78] American Medicine, June 11, 1904, p. 916.

[79] See Morselli (Suicide, pp. 276, 306) for a discussion of the causes of suicide, especially with reference to madness. Morselli relies largely on the statistical method in his study of suicide. He does not fail to recognize, however, that statistics can throw little, if any, light on individual motives; and it is such motives which are the study both of the jurist and the alienist. See his "Introduction."

For four years as follows:

	1903.	1902.	1901.	1900.
Domestic trouble	16	9	12	7
Financial trouble	26	30	16	21
Intemperate and out of employment	2	2	3	3
Temperate and out of employment	9	6	2	1
Intemperance the chief cause	12	5	4	7
Ill health	31	23	25	19
Known insanity	2	2	4	3
Supposed insanity	9	7	8	10
Supposed temporary insanity	5	6	12	6
Illness from overwork	4	3	2	6
No cause known	5	7	6	—

707. The difficulty of analyzing statistics.—If we attempt to analyze these statistics, which are, perhaps, fairly representative, we meet with great difficulties. Many of the causes assigned may or may not be causes also of insanity. Thus, domestic and financial troubles may cause melancholia; so may intemperance and various forms of ill health. Moreover, such statistics are often founded on inexact observation, and are no more reliable than the findings of a coroner's jury; in fact, some of them probably are based on the findings of coroners' juries. This criticism applies to very much of the literature of suicide, which is often inexact, or even dilettantish.[79] For the purposes of medical jurisprudence, the only allowable method is by a careful, detailed study of the individual case which is under adjudication. It is a question of fact, to be determined by the evidence. The historians of suicide are fond of striking incidents; their works are loaded with historic narrative and not a little speculation. It does not help us to know that Empedocles threw himself into Etna; that King Saul ran upon his sword; that Mark Antony disemboweled himself; that Cato took his own life after reading Plato on immortality; that Cleopatra applied the asp; that Seneca and his wife committed double suicide by opening their veins; that Chatterton, in his poverty, poisoned himself; or that Hugh Miller killed himself after overwork. The history of humanity is dotted with acts of self-destruction, from the earliest times, among all peoples. Religion has not controlled this distemper, for we find that, according to Legoyt,[80] sixty-two out of one million Catholics kill themselves; one hundred and two of Protestants; thirty-six of the Greek Church; and forty-eight of the Jews. Hence, Christianity, with all its thunderings against suicide, has not prevented a high death-rate. The fact is that suicide is due to numerous causes, of which insanity is only one; and for the medical jurist the question resolves itself into a

[80] Le Suicide, Paris, 1881.

study of individual cases. Statistics will not decide this question in any court of law.[81]

708. Homicide may be committed by the melancholiac.—The melancholy patient may also commit homicide, but this act is much less common than suicide. In order to understand the motive for it, it is necessary to appreciate fully the state of mental depression which overwhelms these patients. When we consider this state in all its relations we can readily see how it may suggest to some patients the mad impulse to make way with the lives of others as well as their own. Hence, it follows that the person or persons immolated by the suicidal melancholiac are usually those who are near and dear to him. Thus, the disordered mind of a mother, intent upon suicide to escape the burden of existence, may turn to her young children, whom she is unwilling to leave behind in a world which to her seems so unendurable. Those are the commonest cases of joint homicide and suicide. The motive is perfectly intelligible; and the act is, in a sense, a logical sequence of the profound psychalgia. In these cases there is usually nothing left for the courts to pass on, although occasionally the unhappy woman survives the attempt on her own life, and her case comes up for adjudication. In a case in which a woman had killed one child and had intended to kill another, which saved its life by giving its mother an innocent caress, an English judge, Lord Blackburn, told the jury that there were exceptional cases, in which the ordinary tests, such as the knowledge of right and wrong, would not apply.[82] This was a brief, accurate, and profound commentary on such cases.

[81] The literature of suicide is enormous. The Index-Catalogue of the library of the Surgeon-General's office at Washington contains seven large pages of two columns each, of closely printed references to the subject of suicide. Among the best works on the subject are Winslow, The Anatomy of Suicide, London, 1840; Brierre de Boismont, Du Suicide et de la Folie Suicide, Paris, 1865; Legoyt, Le Suicide Ancien et Moderne, Paris, 1881; Morselli, Suicide (in its English translation); Strahan, Suicide and Insanity, London, 1893; Westcott, Suicide, London, 1885; and Carrier, Des Obsessions et des Impulsions à l'Homicide et au Suicide, Paris, 1899. In these valuable works the authors seem to have attempted to outshine all rivals in collecting every scrap of information about suicide, from every historic, legal, and scientific source. Their works are monumental, and not a few of them are among the curiosities of literature. Thus, Winslow's book seems written as though to cast a glamour over the subject; it is laboriously anecdotal rather than scientific, and contains a poetical quotation on almost every other page. The writers on autocheiria have even affected startling titles, and we have in consequence such effusions as The Right to Die, by Bonser; while the Curiosities of Suicide and the Aesthetics of Suicide, are titles which illustrate the morbid fancies of authors as well as of the suicides themselves.

[82] Quoted by Dixon Mann, For. Med. and Tox. 2d ed. p. 361.

Esquirol[83] refers to the case of a woman who, during an attack of melancholia, in which she believed that she was to be arrested, condemned, and led to the scaffold, rendered desperate by the thought of the grief she would bring to her husband, tried to kill him before killing herself. The motive in such a case is easy to understand; the insane mind in such circumstances clings tenaciously to those who are most dear, and seeks to include them in its own fate. A melancholy patient, known to the writer, believed she was in hell, and constantly raved about her mother in such a way as indicated that she might make a dangerous assault upon her. Such cases are instances of agitated melancholia, in which the patients are particularly apt to be seized by impulses, suicidal or homicidal, or both. They are in a kind of melancholy delirium, and are totally irresponsible.[84]

709. Deliberation and premeditation in these patients.—But some of these melancholy patients are capable of acting with great deliberation; their plans are well matured; they have no idea of failing in their terrible designs. They completely upset the legal tests of responsibility. Esquirol records the tragic case of a Belgian woman, who, after throwing four of her children into a well, threw herself in after them. She would have destroyed a fifth if it had not escaped her; and she had sent a dose of poison to a sixth child, who was away from home. The mind stands aghast at such a perversion of the most sacred feelings in the human breast, and refuses to read in such an act anything but the impulses of insanity.[84½]

710. Homicidal impulses in melancholia.—Among the most shocking examples of homicidal impulse are to be placed the cases of women who kill their infants in an access of puerperal insanity. These cases have already been treated of in the chapter on "Mania," but it would not be proper to dismiss the subject entirely from the discussion of "Melancholia." Many of these cases are probably instances of a melancholy impulse, for we know that in mania and in various forms of delirium there are periods of melancholic perversion. This is especially true of the early stages of those diseases, at which time a period of melancholic depression is not unusual, and it is in the early stages of the insanity of childbirth that infanticide is most likely to occur. To analyze the insane motive or impulse that leads a mother to kill

[83] Mental Maladies, Am. translation, p. 259. "Suicide Preceded by Homicide."

[84] Clouston, Clinical Lectures on Mental Diseases, p. 111.

[84½] The classic fable of Medea, who, when she was deserted by Jason, killed her two sons whom she had had by him, supplies us with an early example of infanticide by a jealous and despondent woman.

her newborn babe is most difficult, often impossible. In these cases there is great confusion of mind, with hallucinations, and most disturbing delirious ideas. The character of the unnatural act, however, suggests that the deed is prompted not by hate so much as by fear, anxiety, depression. Where all is disorder, however, it is impossible to detect the sequence of ideas.

711. The complicated motives that may lead to homicide.—The complexity of the human mind is so great that we need not be surprised that very complicated motives may lead a would-be suicide to commit a homicide. Brierre de Boismont[85] says that it is well established by numerous observations that persons seized with the idea of suicide, but not willing to kill themselves, because of their religious scruples, kill another person, in order to have time to reconcile themselves with God. Such a motive might not meet with a favorable reception in an American or English court, and yet it may be recalled that Hadfield, who shot at George III., and was acquitted, was impelled by the desire, not to injure the King, but to secure his own execution.[86] The motive was an insane one; and allied to the motives which lead some melancholiacs to make homicidal attempts. We see in such cases a strange confusion of the moral instincts; for although the person is too scrupulous to kill himself, he is not too scrupulous to kill another; but the explanation lies in the fact that the act of homicide gives him a chance to repent, which the act of suicide necessarily deprives him of. Esquirol, who also noted such cases, included them all in the class of melancholiacs; but Esquirol confused melancholiacs and monomaniacs, especially those of the latter class who have delusions of persecution. This fact should be emphasized; for some of these cases of homicidal suicides, and those especially who act from religious motives, are really cases of religious paranoia. The madman who thinks he is commanded by God to commit murder is not usually a melancholy patient: he is a paranoiac. The motive in the melancholiac rises from the sense of depression and personal unworthiness. These facts are of medico-legal import as well as of purely psychological interest. The lunatic who emulates the example of Abraham in sacrificing his son is not a melancholiac. His motive is profoundly different, and he is not usually a suicide. Of course, he does not recognize that the story of Abraham is a mere legend, in which we catch a glimpse of the practice of human sacrifice as it undoubtedly existed among the primitive Semites.[87]

[85] Du Suicide, etc., p. 729. Consult, also, Marc, De la Folie, etc. Tome I. p. 571.

[86] *Hadfield's Trial*, 27 How. St. Tr. 1281.

[87] Driver. (The Book of Genesis, N. Y.

712. Criminal motives in suicidal patients.—The medical jurist will sometimes be asked for an opinion in cases of conjoint attempts at homicide and suicide, in which the motive had been purely criminal, but where an attempt is made to prove the murderer insane. The mere atrocity of an act does not prove a man insane in law. These double crimes often arise from jealousy, anger, or revenge; as, for instance, when a man kills his mistress, with whom he has quarreled, and then attempts suicide.[88] Assassins not infrequently try to kill themselves; if they do not succeed, they are to be tried exactly as other murderers are. The mere attempt at suicide proves nothing, for here, especially, the courts would be likely to insist on the legal principle stated by Blackstone,[89] that the act of suicide is not, in itself, an evidence of insanity.[90]

Finally, these cases are to be distinguished from the cases of toxic insanity, such as are caused by alcohol, morphin, and cocain, in which impulsive acts of homicide and suicide occur. Thus, recently in Philadelphia a man shot and killed his wife without warning, and then committed suicide. He was reported to be a victim of a drug habit, and was probably insane.[91]

1904, p. 221.) Canon Driver shows us that the custom of human sacrifice was prevalent among the primitive Israelites and their neighbors. Under the later Jewish kings, as Ahaz and Manasseh, the rite was performed. Renan also says it was practised in Jerusalem. According to the Hebrew law the first-born was offered to Jehovah (Jahvah), but was redeemed at a price (Exod. xxii. 29; xiii. 12–15), a statute still obeyed by orthodox Jews. This law, in the opinion of Canon Driver, stands in some relation to the primitive custom of human sacrifice. According to some Greek authors, the Carthaginians, in times of national peril, sacrificed by the hundred the children of their noblest families.

[88] *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 163.

[89] 4 Com. 190.

[90] *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397.

[91] It is hardly necessary to remind the well-read student of Lecky's elaborate discussion of suicide in his History of European Morals, to which reference has already been made in the preceding footnotes. For a note on the legality of suicide in ancient Rome, see his first volume, p. 230 (also Gibbon's Decline and Fall, Chap. XLIV.). The Emperor Domitian made a law that, if an accused person committed suicide in order to escape trial and condemnation, he should suffer the same penalties (such as confiscation of goods) as though he had been condemned. (Compare § 674, *supra*.) Lecky says that the best history of suicide is by Cromaziano, a monk (Istoria Critica del Suicido, Venice, 1788). Seneca's praise of suicide (Consol. ad Mare, CXX.) is quoted by Lecky, Vol. I. p. 228: "To death alone it is due that life is not a punishment;" and again, "Against all the injuries of life I have the refuge of death." He was forced to commit suicide by the Emperor Nero.

CHAPTER XXXIV.

STUPOROUS INSANITY.

I. The medical aspects of stuporous insanity.
713. Definition.
714. Occurrence.
715. The onset.
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721. This is not a disease at all likely to figure in the courts.

I. The medical aspects of stuporous insanity.

713. Definition.—There is a psychoneurosis which differs from both mania and melancholia in the fact that it is characterized by neither an exaltation nor a depression of the emotions. Instead of a disturbance of the emotional life there is a weakening or even abolition of all the mental life, and the patient sinks into a condition of stupor This disease is sometimes called "primary dementia," or "primary curable dementia;" but, as Spitzka[1] has pointed out, the term "dementia" is a misnomer as applied to this psychosis, for dementia indicates a state in which there is a permanent deterioration of the mental faculties. Such does not exist in stuporous insanity, for the brain, although profoundly deranged, is not permanently so.

714. Occurrence.—Stuporous insanity is a disease of early adult life. Krafft-Ebing[2] says that this state of mental weakness is not encountered after thirty years of age. It is caused especially by things that tend to weaken the general physical health, and is seen in those young persons who are by nature delicate and weakly; hence the neuropathic are its natural victims. Among the common causes are the acute febrile diseases, hemorrhages, childbirth, masturbation, injuries to the head, and mental and moral shock. The best

[1] Insanity, chapter on "Stuporous Insanity."

[2] Traité Clinique de Psychiatrie, p. 401.

authorities insist upon including masturbation in this list of causes, but the writer has always been sceptical about this habit having nearly as much to do with the causation of mental diseases as it is credited with.

715. The onset.—This disease usually develops rapidly. The patient becomes more and more preoccupied and absorbed; he ceases to attend to his ordinary affairs; he is no longer interested in his work or his amusements. The mental faculties are all involved,—attention, intelligence, memory, the affections, and the moral sense. There is, in fact, as the case reaches its acme, a total abolition or extinction of the mental life. In severe cases this is shown by the impossibility of obtaining any mental reflexes in the patient, and by the complete blank which exists in the memory after recovery. The whole aspect of the case is one of stupor, deepening even into unconsciousness; but the patient is not always deeply unconscious: he can often be roused a little by repeated urging, and it is said that, even in severe cases, a change in the pulse can sometimes be detected on loud and familiar conversation in the patient's presence.

716. Characteristics.—Savage[3] says that, in his opinion, the touchstone in these cases is the state of the memory. Patients with stuporous insanity, or, as he calls it, acute primary dementia, have no remembrance of the period of their disease. This distinguishes them, in his judgment, from cases of melancholia, in which a painful impress is left upon the mind. He refers to a patient who, on recovering, said that the time of his inactivity was a blank to him, and was in no way associated with painful recollections. This accords with the teaching of Krafft-Ebing, Crichton-Brown, and other authorities.

717. The physical state.—The physical symptoms are in accord with the mental. The patient's expression is one of apathy, or is even entirely blank; the pulse is slow, the skin cool and dry, the temperature perhaps slightly below normal; the eye-reflexes may be sluggish; the vaso-motor system is involved, as is shown by edema of the feet and hands; and most authors say that the urine is rich in phosphates. Motion and sensation are impaired: the patient makes few voluntary movements, and even the calls of nature may be neglected; anesthesia of the skin, or, more properly, the loss of perception to touch, may be complete.

718. Special symptoms.—Krafft-Ebing says that these patients may have episodes of excitement, caused, for instance, by terrifying hal-

[3] Insanity and Allied Neuroses, Phila. 1884, p. 180.

lucinations, and there may be a rare intercurrent stage of what seems like maniacal exaltation, marked by mental and physical excitement, during which the patient sings, paces to and fro, goes about without object, tears his clothes, talks verbiage, and commits impulsive acts. This state should not be confounded with mania, from which it differs in the absence of an exalted emotional state, just as the profoundly stuporous *stadium* differs from *melancholia attonita* in the absence of emotional depression. It is proper to state, however, that some authors, as Régis,[4] teach that stupor is only a form of melancholia, and that the emotional depression is only concealed under the mask of the stupor. It is possible, in fact, that these forms insensibly grade into one another.[4½]

719. The prognosis.—The prognosis in these cases is, as a rule, good: the patients usually recover.

720. This insanity is a physical disease.—Stuporous insanity should be of not a little interest to lay readers from the fact that it exhibits a form of mental disease which has many analogies with a purely physical disease; that is to say, it shows that purely physical causes underlie an affection the seat of which is in the brain cells, which have become disturbed in their nutrition.

II. The medico-legal aspects of stuporous insanity.

721. This is not a disease at all likely to figure in the courts.—The stuporous patient takes so little notice of anything, and has so little initiative, that he is not capable of performing a voluntary act. Such a person can not only not commit a criminal act, but he would be quite insensate in the presence of such an act. Clouston[5] refers to a stuporous patient in Morningside Asylum who took no notice whatever of another patient's committing suicide in his presence by hanging. If, however, a stuporous patient were to have an episode of excitement, such as Krafft-Ebing refers to, he might conceivably commit an impulsive act of violence, and such an act would, of course, have to be judged as an insane act in any of its medico-legal relations.

[4] Médecine Mentale.

[4½] Georget (De la Folie, Paris, 1820, p. 115), under the title of *stupidité*, was one of the first observers to note this form of mental disease.

[5] Mental Diseases, p. 217.

CHAPTER XXXV.

CONFUSIONAL INSANITY.

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I. The medical aspects of confusional insanity.

722. A statement of the disease.—Closely allied to stupor in its causation, but differing from it in some of its symptoms, is the mental disease known in this country as confusional insanity. It is the *Verwirrtheit* of the Germans; the *folie hallucinatoire* of the French. When we consider the causes of these various psychoneuroses,—stupor, confusional insanity, mania, and melancholia,—we are struck with the fact that they are all based upon much the same foundation, and that, however they may differ from one another in their clinical phenomena, they seem insensibly to shade into each other. Thus, stupor and melancholia approach each other by almost insensible gradations, and mania and the present disease have not a few symp-

toms in common. This fact leads some alienists to think that some of the German authors, in the rage for classifying, have gone too far, and have insisted on too many refinements.[1] But, with reference to confusional insanity, there are features which distinguish it fairly well; and it is not unscientific to assign it a clinical place by itself. This should be done, however, with all rights reserved. If, in the future, this disease, or any or all of the other psychoneuroses, shall be found to be dependent on essentially the same disease processes in the brain cells, then it will be our privilege, and also time enough, to reconstruct our classes. In the meantime, the disease which we here consider offers most instructive material to the alienist as well as to the jurist.

723. Its history.—The history of this disease is not without interest. Probably the first notice of it was in the work of Esquirol,[2] who described an acute dementia following a fever, a hemorrhage, or the debilitating treatment which was formerly so much in vogue. This acute dementia of Esquirol was recognized by Georget[3] under the name of "stupidity." Delasiauve, in France, contributed important studies to the subject, but, according to Séglas,[4] this disease was for a long time but little recognized in that country. In Germany the post-febrile insanities have been described by Kraepelin, and Krafft-Ebing has an important chapter on this affection. The literature of the subject in late years has grown voluminous, but this brief historical note will serve to show how slowly a new clinical form finds its way in psychiatry, and will illustrate the conservatism of alienists,—a characteristic with which they are not always credited in the courts.

724. Similar to delirium.—For lay reading this disease can best be described as closely allied to the delirium of fever. It is sometimes called "confusional delirium;" but this term is tautological, for in every kind of delirium, as this word is used in the English language, there is more or less confusion.

725. The causes of the disease.—The causes of confusional insanity

[1] Kraepelin (Psychiatrie, 1903), a leading German authority, is among those who are not satisfied with the present method of classifying the psychoneuroses, and his criticism is based on the fact that those various forms are not always so distinct, nor so functional, as is claimed. See Berkley, Treatise on Mental Diseases, p. 142.

[2] Mental Maladies. Am. Trans. chapter on "Dementia," p. —

[3] De la Folie, Paris, 1820, p. 115.

[4] Leçons Cliniques sur les Maladies Mentales, Paris, 1895, p. 185. Séglas has contributed a valuable series of lectures on this disease in this work. It can be read with profit along with Krafft-Ebing's chapter in his Lehrbuch.

are such as lead to a weakening or poisoning of the system; hence, anything that depletes the blood, and overwhelms the brain and nerve centers with the products of infection. Thus, the febrile diseases, such as typhoid and typhus fevers, may cause this psychosis, and it is then called post-febrile insanity. So like to delirium, indeed, is this insanity that the ordinary delirium which attends typhoid fever may merge gradually into confusional insanity. Instead of recovering his mind when the fever decreases, as in most cases, the patient continues in a wandering delirium; the regular symptoms of the typhoid infection may all disappear, and there remains only this post-febrile insanity to mark the extent and power of the disease. In other cases the delirium may set in during convalescence from the fever; or it may occur after a serious surgical operation,—especially an operation within the abdomen,—and is then called post-operative insanity. One of the commonest causes of this delirious insanity is childbirth; and a large percentage of the cases of puerperal insanity are really of this type. They are commonly called cases of mania, following an old usage; but the mental symptoms more nearly approach a true delirium, like that of fever, than a state of maniacal exaltation. This, it must be confessed, is often a nice question, for a true maniacal exaltation, or what approaches such, may arise out of the midst of the delirium. Krafft-Ebing[5] speaks of such attacks as episodes in the course of the confusional insanity; but this seems like an attempt to keep up appearances; and it is better to regard these cases as instances which show how the two affections may merge into each other.

Among other causes mentioned by various observers are malaria, acute rheumatism, hemorrhage, and the abuse of alcohol. The mental affection known as delirium tremens is psychologically very much like confusional insanity, but has some special physical symptoms due to the alcohol poisoning; such as extreme muscular tremor. In our hospitals it is not uncommon to see a delirious insanity set in and complicate other affections in alcoholic patients. This is true especially in pneumonia, and in surgical cases, such as fractures. Within a year the writer has seen such a case in a woman with a broken leg. She progressed well until the second week after the accident, when she quite suddenly developed delirium with hallucinations. She had a history of alcoholism.

726. Hallucinations are common.—The French give the name "hallucinatory insanity" to this disease, and this indicates one of its

[5] Traité Clinique, p. 415.

chief characteristics. Hallucinations are very common, especially hallucinations of sight. In this respect the disease differs from melancholia, in which hallucinations of hearing are more common. But in the height of the affection all the sensorial organs are involved, and the patient has hallucinations and illusions of hearing, smell, taste, and general sensation. This extreme disorder of the senses is naturally accompanied with great confusion of mind. Hallucinations, in all forms of insanity, are very dominating to the mental functions; much more so in this form, in which these phenomena appear often in great profusion and complexity. They follow each other rapidly, and produce a bewilderment which shows itself in the reaction of the patient to them. They readily translate themselves into delusions, and these are fleeting and changeable; there is no tendency for them to become fixed and systematized. The delirious ideas are usually of a disturbing and even of an alarming kind. The patient is therefore irritable, alarmed, anxious, and unhappy. Occasionally the ideas are expansive and grandiose: the patient is, in a measure, exalted. Sometimes they have a religious tinge, and may be terrifying. The patient may see disgusting and alarming objects; and the tendency of the victim of delirium tremens to see snakes is proverbial.

727. The emotional disturbance.—The emotional reaction is in accord with the nature of the hallucinations and delusions. A gay or happy expansive state is very uncommon: the patient is more apt to be depressed, annoyed, or alarmed.

728. The intelligence is involved.—The intelligence is in great disorder: the attention cannot be fixed, or only for a moment, and the memory is greatly impaired; as a consequence, there is marked confusion of identity, both of person and of place. The patient's self-consciousness is obliterated: he does not recognize either himself or his surroundings, nor does he identify his friends and attendants.

729. Impulsive acts.—Impulsive acts are very common in confusional insanity, and they are the natural reaction of the mind to its disordered contents. There can be little, if any, premeditation in such a confused brain; the impulse is, in a sense, mechanical,—unconscious,—without any ethical quality. But these acts may be violent and very dangerous, and such patients sometimes do injury to themselves or to others. They may also refuse food, under the influence of delusions, or from the anorexia which is a natural result of the physical state.

730. The physical state.—The bodily functions are, as a rule, much

disturbed. The patient is debilitated, and loses in weight; the tongue is coated; the digestion impaired. As a rule there is no fever, unless in cases in which the primary disease, such as typhoid infection or a puerperal blood-poisoning, lingers. The writer has seen a case in a woman, brought on by over-childbearing and by a septic state resulting from a recent confinement, in which fever persisted; the patient was in a wandering delirium, and did not fully recover for a year. Moreover, in this case, the patient before recovering passed from a delirious state into a state of melancholia, with well-marked weakening of all the mental faculties, or a threatened dementia; thus showing how this psychoneurosis may change its type, and merge into another in the same patient,—a fact which is not always emphasized by the systematists. Insomnia is a complication in most of these cases. In women suffering from this disease, from whatever cause, a menstrual period usually causes an access of the delirium.

731. Various forms.—Some authors, notably Régis,[6] attempt to describe a separate form of insanity for each individual cause that produces it; thus, there is one form following small-pox, another form following typhoid fever, etc., but this excessive subdivision is not called for in these pages. The delirium, or confusional insanity, which follows these various infectious diseases, is of one type, as a rule, and is sufficiently indicated in one general description. This type may, it is true, present variations, but these do not conform so much to the individual causes as to special conditions. Thus, the mental affection that comes on during prolonged convalescence from an infectious disease may tend to be of a melancholy kind, while the affection which presents itself earlier in these states of blood-poisoning is more likely to be of the delirious kind described above. In truth, it is hardly possible to draw hard-and-fast lines between the varieties of psychoneuroses which appear as results of exhausting and infectious processes. In these cases the nutrition of the brain cells is doubtless perverted, and the manifestation of this perverted nutrition, which we call insanity, varies within certain limits. These various forms shade into each other, as already said; and, indeed, we could expect nothing else, for nature does not work by set rules and definitions. Just as in botany or zoölogy we see one variety, or even one species, insensibly merge into another, so it is all through nature; and so it is with the functional insanities.

732. Duration and prognosis.—The duration of these cases varies according to the intensity of the causes. In most cases the prognosis

[6] Médecine Mentale.

is good: the patients eventually recover; but in unfavorable cases death may occur, or the patient may pass into a state of secondary or chronic insanity.

733. **The pathology is not entirely unknown.**—The morbid process underlying confusional insanity is probably a disturbance of the nutrition of the brain cells, and this may be due to various causes. In febrile and septic cases the opinion is now generally held that the agents are bacteria and the toxins, or poisonous substances which they elaborate in the blood. Hence, this disease properly belongs to the class of the toxic insanities. Kraepelin[7] divides these post-febrile insanities into various groups, according as they are distinguished by collapse, hallucinations and delirium, and dementia; but these various forms probably only represent variation in the intensity of the action of the poisons. Berkley[8] says that the exact process is incompletely known; but he describes appearances in the substance of the brain which indicate an infectious process.

734. **The scientific interest in these cases.**—These infections, or toxic insanities, which are included here in a general way under the term "confusional insanity," offer a great and fruitful field for scientific investigation. It is not too much to believe that the future will reveal in this field a more definite basis for our knowledge of mental pathology. It daily becomes more clear that insanity is an organic disease of the brain cells, and that this disease is not out of the reach of the microscope to the extent that has sometimes been held.

II. The medico-legal aspects of confusional insanity.

735. **Impulsive acts of violence.**—Under the influences of terrifying delusions or of frightful hallucinations the delirious patient may commit impulsive acts of violence. The most common of these cases occur in the insanity of childbed. Infanticide may occur, or suicide, or both. This subject has already been fully discussed in the chapter on "Mania," and need not be repeated here. What was said there applies in great part here. The puerperal patient is, by long custom, regarded as having an attack of "mania" when she falls into insanity; but the exact form of her disorder is not seldom the form we

[7] "Einfluss acutes Krankheiten," Arch. f. Psych. u. Nervenk, 1882.

[8] Treat. on Ment. Dis. p. 348. Dr. Berkley's valuable treatise contains a very full discussion of the insanities due to infection. In this respect it is the most complete treatise in the English language. The literature of the subject is already very great, and is fully represented in that work.

are here discussing. She is suffering from a blood-infection,—a septic state,—associated with prostration of the physical health; the nutrition of the brain cells is impaired. From the medico-legal standpoint it is not a matter of first importance what exact form, or type, her mental disease may assume. Whether it declares itself in a melancholic depression, a maniacal outburst, a lapse into stupor, or an access of delirium, is a question of less importance than whether it so impairs her mind as to render her irresponsible. The courts, without exception, would probably hold with the Scotch judge[9] (although his opinion was not given in this kind of case) that if the mind is diseased, the patient is insane; and if the mind is diseased, it is no matter what has caused it, so that the insanity is actually produced and present at the time.

736. Loss of responsibility.—In these cases the insanity is so clear that, as a matter of fact, the patients are seldom, if ever, brought into court. In the whole range of medico-legal literature there are probably very few genuine cases of puerperal insanity that have come before the courts. There are, however, a large number of alleged cases, in which the crime of infanticide has been shielded by the defense of insanity. For this reason, if for no other, it is essential that the medical jurist should have a clear conception of the various psychoses occurring in childbed. He should note, for instance, that, in spite of the fact that these patients often act from impulses, their cases do not support the claim for an "impulsive insanity," as it is urged sometimes in court. The impulse of a confused or delirious patient arises from the midst of her delirium; the mental confusion preceding and succeeding the act is continuous, and in no way affected in its course by the impulse. The patient has but little knowledge of her act, and may have no remembrance of it whatever. In other words, the impulse is but an episode in the disease, and, relatively to the disease itself, an unimportant one. It had not been premeditated, and whatever motive for it had existed was a confused and insane one. This is a very different affair from an impulse that arises in a sane mind, and that constitutes practically the whole of the alleged disease, or is based upon passion or self-interest, and leaves no trace behind it after the commission of the deed.[10]

737. The word "impulse" has been greatly abused.—Impulse is not synonymous with insane motive, as attempted to be proved sometimes in court. The word has no special significance in psychiatry, but is

[9] The case of Milne, Ed. Med. Journal Vol. XI. p. 18.

[10] *People* v. *Walworth*, 4 N. Y. Crim. Rep. 355.

used merely as a general term, to describe those acts of the insane mind which proceed from morbid concepts irresistibly acted on. Its morbid character depends entirely upon the morbid state of the brain from which it takes its rise. Hence, in mental diseases in which there is diminished self-control (as in melancholia), and especially in those in which there is a confused intelligence, with disordered delusions and rapidly repeated hallucinations (as in confusional insanity), insane impulses are commonest.[11]

738. The defense of impulsive insanity.—It is significant that the plea of impulsive insanity is never used for delirious or confusional patients, although these patients are very subject to impulses. The term is reserved almost exclusively for persons who commit crime under the stress of emotion, as anger or revenge; and in that connection it is often a pure invention.[12] But these remarks are not intended to apply to forms of insane impulse, or imperative conception, which are observed in neurasthenics and paranoiacs, and which may dominate the mind for long periods with the same tyranny as an insane delusion. These will be considered in their proper place; they have no resemblance, however, to the sudden impulses which arise in mania, melancholia, and delirium.

739. Suicide in these patients.—The delirious, or confusional, patient may commit suicide, and when this is done, it is usually done as an impulsive act. Puerperal patients have been known to throw themselves out of a window. Suicides committed in the state of pregnancy or after childbirth, often preceded, in the latter case, by infanticide, are not rare. According to Morselli[13] they number 22 per 1,000 in Italy and Prussia, 29 in France, and 50 in Norway; but the greater number of these cases occur in girls who have been seduced, and these figures do not tell us how many of them are due to insanity.

Suicide may occur in the delirium of typhoid fever, small-pox, and measles. Brierre de Boismont[14] gives a list of such cases. He has seen it, he says, in the acute insanity sometimes observed towards the end of typhoid fever,—the post-febrile insanity here described. He refers to five cases, in one of which the patient was in a furious delirium. The act is usually sudden,—impulsive.

740. Disturbance of the emotions denied.—It is said by some authors that disturbance of the emotions is not observed in confusional in-

[11] For a discussion of "impulsive insanity," with references to cases, see chapter on "Mania."

[12] See Brannon, J. in *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

[13] Suicide, Am. Trans. p. 291.

[14] See Suicide, p. 237.

sanity, and that this serves to distinguish this affection from mania, on the one hand, and melancholia, on the other;[15] but this claim is much too absolute. Krafft-Ebing is more nearly correct when he says that the emotional disturbance is in accord with the fleeting hallucinations and delusions; it is itself undoubtedly very fleeting and changeable.

741. The evil passions.—In the courts, also, there has been some tendency to separate "irresistible impulse" from the emotions, and to say that if the accused had an evil passion as a motive for his impulse, he is responsible. Thus, Chief Justice Lewis,[16] of Pennsylvania, charged that if the prisoner was actuated by an irresistible inclination, and was unable to control his will or subjugate his intellect, and was not actuated by anger, jealousy, or revenge, he was entitled to an acquittal. Such an opinion might be all right in the case for which it was intended, which was not a case of confusional insanity; but it might be all wrong to claim that any display of such passions in any form of insanity would entail responsibility. The impulse in confusional insanity, or in mania, or melancholia, is irresistible, because it arises in an insane mind; and the fact that it is accompanied with some disturbed emotion, such as anger, fear, or despair, is not evidence that the person is not irresponsibly insane. To impute irresponsibility to an insane impulse, and then, in the same sentence, to deny such irresponsibility if the impulse is accompanied with a disturbed emotion, is to ignore some of the ordinary laws of psychology, and to reach the height of paradox. An attentive study of the mental state of a delirious patient must convince any one that there is often profound disturbance of the emotions, and that such disturbance often forms a part of the confused motive for the impulsive acts. This is not disproved by the fact that in some other cases there may be great apathy, both of intelligence and emotion.

742. Impulsive acts not always dangerous.—Séglas[17] has pointed out that, although the impulsive acts in confusional insanity may be dangerous to the patient and to others, it is possible to exaggerate this danger. He says that it happens frequently that between the moment when the idea arises in the mind, and the accomplishment of the act, the patient forgets the idea, and does not put it into execution. One of his patients who had suicidal impulses would suddenly

[15] Spitzka, Insanity, p. 161.
[16] Quoted by Taylor, Med. Jur. 11th ed. p. 763.
[17] Leçons Cliniques, p. 166.

make a move towards the window, as though to throw himself out; but it was enough to detain him for a moment, and to speak to him, to make him forget the impulse. Delasiauve has well said that these impulses have none of the characteristics of a voluntary act. They are, in fact, almost automatic in some patients, so profoundly affected is the self-consciousness.

CHAPTER XXXVI.

SECONDARY OR CHRONIC INSANITY.

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I. The medical aspects of secondary or chronic insanity.

743. A statement of the disease.—In the acute or primary insanities which have just been described, we have to do with an active pathological process; and this process, as in the case of all acute diseases, has one of three tendencies: it may tend to recovery, to death, or to a state of chronicity. When the chance of recovery has gone by, and the violence of the disease has not been great enough to end in death, the patient passes into a state of permanent insanity. He becomes a chronic lunatic; and joins the great body of unfortunates who go so largely to fill the wards of our asylums.

744. The cases vary within wide limits.—It can readily be understood that the symptoms of this chronic stage vary within wide limits, according to the antecedent disease and the personal traits of patients. We have to do here with a residuum of mental disorder, and the primary affection has varied according as the patient has been

a maniac, a melancholiac, a stuporous, or a confusional lunatic. Thus it happens that in chronic or secondary insanity there is often left a kind of stereotyped form of the primary disease, so that this latter may even be predicated by an experienced observer; but, at the same time, very much of the primary disease is effaced.

745. Progressive weakness of mind.—Whatever may have been the form of primary or acute insanity, the chronic form always presents, as its most prominent feature, a progressive deterioration or weakening of the mental faculties. The stamp of chronicity is unmistakable; and it is deeply impressed in this enfeeblement of the mind.

746. Symptoms become fixed.—It is the delusional state especially which becomes stereotyped. The maniac or melancholiac settles down, as it were, into a kind of monotony of insanity. Whereas, in the primary affection, the delusions were apt to be changeable and unsystematized, in chronic insanity a few of these delirious ideas become fixed in the mind; but they are never systematized and elaborated as in the monomaniac. This lack of system, or logical consistence, is a mark of the mental debility. There is not an accord, as Krafft-Ebing[1] expresses it, between the sentiments and the ideas; the delusions do not profoundly affect conduct and character, as in the paranoiac. They are simply mental representations of a superficial kind, and they are often contradictory and entirely opposed to the laws of time, of space, of logic, and of experience.

747. The emotions are weakened.—A proof, as well as a result, of the superficial character of the delusions in chronic insanity, is the dissociation between them and the emotions. As we have seen, emotional disturbance is a prominent symptom in acute mania or melancholia: the maniac is exalted; the melancholiac is depressed. But this is no longer so in chronic lunacy, or, at least, if there is any such association left, it is but slight. The chronic maniac is no longer the exalted individual of his primary disease; the melancholiac no longer suffers a profound psychalgia. And yet the primary emotional storm may leave traces; thus, in melancholia the chronic patient may continue to act the part of despair without feeling it; the chronic maniac may have his grandiose delusions without elation.

748. The keynote of chronic insanity is weakness.—The mind has suffered an irreparable disaster; it has fallen into a groove or rut from which it has no power to lift itself. This is shown in all the faculties: the intelligence is disordered; the imagination puts forth only a few morbid fancies; the attention is fixed with difficulty, and

[1] Traité Clinique, p. 424.

only for a brief space; the memory is impaired; and the moral and emotional instincts are lost or perverted. These disorders vary in different patients in all degrees and combinations; for no two chronic lunatics are alike; but in every case the enfeeblement of the mind is unmistakable.

749. Exacerbations occur.—In some cases of chronic mania there occur exacerbations. The patients have relapses into spells of maniacal excitement. In fact, mania is often of a recurrent type, each successive attack leaving the mind more impaired; and even after chronicity is well pronounced, the disease continues to present this type. So, too, in melancholia, the chronic patient has his better and worse periods; episodes of stupor or agitation may occur, in which there appears to be a lighting up of the primary acute disorder; but in all cases in which chronicity is once declared, the progress is downward; every relapse is a landmark in a territory already desolated.

750. The conduct.—The conduct is in accord with the mental decline. The chronic patient, when not too far advanced, is competent to do light work. Half the work of the county asylums of England, according to Savage,[2] is done by patients who belong to this class. In America special hospitals have been built for them in farming regions in order that they may be wholesomely employed. One of the most noteworthy of these is the asylum for the chronic insane at Wernersville, in Pennsylvania.[3] The capacity for work varies, of course, with the individual, and usually in an inverse ratio with his mental impairment. In advanced cases the curious tendency to routine is seen. The patient can perform a set task in an almost automatic way. This becomes a second nature to him; he keeps at his work in a mechanical fashion which shows the narrow limit within which his mental life revolves. Savage had one patient who, for many years, polished a floor; another who was happy only when fitting stones or pebbles into gaps in the paths. If left alone they behaved well; but any attempt to change their occupations was violently resisted.[4]

751. Habits and tendencies.—On the other hand, automatic habits are formed which are useless or even deleterious. In advanced cases the daily life becomes a void: the patient is idle, apathetic, vegetative, unconcerned. His mode of life becomes more and more re-

[2] Insanity and Allied Neuroses, pp. 225, 226.

[3] The experience at this hospital amply proves that, although the system is most advantageous to the patient, the amount of work to be obtained is much less per patient than in the sane.

[4] "I sometimes compare the mental state of such patients to that of a

laxed; he requires constant attention. Thus he passes, by imperceptible degrees, into the terminal period of his disorder, which is dementia.

II. The medico-legal aspects of chronic insanity.

752. Chronic lunatics may commit crime.—Much of this ground has already been covered in what has been written about the acute psychoneuroses. Still, the chronic cases present some differences which are of importance to the medical jurist. Chronic lunatics have been known to commit crime, and to be tried for it.

753. How distinguished from acute cases.—These patients are distinguished from the acute cases by the debility of the mental faculties, by the greater fixity of the delusions, and by less of the emotional tone. Nevertheless, they are capable of acting from insane motives, from impulses, and from emotional disturbances. Some chronic lunatics are irascible, passionate, and capable of acts of violence and revenge. Moreover, some of them are not so affected in their minds as not to be able to distinguish right from wrong on general principles, or to know the nature and character of their acts.

754. The presumption in favor of irresponsibility.—Their prolonged sojourn, as a rule, in an asylum, creates a powerful presumption, even in the mind of a court, in favor of their insanity; but this is not always so, as was shown in the case of Blampied.[5] This man had been an inmate of an asylum for four years when he killed a fellow inmate in resentment, and with not a little design; but Justice Brett told the jury that, in order to exempt the prisoner, he must have been so mad as not to know the nature and character of his act, or that it was wrong. In fact, the court applied the conventional test to the case of a chronic lunatic, with no more discrimination than though the patient were a mild case of some temporary aberration. It is gratifying to note that the jury acquitted the prisoner in spite of the charge of the judge.

755. Few courts would hesitate to admit such presumption.—This case of Blampied illustrates the problems which may arise in the medical jurisprudence of chronic lunacy, and shows that they are not always so different from other cases as might be supposed. Still, the history of these cases is so conclusive, and the mental state of the patients so unmistakable, that probably few judges would follow the

mountain lake, on which a very small storm will produce a large amount of disturbance."—Savage, op. cit.

[5] *Reg.* v. *Blampied*, quoted by Taylor, Med. Jur. 12th ed. p. 762.

course of Justice Brett. If there are any patients who are indisputably insane, and who should appear so to a court of justice, it is these chronic patients, who have passed beyond the boundaries of recovery, to whom the avenues of hope are closed, and whose cases are indelibly marked with the *stigmata* of an irreparable derangement. To attempt to apply to them the test of a knowledge of right and wrong seems like the irony of law.

756. The distinction between chronic lunatics and paranoiacs.—In medico-legal practice the difference between a chronic patient, on the one hand, and a monomaniac or paranoiac, on the other, should be kept clearly in mind. In chronic insanity the delusions are not systematized as in paranoia; they are not so deeply founded in the patient's self-consciousness, and they proceed from a secondary insanity, as has been shown above. In paranoia, the insanity is not a secondary one, but is, in itself, primary and constitutional; and the delusions are much more elaborate and determinative of character and conduct. Nor, in the latter cases, is there such a marked enfeeblement of all the mental faculties as is seen in chronic lunacy.

757. Epilepsy and chronic insanity.—In epilepsy there is also a tendency to chronic impairment; but epilepsy is such a special affection that it is properly treated as a disease apart.[6]

758. What cases are to be called chronic?—The term "chronic insanity" has reference to time, as Dr. Chapin[7] has pointed out, and in hospital reports is somewhat arbitrarily applied to a duration of the primary disease beyond one year. According to this usage, however, the term does not necessarily imply that the cases are all incurable. It includes some cases which have a tendency to become incurable, but which may yet be very greatly improved. In such a case the patient may yet resume an orderly habit of living and thinking, but it is unusual for him to return to a useful occupation. He remains peculiar, with some mental weakness, although he may be discharged from the hospital, to resume his life with his family; but he is always a care, and may have relapses which again consign him to the asylum. These patients, therefore, are not really cured; they are simply mild chronic cases,—cases in which the nerve-storm has been arrested before it made a final shipwreck of everything. Such patients, as Dr. Chapin warns us, can at no period be pronounced mentally well; but for the

[6] The case of Bowler (Collinson, L. Lunacy, 573) was an instance of a chronic lunatic. Bowler was an epileptic who had been legally found insane, but he was convicted and hanged.

[7] Compendium of Insanity, Phila. 1898, pp. 122, 123.

very reason that they are not extensively deranged, they may present grave problems of responsibility in medical jurisprudence. No positive rules can be prescribed, however, by which to measure them. Each case must be tried by the evidence; and the degree of impairment is a question of fact, to be determined by the jury.

759. Offenses against decency.—We are too apt to limit our ideas of the crimes committed by the insane to the acts of homicide and suicide; but we should not forget that there are other delinquencies of which these patients may be guilty. In the chronic insane, especially, there may be offenses against modesty and decency; and exceptionally these patients may commit a sexual assault. The chronic insane are sometimes grossly immodest, and sometimes very indecent and filthy; but the indecent act of a weak-minded person is usually puerile, semi-conscious, even automatic. In some cases, as Régis[8] tells us, an indecent exposure may be prompted by ill-defined sexual ideas, or even genesic excitement; but often it is silly, absurd, purposeless. Lasègue has described as "exhibitionists" those patients who, without knowing why they do so, content themselves with displaying their genital organs in public.[9]

[8] Méd. Mentale, translated by Bannister, p. 642.

[9] Burge has a recent paper in All. Zeit. f. Psych. IX. 1903, 1, 2, in which he describes the various types of "exhibitionists."

CHAPTER XXXVII.

DEMENTIA.

I. The medical aspects of dementia.
760. A terminal deterioration.
761. Dementia is an evidence that insanity is a physical disease.
762. An analysis of the disease.
763. Various forms of dementia are seen.
763½. The question of a "primary" dementia.
II. The medico-legal aspects of terminal dementia.
764. A common legal error about dementia.
765. Only dements are "totally deprived of understanding and memory."

I. The medical aspects of dementia.

760. A terminal deterioration.—Dementia has well been called the "goal of all the insanities;" it is the state of terminal deterioration to which the chronic and incurable cases naturally tend. Hence, it is often the termination of the acute insanities, or psychoneuroses, which we have been considering; but it is not confined to those acute insanities, for it may follow upon other forms, as we shall see hereafter. It cannot be stated too often that insanity is the manifestation of a morbid process in the organic brain; and whatever this process may be, or from whatever cause it may arise, it acts in the end as every morbid process acts in any organ of the body when not arrested. Its effect is destruction of sound tissue; and if it is not arrested, it inevitably causes lasting damage. The expression of this final dissolution of sound tissue in the brain is dementia.

761. Dementia is an evidence that insanity is a physical disease.—This termination in dementia is therefore a striking evidence of the fact that the insanities are not merely functional, but that they are organic. The worn-out tissue has been ravaged by disease until it can no longer perform its proper functions. Healthy brain-tissue does not suffer such decay except from adequate causes; and whether this decay comes soon or late,—whether it follows in young maternity, upon the assaults of puerperal delirium, or is postponed until in old age it reveals itself in the ravages of senile dementia,—it is equally a physical process. *Mens insana in corpore insano.*

Dementia is usually the product of years; and follows by insensible degrees upon chronic insanity, which, in its turn, has followed an acute attack. Hence it is not easy to detect the dividing line. In some cases, however, a permanent dementia may follow with surprising rapidity upon a hyper-acute delirium. Even in young persons this may be seen in cases of what is called furious mania, in which the morbid agent acts with great virulence. After a few months, or even weeks, the violent excitement passes by, and the patient is found hopelessly impaired in mind.

762. An analysis of the disease.—If we attempt to analyze step by step the mental state in dementia, we find that all the faculties are impaired. The intellect is quite in ruins: these patients have no longer the ability to reason or to think except in the most elementary way. The fragments of some of their old delusions may cling to them, but they have no longer an influence upon the mind. Language may be almost or quite lost, the patients using verbiage and disjointed sentences. The memory is weakened; it may even be a blank. In some cases remote events are recalled, even though the events of the present fade instantly from the mind. The attention cannot be fixed for any useful purpose: the genuine dement neither reads nor works. The affections are blunted or effaced. The emotions are transitory, without depth. The perceptions are dulled in all stages. These symptoms and combinations of symptoms vary in intensity according to the cases. Many patients require constant supervision: they must be dressed and undressed, fed, bathed, and their natural wants attended to as in young children. But in these pages no attempt is made to exhaust the symptoms in their various combinations. The one word for them is "de-mentia,"—deprivation of the mental faculties.

763. Various forms of dementia are seen.—Griesinger[1] and others have described types of dementia. Thus some patients, especially former maniacs, preserve some activity; they are restless and loquacious. In others is seen an apathetic form, usually following melancholia, and this is the most profound negation of mental function of which poor humanity is capable. The patient is listless, stuporous, taking no notice, without thought, without emotion or affection, disregarding the calls of nature, bedridden or planted hopelessly in a chair, a mere wreck and residue of a man. To enlarge upon the picture here is useless, for these apathetic patients have no medico-legal importance.

[1] Mental Pathology and Therapeutics, Eng. Trans. p. 242.

Among the commoner forms of dementia is that which comes on in old age,—senile dementia; but this will be described in a section apart, for it has great importance in the courts. Another special form is dementia paralytica, or general paresis; but this also requires special description. Finally, in epilepsy there is a terminal dementia, which can by no means be ignored by the medical jurist, and this, too, is described apart.

763½. The question of a "primary" dementia.—According to the view here taken dementia is always a secondary or terminal affection. It follows upon a primary or acute form of insanity. But this view has not been held by all alienists, and some of them have described a "primary" dementia; that is, a dementia which, in itself, constitutes the whole of the mental disease from the very start. This view of a primary dementia we are convinced is erroneous, and has led to much confusion. Thus, the primary, or acute, dementia of Esquirol and of other writers who have too blindly followed that great phychiater, is not a dementia at all, but a stupor, a delirium, or a confusional insanity, as the case may be; and differs from a true dementia in the fact (a most important one)that the patient can recover. Dementia is not mere weakness: it is annihilation.[1½]

II. The medico-legal aspects of terminal dementia.

764. A common legal error about dementia.—While it is true, as already said, that the dementia following acute insanity has but little medico-legal importance, it is imperative here to call attention to the errors into which legal writers and courts have sometimes fallen in their statements about criminal insanity. The older writers have described criminal insanity as though it were always of this extreme type of dementia. Bracton,[2] as we have seen, following the Roman law, described an insane man as *furiosus non intelligit quid agit, et animo et ratione caret, et non multum distat a brutis;* but if we except some of the more excited maniacs and delirious patients, it is only extreme dements who do not know what they are doing, and who are not far removed from the brutes. Such patients are never the objects of medico-legal inquiry, for their state is too evident to admit

[1½] Esquirol, Mental Maladies, Am. Trans. p. 417; Spitzka, Insanity, 1883, p. 160; Régis, Mental Med. Am. Trans. p. 323. The last-named writer includes senile dementia under "primary" dementia; and perhaps this is the nearest to such a type that there is.

[2] De Legibus, Lib. III. fol. 100, and Lib. V. fol. 420*b*.

of question, and they are incapable of crime. Justice Tracy,[3] in the case of Arnold, said that an insane man, to be exempt in the eyes of the law, must be "totally deprived of his understanding and memory," and not know what he is doing, "no more than an infant, than a brute, or a wild beast." Coke[4] also refers to a loss of memory and understanding as a necessary test of insanity.

765. Only dements are "totally deprived of understanding and memory."—Now these extreme statements, which have been widely copied and followed in the courts, can apply, as a rule, only to dements; for dements alone approach a condition in which there is total deprivation of memory; or to violently excited maniacs, as already said. Hence, if these older writers were to be followed, irresponsibility for crime would have to be narrowed down to these extreme cases; and as such patients never commit crime or any voluntary act, we should practically have no need of such a science as the medical jurisprudence of insanity; at least, in criminal cases.

Erskine saw the fallacy of such an extreme position, and in his speech for Hadfield[5] he boldly and accurately declared that, as for a man being "totally deprived of his memory and understanding . . . no such madness ever existed in the world." Certainly no such madness was ever seen in the courts of Westminster Hall or in any other courts; for if we wish to find patients who approach such an abject type of insanity, we must seek them in the chronic wards of our asylums. It may be a mere academic question to ask whether, even in extreme dementia, there is total deprivation of the mental faculties; probably there is no dement, even the worst, who has not some spark of mentality left; but for the practical purposes of medical jurists it may be broadly stated that criminal insanity cannot, from the very nature of things, conform to such a type.

[3] *Arnold's Trial*, 16 How. St. Tr. p. 695.

[4] 2 Litt. 247*a*.

[5] *Hadfield's Trial*, 27 How. St. Tr. p. 1281.

CHAPTER XXXVIII.

PERIODICAL INSANITY.

I. The medical aspects of periodical insanity.
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767. Periodicity in mental pathology has long been observed.
768. A sign of degeneration.
769. The marks of periodicity.
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774. The distinction between simple primary mania and periodical mania.
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777. This is a special form of mental disease.
778. There is a complete cycle in this disease.
779. The maniacal period in circular insanity.
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790. Among the more common symptoms are insane impulses.
791. But the criminal acts of the periodical insane have no special characteristics.
792. Suicide and homicide in periodical insanity.
793. The period of transition from one attack to another is not necessarily a "lucid interval."

I. The medical aspects of periodical insanity.

766. In some forms of mental disease there is observed a tendency to periodicity.—The insanity is not characterized by a single attack, such as is seen in the ordinary psychoneuroses, in which the patient, having passed through an access of mania or melancholia, either re-

covers or proceeds into a chronic stage, never again to become the victim of a paroxysm of the disease. In these simple or single forms, as we may call them, the one attack constitutes the whole history of the disease. The patient either recovers permanently or suffers the onset of a chronic stage, passing on into a terminal dementia; the history is complete. But in the forms which we call periodical there is a much deeper basis for the mental malady. The patient has a constitutional taint. He is no sooner recovered from one attack than he may be laying the foundation for another; for even though he enjoys a prolonged period of exemption, yet he has in him the fatal seeds which in time will engender and produce another paroxysm.

767. Periodicity in mental pathology has long been observed.—Some evidence of this belief is seen in the popular notion that the moon has an influence in causing exacerbations of insanity. The word "lunacy" is derived from the Latin word *luna*,—the moon,—and the term denotes clearly the origin of the doctrine of "lucid intervals;" a doctrine which has had such sway in the courts.[1] Lord Chief Justice Hale,[2] as is well known, based his law of lunacy on this belief. Dr. Rush[3] was not entirely unconvinced, and Esquirol[4] thought it worth while to deny the influence of the moon in epilepsy; but this notion has no scientific warrant. The modern doctrine of periodicity, on the other hand, is founded on scientific observation, and leads to positive conclusions which are of great medico-legal importance.

768. A sign of degeneration.—Periodicity in mental disease is a sign of degeneration. This is now a cardinal doctrine among alienists, following Morel.[4½] It is seen especially in hereditary patients; in those, therefore, who have a constitutional tendency to insanity.[5] In rare cases it occurs also from causes which profoundly modify the brain: as in alcoholism and injury to the head. From its very nature it suggests an organic and constitutional defect. These patients can recover from individual attacks, but they cannot keep well. Their mental health is always a matter of doubt, of anxiety. They may be at any time, and at their best, on the very threshold of a seizure. They have set upon them the indelible brand of abnormality.

In this respect periodical insanity has some analogies with other nervous diseases, such as hysteria and epilepsy, in which the affection

[1] See the chapter on "Lucid Intervals" in the present work, page 496.
[2] 1 P. C. Chap. IV.
[3] Diseases of the Mind, p. 170.
[4] Maladies Mentales, art. "Épilepsie."
[4½] Traité des Dégénérescences, Paris, 1857.
[5] Bevan Lewis, Text-Book of Ment. Dis. 2d ed. p. 238.

is explosive. In these nervous diseases the most conspicuous symptoms are paroxysmal, such as the convulsions; and these maladies, as is well known, are constitutional, depending on permanent defects in the organism, which are often the expression of heredity.[6] It may be said that all these periodical diseases of the brain are Promethean: the patient is condemned to the ever-renewed assaults of a foe which preys upon his vitals.

769. The marks of periodicity.—Whatever form may be assumed by periodical insanity, whether it be mania or melancholia, there are some particular traits which serve to distinguish it.[7]

In the first place, the individual attacks resemble each other in their evolution and symptoms. Falret,[8] who was one of the first to describe this stereotyped form of insanity, said that the latest attack resembled the preceding attacks in all points; in its physical symptoms as well as in its mental and moral traits, and even in the delusional ideas expressed, as well as in its progress. This accords with the law of periodicity in all nervous diseases, and is seen strikingly in epilepsy, in which each fit resembles the former fits in the minutest particulars; but the duration of the attacks in periodical insanity may vary, since they are subject to modifying influences, which tend either to prolong or to shorten them; and in some instances we may see abortive attacks, just as in hysteria and epilepsy. As the patient advances in life, moreover, the attacks tend to vary from their stereotyped form.

Again, in the intervals these patients are not always entirely well. It is common to observe changes from a normal standard of mental health,—changes which perhaps only near acquaintances or skilled observers can detect, but which show clearly an affection of the mind more or less permanent. These intervallary symptoms vary according to individual cases: there may be change of character, irritability, moral perversities, apathy of the emotions and instincts, or even mental weakness. The type seen during the intermission may be that of the degenerate: there may be loss of moral control and of intellectual balance and common sense. It is in this interval that the nicest questions of responsibility arise.

[6] Sankey (Lectures on Mental Disease, p. 179) claims that periodical insanity is not only allied to epilepsy, but in some cases may actually terminate in epilepsy. It would not do to accept such a statement without great caution; the cases referred to are probably epileptic from the beginning.

[7] Krafft-Ebing, Lehrbuch; also Traité Clinique de Psychiatrie, traduit par Laurent, p. 492; Kirn, Die Periodischen Psychosen, 1878.

[8] Maladies Mentales, p. 452

770. The intervals between the attacks.—These intervals, or periods between attacks, may be of surprising regularity. In many cases they are equal in duration. Clouston[9] had a patient, aged forty-nine years, who for twenty-six years had been subject to the most regularly recurring maniacal attacks every four weeks, almost to a day. The attack was necessarily short, lasting sometimes only about a week. Such a case reveals how persistent this type of insanity may be for many years; and confirms the statement by Falret that it is a mistake to believe that intermittent insanity always ends by becoming continuous. So persistent, indeed, is this type, and so regular the recurrence and disappearance of the symptoms, that the physician can often foretell unerringly how and when the paroxysm will end. Such cases also prove that, although the individual attacks are curable, the disease itself is inveterate.

771. The nature of the attack.—As to the nature of the attack itself, this is usually of rather sudden onset, with short prodromal or introductory symptoms; and the termination is also, as a rule, abrupt. The symptoms themselves are usually not marked by the formation of delusions and hallucinations, but the affective, or emotional and moral, instincts are involved; the ideas are not well formed or systematized. The duration of the attack is also, as a rule, not so prolonged as in the non-periodical cases, and there is not the same obvious tendency to chronic insanity and dementia; but, in this latter respect, we should note that such an experienced observer as Krafft-Ebing claims that towards the end there is a tendency for the disease to progress into a state of mental feebleness, in which there is a continuous alienation, with defect of the intelligence. Cases doubtless vary in this respect.[10]

Finally, all observers agree that there is marked contrast between the personality of the patient during the attack and his personality during the interval. It seems as though he is not the same individual,—that his case is one of double personality,—so profound is the change in the patient's ego.

772. Periodical insanity may assume several types.—The commonest are mania, melancholia, and a combination of these two,—the so-called "circular" insanity.

773. Periodical mania.—This is sometimes called also recurrent

[9] Clinical Lectures on Ment. Dis. p. 177.

[10] Bevan Lewis (op. cit. p. 250) says that a large proportion of the "recurrent" insane become chronic; but he groups many diverse forms under this term.

mania;[11] it is much more common than the same type of melancholia. Some of its distinctive features have been indicated in what is written above. The onset is brusque or explosive. Some observers claim that there is always a short precedent attack of melancholic depression, as in simple mania; but others deny this. There may be, however, a kind of aura, or warning, as in epilepsy; consisting of flushing, determination of blood to the head, neuralgia, headache, insomnia, and a sense of general *malaise*. Exaltation is pronounced; the ideas flow freely, but there may not be a high degree of incoherence, much less confusion. The patient is gay, talkative, restless, and erratic; he may be also irritable, especially if opposed. The moral sense is blunted, and these patients often present the picture of a so-called moral insanity, or reasoning insanity, in which a certain amount of wit and acumen remain, but with a disregard for conventionalities and ethics.

Impulses may have full sway: the patient is intemperate in eating, drinking, smoking, and sexual indulgence. The excitement of the sexual feeling is almost sure to reveal itself in language and in the bearing towards the opposite sex. The impulsive tendency may show itself also in acts distinctly criminal, as in assaults or in stealing. Extravagance with money is common. Some of these patients are quarrelsome, disagreeable, insulting. They are usually devoid of common sense and of the finer feelings. In some cases there may be episodes of extreme excitement, amounting to a genuine frenzy or delirium, especially in patients who have indulged too freely in alcohol. These, however, are in the nature of complications. Physical symptoms, such as headache, loss of weight, indifference to cold, insomnia, dyspepsia, and loss of appetite, are common.[11½]

[11] The term "recurrent" is better reserved for the cases of simple mania in which there is a relapse or a remote reappearance, without the distinct periodicity referred to in the text. It is worth while to note that Esquirol (Mental Maladies, art. "Mania") recognized an intermittent mania, and came near anticipating later writers in his close description of it.

[11½] There is nothing more tragic and pathetic in the history of insanity than the story of Charles and Mary Lamb; and it is one long story of recurrent mania. This ill-fated woman, whose name will always retain an honorable place in English literature, killed her mother by stabbing her with a knife, in an access of maniacal fury, in Sept., 1796. Charles Lamb himself went insane from the shock, and spent six weeks in Hoxton asylum. An account of the tragedy, with the finding of the coroner's jury, was published in the Annual Register, Sept. 23, 1796 (quoted in Carew Hazlitt's work on Mary and Charles Lamb, p. 138). For nearly forty years after this event the brother and sister lived together, except for such periods as she spent in an asylum; and he was practically her care-taker. They both devoted themselves to literature, with no inconsiderable success, and some of his essays are among the choicest in our language.

In Mary Lamb's case the recurring attacks of mania were usually preceded by forewarnings, which enabled her brother

The termination of the attack is usually as abrupt as the onset, and is likely to be followed by a stage of physical and mental prostration of relatively short duration. Recovery from the attack may be apparently quite perfect; but, on the other hand, these are the patients especially in whom there is likely to persist during the intervals such a permanent change as has been indicated above. They are unstable, irritable, indisposed to work, or even incapable of it; and they are not fully accountable. Permanent cure, even in cases with long intervals, is not to be expected. Cases vary as to the length of the paroxysms and of the intervals; some are of long, others of short, duration. Spitzka[12] has noted the relation of dipsomania to periodical excitement or mania, and defines it as a form of periodical insanity manifesting itself in a blind craving for stimulants. It is indisputable that dipsomania is a marked symptom in some periodical maniacs.

774. The distinction between simple primary mania and periodical mania.—This distinction is perhaps more easily made in writing than practice. Krafft-Ebing gives elaborate rules, but a more recent school, led by Kraepelin, claims that all forms of mania are liable to recurrence; that, in fact, periodical mania is the only form of the disease. In other words, a patient who has once had an attack of mania is liable to have another attack; but this claim is much too radical. According to such a view, a patient who has an attack of simple mania in early life, and then suffers a second attack in middle life, without any particular relation or resemblance between the two attacks, is a case of periodical mania. We should rather say that such a case was one of simple mania with recurrence, or a case of simple recurrent mania, to distinguish it from the periodical type. This distinction is not unimportant, for in the one case there is not the intervallary degeneration which is so often seen in the other; the prognosis is better; the medico-legal aspects are different. Kraepelin has made the astonishing statement that of 1,000 cases of mania which he had seen, only one was not of the recurrent type. Others[13] have also demonstrated with statistics that the cases of mania which never relapse are much fewer than has been supposed. Nevertheless, it must be repeated that a mere relapse in simple mania is not neces-

and herself to take the necessary precautions; and a friend of the Lambs has related how, on one occasion, he met brother and sister at such a time, walking hand in hand across the fields to the old asylum, both shedding tears. (Charles Lamb, by Ainger, in English Men of Letters, edited by John Morley.)

[12] Insanity, p. 271.

[13] Berkley, Mental Diseases, p. 142, footnote.

sarily an instance of the periodical disease. Such a conclusion is strained.

775. Periodical melancholia.—Typical forms are more rare than in the same type of mania, and the symptoms are usually mild as compared with simple primary melancholia. It is seen especially in the latter half of life; in women after the menopause; and in men who have succumbed to some of the discouragements of life. There is not so marked a tendency to the formation of delusions, nor so profound a sense of personal abasement as in the more acute forms. Many of these patients do not find their way into the asylums; they pass through a listless and depressed period in their own homes, the prey of *ennui* and the *tædium vitæ*. After the cloud passes by, they quickly resume their accustomed life until the next attack. They are not regarded as badly insane, and, in fact, the intellectual faculties in some of them are little, if at all, impaired. There is simply an emotional depression, with ideas of discouragement and weariness of life, some of which, indeed, are not without a basis of fact.

In some cases the paroxysm is more pronounced. In all these cases there is danger of suicide, and not a few of the cases of self-destruction in persons past middle life are prompted by recurrent attacks of mild melancholia. During the access the patients seem to age rapidly; after recovery they regain a placidity of expression in marked contrast; and the mental state may gradually merge into one of senility. In younger patients the appearance of mental suffering is more marked, but the attacks often end suddenly and are of shorter duration, as a rule, than in simple non-periodical psychalgia.

776. Circular insanity.—In 1854 Falret, a French alienist, described a form of periodical insanity which was characterized by alternations of mania and melancholia, and by a tendency for these two states to reappear at more or less regular intervals and in a definite sequence.[14] To this affection he gave the name of *folie circulaire*. About the same time Baillarger read a paper before the French Academy of Medicine upon the same disease, which he called *folie à double forme*.[15] Since that time this disease has been widely recognized, and is classed, by universal consent, among the degenerative or hereditary insanities.

777. This is a special form of mental disease.—Falret emphasized

[14] Des Maladies Mentales, Paris, 1864, Chap. VII. p. 456.

[15] Falret disputed Baillarger's right to priority, and Baillarger retorted that his disease was not the same as Falret's. The dispute is merely of historic interest, for the disease described by both alienists is identical. See Falret, op. cit. p. 456, note.

the fact that circular insanity is a special form of mental disease, and is not to be confounded with cases in which a patient may occasionally have had both melancholic and maniacal symptoms. It is well known, for instance, that in ordinary mania there may be a short precedent attack of depression; also that after an attack of acute mania there may be a period of prostration which resembles melancholia; and that in other cases there may be episodes of either of these states complicating the others; or that, in still other cases, there may be a transformation of mania into melancholia, or *vice versa,* from accidental causes. None of these, Falret pointed out, constitutes a true circular insanity.

In order to constitute this disease, the depression and the exaltation should succeed each other in recurring cycles during a long time (even during the most of the patient's life), in a manner quite regular, in an order always the same, and with an interval very short relatively to the duration of the attack. This periodicity, with this element of sameness, is the main characteristic of circular insanity. The cycle may be short or long; it may last for but a few weeks or it may extend over months and even years; but, whether rapid or slow, the disease remains the same in its general traits and its principal details. The resemblance of each cycle to those that preceded it in each patient is marked; and this tendency of the attacks to be stereotyped, and of the disease to be composed of such diverse elements, which, nevertheless, always retain for it an identity of its own, together with its uncontrollable tendency to recur,—all these are the indications of a deep-seated basis which is founded only in heredity. Falret, as have most observers after him, insisted strongly on the element of heredity in the causation of the disease.

778. There is a complete cycle in this disease.—The three periods in circular insanity form, according to Falret, a cycle complete. By these three periods he meant the distinct attacks of mania and melancholia, with the interval, usually short, which separates them. But, in order to avoid confusion, there should be pointed out a fact which Falret did not sufficiently distinguish; that in order to form a complete cycle there is a fourth period, and that this is the long interval which separates the one attack from the next. For instance, a patient begins his attack with mania; this is succeeded by a short period of comparative or even complete lucidity, to be followed in turn by the melancholia. With the disappearance of the latter, the patient recovers, and passes into his normal period, which endures until the whole cycle is completed by the return of another attack. This at-

tack then repeats exactly the preceding one, and the vicious round of alternating disease and health goes on for a lifetime. It is thus seen that what we may call the attack is composed, as Falret said, of three periods,—mania, short interval, melancholia,—but that the whole cycle is composed of four periods, since it includes the long period between the attacks. From a medico-legal standpoint these distinctions are highly important, for there may be a great difference between the short and the long interval, as these two periods affect legal accountability and capacity.[15½]

779. The maniacal period in circular insanity.—The attack, according to Falret, begins with the maniacal seizure. This resembles an ordinary mania, as a rule. Krafft-Ebing[16] says that neither the mania nor the melancholia presents anything specific. There is a simple exaltation, without a distinct tendency to the formation of delusions, and, as compared with simple acute mania, the course of the disease may be rather mild. There is not much tendency to extreme confusion, or especially to fury. The patient is merely elated in spirits, talkative, restless, now gay, now irritable, with a rapid succession of ideas, and with a corresponding relaxation of the moral sentiments. He is not unlike a man slightly intoxicated. He says and does foolish things. He is not himself, and his habits and manner of living accord with his disordered state. In short, he is in a maniacal paroxysm, such as has already been described in these pages. To describe mania, as Esquirol said, is impossible; and to attempt to describe it twice in the same book is superfluous.

780. The short interval is not a true "lucid interval."—After a time more or less prolonged, according to the case, excitement diminishes, and there succeeds a state which, as Falret observed, is difficult to characterize. This is the short interval between the mania and the melancholia. It may partake of the excitement of the one and the depression of the other; and a grave medico-legal question may arise whether it is a true lucid interval. Falret claimed that it is not, and most authorities agree with him. Some observers even state that in some cases this transition period is exceedingly short, the patient passing almost abruptly, even in a single night, from a state of mania to a state of melancholia. The difficulty arises in cases in which this

[15½] In some cases, as Régis points out (Ment. Med. Am. Trans. p. 195), the interval between the attacks may be very short; as short, in fact, as the transition period from the one stadium to the other.

[16] Lehrbuch; also the same, Traité Clinique de Psychiatrie, traduit par Laurent, p. 506.

period is so well-marked that the patient even presents the appearance of recovery, and may deceive the unwary; but an experienced observer will always find in this transition period the evidences of a disordered mind. Certainly, it would be a dangerous doctrine to claim that in a patient thus passing rapidly from one phase of disease to another, the mind is fully recovered. The one phase is too recent, the other too imminent, to admit of such a conclusion. This transition period, even in cases in which the whole attack is prolonged, is always shorter than the period of recovery which completes the cycle.

781. The period of melancholia in circular insanity.—The melancholia declares itself rapidly, even abruptly; and there is presented a veritable transformation scene. The personality and appearance of the patient are completely changed; from exaltation he passes quickly to the other extreme of depression; he is no longer seemingly the same individual; and most persons who see him note that it is difficult to recognize him as the same. This condition of melancholia presents nothing special or distinct; it resembles an ordinary primary melancholia; one, however, in which there is not much tendency to the formation of systematized delusions, nor to pass into such extreme conditions as stupor. The course and duration are often benign and short; but in this respect cases vary. Clouston says that suicide is not common.

782. The periodicity and sameness are distinguishing marks.—There has been some tendency to over-description of circular insanity, and to map out the disease in a rather academic fashion. The fact remains, however, that the periodicity and sameness of the cycles are distinguishing traits. The following features are also more or less constant: The two morbid states are clearly defined, and do not present a confused transition or mingling; the interval between them is much shorter than they are themselves, and much shorter than the interval between the attacks; the melancholic phase is longer than the maniacal one; the symptoms in prolonged cases may be mild, the patient not even entering an asylum.

The order of appearance of the morbid phases is not the same for all patients. Falret described the mania as the initial phase, and in this he is followed by Clouston,[17] by Régis,[18] and by others. Clouston says that 90 per cent of the cases begin with mania; but Krafft-Ebing[19] reports cases in which the melancholia constituted the first stage.

[17] Op. cit. p. 184.
[18] Op. cit. p. 196.
[19] Op. cit. p. 507.

783. Varieties of circular insanity have been named.—Thus, the form in which the morbid states are not separated by an intermission has been called continuous insanity of double form; also alternating insanity. Too great refinement, however, in this matter is not necessary or desirable in these pages. These periodical and circular types of insanity are, as already said, of constitutional origin, and their medico-legal importance depends largely upon the fact that they present such marked alternations of health and disease.

II. The medico-legal aspects of periodical insanity.

784. The question of "lucid intervals" in circular insanity.—The chief question in all these cases has reference to what the law calls a "lucid interval." From the purely legal standpoint this question is not so difficult. If the patient has a lucid interval he is, in the eyes of the law, both capable and responsible. This legal doctrine is discussed elsewhere in these pages.[20] But from the medical standpoint the question is not easily reduced to such simple elements. In these transitions from health to disease and from disease to health, there are borderlands in respect to which it is extremely difficult to give precise answers.

785. Testamentary capacity in these cases.—According to the Roman law[21] if a man made his will during a lucid interval, he was a legal testator, and it was certain that a testament which a man had made before he was seized with madness was good; for a subsequent fit of frenzy could not invalidate a regular testament or any other regular transaction. This is doubtless good law to-day in every civilized country, just as it was in ancient Rome; and it is just as good science as it is good law. It applies with especial point to cases of periodical insanity; and one might almost imagine that the old lawmakers had in mind the circular insanity of Falret. This Justinian law recognizes plainly that there may be recurrences in mental disease, and is careful to guard a testator's rights against any false inferences which might be drawn from such a fact.

786. The difficulty of determining a lucid interval.—But, on the other hand, the Roman law contains no inkling of the fact that a lucid interval is sometimes one of the hardest things to determine in psychiatry, and that the mental state of a patient with periodical in-

[20] Chapter on "Lucid Intervals," page 496, *ante*.

[21] Justinian, Institutes, Lib. II. Title XII. § 1.

sanity is not always easy to fathom. Herein is seen the limitation of the Roman law and of some of its successors, among them the English law. They are content to prescribe a definition, to draw a hard-and-fast line, and then to insist that the laws of God and nature must conform to it.[21½] Nowhere is this incongruity more plainly shown than in cases of periodical insanity, where the rules of law are used for determining the return of reason. Alienists, who mingle daily with these patients, know that the border line is a region of perplexity.

787. Abuse of the doctrine of lucid intervals.—Some law-makers have recognized that the doctrine of lucid interval is subject to abuse, especially with reference to testamentary capacity. The English law recognizes no such danger, for it has elaborated this doctrine with perfect confidence; but the French law, according to Le Grande du Saulle,[22] has not recognized this intermediary state, and it has avoided the subject intentionally. Article 901 of the Civil Code is content simply to say: "In order to make a donation *inter vivos,* or a testament, it is necessary to be of sound mind."[23] This is admirably brief, and could not be improved by a reference to lucid intervals.

As is well known, Sir Matthew Hale[24] defined the law of lucid intervals with the utmost precision, and pointed out the results which flow from it: crimes committed in those intervals are subject to punishment, and contracts and sales made then are obliging to the heirs and executors; but neither did Hale, as, indeed, could hardly have been expected, recognize the difficulties and dangers of the doctrine which he announced so complacently. The presumption of the law, according to Hale, is in favor of a lucid interval in the case of a lunatic who signs a legal paper; but this presumption is not supported by science, and is easily shown to be a dangerous one in cases of periodical insanity. In such cases patients might be induced to sign papers while still under the influence of one of their paroxysms.

It is difficult to understand why there should be any presumption about the matter in cases in which the patients spend part of their time insane and another part of it in recovering from the effects of their insanity. The question is one of fact, not of presumption one way or another, and should be simply a matter for proof. Lord

[21½] In *Clarke* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90, Sir William Wynne said: "If she could converse rationally, that is a lucid interval; and that she so did, and had lucid intervals, I think is completely established." But such a rule ignores the fact that many insane persons can converse rationally on many subjects.

[22] Traité de Médecine Légale, p. 666.

[23] "Pour faire une donation entre-vifs ou un testament, il faut être sain d'esprit." French Civil Code, art. 901.

[24] 1 P. C. Chap. IV.

Brougham[25] discussed this question of presumption in a case of recurring insanity, and showed that the presumption, if any, was rather in favor of insanity in cases in which mental disease was known to have pre-existed for long periods. His statement was so clearly reasonable, and his authority is so high, that his opinion may be accepted as a standard one by medical jurists. But as this subject has been discussed elsewhere in these pages it need not be pursued farther here.[26]

788. A legal maxim of the civilians.—To show, however, that there has not been unanimity among jurists on this subject of presumption in insanity, it is enough to recall a legal maxim of the civilians: *Semel furiosus, semper furiosus presumitur et contrarium tenenti incumbit onus probandi sanam mentem,*—once a madman, a man is presumed to be always a madman; and upon him holding the contrary is placed the burden of proving a sane mind.[27] This is directly opposed to the teaching of the English law. The doctrine, moreover, will certainly not be sustained by modern alienists in all its bearings, for it goes to the opposite extreme; but it is quite as good a presumption in logic as that of Anglo-American jurists. Pinel, the French alienist, stoutly protested against this maxim of the civilians, for it seemed to him to rest upon the popular error that insanity is always incurable; but Morel defended the wisdom of this principle. He held that the rationality of an isolated act is not sufficient to prove the sanity of an individual supposed to be insane. If this principle, he says, had penetrated more deeply into the spirit of modern laws, we should not see so many testaments referred to lucid intervals merely because their dispositions did not suggest that the testators were of unsound mind. In spite of Morel, however, the best rule would seem to be not to rely too confidently on presumptions, but to study individual cases entirely on the evidence. If there is any presumption, it should go with the preponderance of proof.

789. Every case must be studied by itself.—From the medical standpoint it is obviously impossible to lay down positive rules for the determination of all cases. Every case must be studied by itself. The matter to be determined in any individual case is whether the victim of periodical insanity has fully recovered from the last attack, and is not suffering with any of the prodromal symptoms of the attack

[25] *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947. See also an opinion by Chancellor Harrington, *Frazer* v. *Frazer*, 2 Del. Ch. 260.

[26] Chapter on "Lucid Intervals," page 496, *ante*.

[27] Morel, Traité de Médecine Légale, p. 70. Morel discusses in detail the civil, or Roman, law in its relations to lunacy.

which is next to follow. In a case of alleged crime the precise moment when the act was committed must be studied with reference to the preceding and succeeding attack, and it must never be forgotten that many of these periodical lunatics display the symptoms of a more or less enduring alienation all through the so-called lucid interval. In other words, the term "lucid interval" as applied to some of them is a misnomer. This fact is well known to alienists. The symptoms are too multifarious to be marshaled in detail here.

790. Among the more common symptoms are insane impulses.—These may persist as residua of the former attack, or they may appear as forerunners of the next seizure. An impulsive criminal act, committed by a periodical maniac or melancholiac, would raise a presumption (to use the legal term) in the mind of an alienist that the person was insane; and by any system of logic this presumption would be more valid than the legal presumption that he was sane. A presumption is only an inference based upon the law of probabilities or averages, and this law in such a case would be in favor of insanity.

Such impulses may lead to homicide, suicide, theft, or malicious mischief. Sankey[28] relates a case of sacrilege committed in Marylebone church under mysterious circumstances. One of the attendants at Hanwell asylum immediately suspected a patient who had recently been discharged in a "lucid interval." Investigation proved the suspicion well-founded, and the patient was convicted and sent to Broadmoor asylum for the criminal insane. This attendant was a good diagnostician: his method was based upon an intimate knowledge of the patient. There is no other method that is sound.

791. But the criminal acts of the periodical insane have no special characteristics.—That is to say, their criminal acts do not differ from those committed by ordinary maniacs or melancholiacs. An exception may be seen, possibly, in those cases in which repeated attacks of insanity have impaired the brain permanently, and left the patients in a state of chronic lunacy, with perversion of the moral sentiments. Such patients may present a superficial resemblance to paranoiacs, or monomaniacs; but in fact they are not real paranoiacs. There is not the same profound impress on character and conduct that we see in the monomaniac; not the same systematized delusions, and not the same logic and coherence in defending delusions and living up to them. The chronic lunatic, especially in circular insanity, may somewhat resemble the cases of so-called moral insanity. He may be plausible, but erratic, unreliable, and with a twist in his moral

[28] Op. cit. p. 173.

nature which only those who know him well can sufficiently estimate. If such defects are due to the damage which his brain has sustained from repeated attacks of disease, he is not in a normal state, nor fully responsible.[29]

792. Suicide and homicide in periodical insanity.—Clouston says that suicide is not so common in circular insanity as in ordinary melancholia. It is, however, very common in periodical melancholia. These patients are not naturally homicidal, or, at least, not deliberately so, as a rule. Exceptions may occur in patients who commit impulsive acts of violence, and in melancholiacs who commit murder, as elsewhere stated, in response to their delusional ideas and emotional depression. In considering any question of responsibility in a patient who is subject to recurring attacks of insanity, if a doubt exists, it might be well to recall the rule of the ancient jurisconsults: if it is doubtful whether an act was committed in a time of insanity or in a lucid interval, the presumption is in favor of its having been done in a time of insanity.[30] This is a safe rule for an expert witness to adopt, because it accords with the probability of science. If it were rejected in an American court, the inference would be that the modern courts are not as inclined to a liberal interpretation as were the ancient tribunals; and while it is incumbent on an expert to respect the law, it is not imposed upon him to subordinate his judgment in a matter of fact.

793. The period of transition from one attack to another is not necessarily a "lucid interval."—In circular insanity the short interval between the mania and melancholia is rarely of such a character that it can be called a "lucid interval." It is merely a period of transition from one phase of disease to another, and is sometimes very brief. It has been known in some cases not to last longer than a night. Consequently the gravest doubt would arise as to the sanity of any patient in this interval, in the event of his committing crime. In the longer interval which separates one attack from the other, and completes the cycle, the restoration to normal health is much more evident; but even here there is often left the evidence of mental impairment.[31]

[29] Ritti, in his Traité Clinique de la Folie à Double Forme, has discussed many medico-legal cases, but the book is not readily obtained in America.

[30] "Si dubitatur quo tempore delinquerit, an tempore furoris, an tempore sanæ mentis, in dubio est potius quod delinquerit tempore furoris."—Farinarius, Quæst. XCVIII. 8.

[31] For various opinions on "lucid intervals" see *Reg.* v. *Brooks*, 6 Cox C. C. 149; Haslam, Med. Jurisp. p. 224; Reid, Hypochondriacal and Other Nervous Affections, 21st essay; Combe, Mental Derangement, p. 241; *Cartwright* v. *Cartwright*, 1 Phillimore, 90; Ray, Med. Jurisp. of Insanity, 5th ed. Chap. XV., with numerous references.

CHAPTER XXXIX.

HYPOCHONDRIA.

I. The medical aspects of hypochondria.
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796. Hypochondria and neurasthenia.
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II. The medico-legal aspects of hypochondria.
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801. Errors in diagnosis.

I. The medical aspects of hypochondria.

794. The term defined.—This is a very old term in medicine, and is derived from the Greek words ὑπό, under, and χόνδρος, a cartilage,—meaning the upper region of the abdomen, beneath the cartilaginous borders of the ribs, where the disease in question was supposed to have its origin. The term, in fact, is so venerable and so familiar from common usage, that it seems to demand notice here, although there are good writers who do not regard hypochondria as a distinct mental disease. The essential feature of this affection is a morbid fear of, or a delusional belief in the existence of, some bodily disease. It is thus rather a symptom of other diseases than a distinct disease in itself. It may be seen, for instance, and often is seen, in melancholia; also in paranoia; and again in some forms of neurasthenia.[1]

795. Hypochondria and melancholia.—In melancholia, as we have already seen, it is not uncommon for hypochondriacal delusions to occur. In fact, to distinguish a hypochondriacal delusion from a

[1] One of the early writers on these and kindred topics was Tissot (Diseases Incident to Literary and Sedentary Persons, translated from the French, 1769). "This essay is elegant in style but not always convincing in matter, because it has the still prevailing fault of ascribing too much to the alleged cause. In the cases of Tissot's scholars and literati every ache, every symptom, is to be ascribed to their occupations. The stone in the bladder is with him a concretion of learning."—20th Cent. Pract. of Med. Vol. III. p. 312.

purely melancholic delusion is not always easy; and yet we do not quite agree with Savage[2] when he says that there is no essential difference between the man who is always considering the state of his digestion and the man who is always considering the state of his mind. There may be very different emotions in these two states, for the melancholy patient, as we have taken pains to explain elsewhere, has a sense of personal unworthiness, and this is not essential in pure hypochondria. A man who believes that his bowels are occluded may be in great distress of mind over it, but he has not necessarily the bad opinion of himself (the self-hatred) which poisons the soul of the melancholiac.

796. Hypochondria and neurasthenia.—In neurasthenia it is not unusual for hypochondriacal notions to exist. In this state, however, these notions are usually based on subjective symptoms of pain and weakness, which may not be without some foundation. Neither, as a rule, do they assume the elaborate and systematized form which we see in the genuine delusions of hypochondria. But morbid dreads and morbid impulses are sometimes distinctly hypochondriacal in tone; as, for instance, in the case of the obsessions described elsewhere. Thus, mysophobia, or a dread of contamination, if not identical with, is at least not remote from, hypochondria. The one is a fear, the other a belief.

797. Hypochondria and paranoia.—In paranoia, or monomania, the false beliefs which are so common in the persecutory stage may assume a hypochondriacal form, as Spitzka[3] has pointed out. We have then a condition of hypochondriacal monomania. The patient believes that he is beset with bodily ailments, or with vermin, which he feels crawling over him; or that he has an animal inside of him; or that he receives electric shocks; or that his mind is being drawn off, or his semen taken from him. These things may in time be ascribed to his enemies, and form an important part of the persecutory delirium.[4]

798. Various forms of hypochondria.—Thus there are various grades and combinations of hypochondriasis, from the mere morbid fear of disease up to the confirmed belief in the existence of it. There are also some special varieties. For instance, there may be a morbid dread of syphilis, or "syphiliphobia;" of hydrophobia, or "lyssophobia;" and of the loss of semen, or "spermatophobia." In all

[2] "Hypochondriasis and Insanity," in Tuke's Dictionary of Psych. Med.

[3] Insanity, 1883, p. 316.

[4] Krafft-Ebing, Traité de Psychiatrie, traduit par Laurent, pp. 606–608.

these cases there is one underlying mental state,—a morbid apprehension of bodily impairment or infection.

The reaction of the patient to this morbid state varies according to the intensity of the conviction. Some hypochondriacs pursue their ordinary lives; others are completely immersed in their fears, and become radically insane. Suicide is sometimes caused by the mental disorder.

799. **Sexual hypochondria.**—A noteworthy form of hypochondria is that which affects the sexual functions. In young men it is not unusual for morbid ideas to center upon the generative organs. These individuals are often the victims of charlatans; of the advertising quacks who profess to restore "lost manhood." They become possessed of the idea that they have injured themselves by self-abuse or by sexual excesses; that they are constantly losing their semen, and that they will become, if they have not already become, hopelessly impotent. These cases are to be distinguished from the religious fanatics who mortify themselves in the flesh for their souls' welfare, and who in some instances emasculate themselves from pious motives. The hypochondriac, too, may mutilate himself, but it is to prevent himself from wasting away. (*Ante,* § 657.)

Under the influence of these conceits the patient sometimes becomes sexually impotent from mere worry. Such is the influence of mind upon body, such the power of the imagination, that the youthful bridegroom has been known to approach the nuptial night with fear rather than joy.[5] In some cases this morbid sexual introspection has disastrous results; and, as Savage has remarked, is the cause of suicide either just before or soon after marriage.[5½]

[5] John Hunter, in his Treatise on the Venereal Disease, Phila. 1818, p. 186, has an excellent chapter on "Impotence Depending on the Mind," in which he relates how he cured a man by making him promise that when he retired with the woman of his choice he would make no attempt for seven nights. This changed the current of the hypochondriac's ideas; he began by fearing he could not keep his promise, and he ended probably by breaking it. It was a permanent cure.

Montaigne, in his essay "Upon Some Verses of Virgil," has given us a discourse on the sexual life, not forgetting the hypochondriacal side of it.

Burns has referred to the same subject, and attributes all such mishaps to the Devil:

"Thence, mystic knots make great abuse
On young guidman, fond, keen an' croose;
When the best wark-lume i' the house,
By cantraip wit,
Is instant made no worth a louse,
Just at the bit."

—Address to the Deil.

[5½] Insanity, 1884, Chap. VI. p. 128; also p. 362. The so-called "post-connubial" insanity may occasionally be of this type.

II. The medico-legal aspects of hypochondria.

800. Hypochondria and suicide.—Suicide, as already said, may be the last resort of the hypochondriac; but this subject has already been discussed under the head of "Melancholia" (*ante,* Chapter XXXIII.). As an element in paranoia, especially in the persecutory stage, and as giving a tinge to the obsessions of the neurasthenic, the subject has also been discussed under those heads.

801. Errors in diagnosis.—Errors in diagnosis, which might lead to questions of malpractice, may occur. Thus, a patient may complain of discomfort or pain within the body, and become apparently quite hypochondriacal, without anything being discoverable to account for his condition. He is set down as a mere hypochondriac; but in time some organic disease shows itself, and vindicates his complaints. Allbutt[6] relates the case of a man who thus became quite hypochondriacal about a pain in the rectum, for which no one could find a cause; but in time real disease appeared, to the confusion of his doctors. It is well to be cautious in making a diagnosis of hypochondria.[7]

[6] Syst. of Med. Vol. IX. p. 155.

[7] The belief in witches was doubtless often associated with hypochondriacal ideas. Lecky (History of European Morals, Vol. I., chapter on "Magic and Witchcraft") points out how every strange and unaccountable disease was regarded as the result of the malice of a sorcerer. Such ideas would particularly appeal to an ignorant and credulous hypochondriac. Sexual impotence was especially one of the devices of witches. To administer love potions was illegal according to Roman law,—an evidence of the ancient prejudice against magic. (See the article on "Witchcraft" in the Encyclopedia Britannica.)

CHAPTER XL.

THE INSANITIES ASSOCIATED WITH THE GREAT NEUROSES.

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831. A true form of impulsive insanity.

832. Criminal impulses, such as kleptomania and pyromania.

833. Suicidal and homicidal impulses take the form, in some cases, of genuine obsessions.

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849. All insane impulses are not obsessions.
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851. Is dipsomania an obsession?
852. Sexual perversions in this connection.

I. In general.

802. The chief neuroses.—There are certain important nervous diseases, widely spread, which are called the "neuroses." The chief of these are epilepsy, hysteria, chorea, and neurasthenia. They are called "neuroses" because they are still included in the class of functional diseases,—*i. e.*, diseases which have no recognizable anatomical basis. They are not, properly speaking, examples of insanity, but they often entail such grave disturbance of the mental functions that insanity of various types is associated with them or results from them. The most important, from a medico-legal standpoint, is undoubtedly epilepsy; and this disease is therefore considered in a chapter apart. The others will be considered here in brief detail.

II. Hysterical insanity.

803. The curious origin of the term "hysteria."—Hysteria[1] was named by the Greeks more than two thousand years ago, from the Greek word meaning the womb (*ὑστέρα*). It was believed that the disease had its origin in that organ. Hippocrates taught that hysterical symptoms were caused by the ascent of the womb against the liver and diaphragm. This fanciful doctrine of the wandering womb was

[1] Text-Book of Nerv. Dis. edited by Dercum; art. "Hysteria," by Lloyd, p. 87.

also held by Plato, who wrote that the womb is an animal which desires ardently to engender children; when it remains sterile it controls itself with difficulty; it is indignant; it wanders about the body, obstructing the air-passages, arresting respiration, throwing the body into extreme dangers, and causing diverse maladies.[2] Aretæus accepted this incredible doctrine. For him the womb was an animal within an animal, enjoying delicate odors; it could be driven down by presenting fetid odors to the nose, and driven up by presenting the same odors to the vulva. This opinion, unworthy of an untutored savage, controlled practice down to the Middle Ages. It is needless to say that such theories have long since been exploded. Hysteria is now uniformly regarded as a disease of the nervous system; it is not confined to women, but is often seen in men and in children. Yet even to this day there remains a trace of the old doctrine, and the opinion still prevails that hysteria is in some way associated with disorders of the sexual system. It is not necessarily so.

804. The symptoms of hysteria are of two kinds.—They are convulsive, or paroxysmal, and those that occur between or independent of convulsions,—the inter-paroxysmal.

805. The inter-paroxysmal symptoms.—These symptoms may endure for a long period, and may closely simulate organic diseases. Among the commonest are various forms of paralysis, such as hemiplegia, or paralysis of one side; paraplegia, or paralysis of both lower limbs; and monoplegia, confined to one limb. There may also be contractures and tremors, while on the sensory side are various losses of sensation, varying greatly in extent and location. The internal organs may be affected; there may be extreme rapidity of the respiration, also of the heart's action; aphonia, or loss of voice; and anuria, or inability to pass water. The eyes are variously affected, especially in the extent of the visual fields. Neuralgic and hypersensitive zones are found, especially over the region of the ovaries. The symptoms of hysteria, indeed, are multiform and often perplexing; they may come on suddenly, endure for long periods, closely simulate organic diseases, and then disappear quite as suddenly as they came. They are often called *stigmata,* or marks of the disease; and the name is not inappropriate.

806. Hysteria in the Middle Ages.[2½]—During the Middle Ages the loss of sensation, or spots of anesthesia, played a conspicuous rôle. As the "marks of the Devil" (*stigmata diaboli*) these spots had been

[2] Timæus, p. 568, Works of Plato, translated by Taylor, London, 1804.

[2½] Lecky, Rationalism in Europe, Vol. I. Chap. I.

noted and described by churchmen as far back as the time of Tertullian, and they served their purpose for centuries as the distinguishing marks of witches.[3] It had been noted that witches and those possessed of evil spirits had areas of anesthesia in which the prick of a needle was not felt and did not draw blood. In epidemic hysteria, excited by witchcraft crazes, the poor wretches who displayed these sensory *stigmata* were too often doomed. This fact alone refutes those who tell us that hysteria is always a simulated disease, or one which it is in the power of the patient to control. Most ingenious methods were taken by experts to detect these signs, which, far from being simulated, were disguised by the unhappy victim. In some cases, it is significant, the sorceresses had no consciousness, until they were detected, that they had these signs. How different all this appears from what would have been the case if these symptoms were, as some modern writers assert, always unreal.[4]

807. The paralyses caused by hysteria.—Of even more importance in modern times are the various kinds of paralysis which may become obstinately fixed in hysteria. These are sometimes the results of injuries and fright, and they not infrequently figure in the courts in suits for damages. They may be associated with contracture, rigidity, and pain, and thus resemble grave surgical conditions, as hip-joint disease.[5] The contractures are so severe in some cases as to seriously embarrass the patient. I once had under observation in the Philadelphia Hospital a young woman, a Russian Jewess, who walked entirely on her toes because of hysterical contracture of the calf-muscles. In another case, a seamstress, the arm was contractured and held firmly against the side, effectually preventing the patient from doing her work. In still another case, a young woman was bed-fast for weeks, unable to move her limbs below the hips, or to void her urine. The duration of some cases of contracture is extraordinary, and far beyond what would be possible by volition. Moreover, there is no sense of fatigue, a fact which indicates that the muscles are not kept rigid by voluntary action. Under ether the contracture relaxes promptly and completely, but it is likely to return as promptly when the patient wakes. In one curious state, known as astasia-abasia, the patient walks with a staggering, incoordinate gait, almost like a drunken person.[6] I have seen such a case in a young woman, caused by fright.

[3] Tourette. Traité de l'Hystérie. Paris. 1891. p. 128.

[4] Am. Text-Book of Nerv. Dis. loc. cit. p. 107.

[5] Richer. Paralyses et Contractures Hystériques.

[6] Blocq, Sur une Affection Caractérisée par de l'Astasie et de l'Abasie.

808. Other bodily symptoms.—When the heart and respiration are affected, the case may resemble one of organic disease; in one such case, great rapidity of breathing came on after a surgical operation.[7] Hysterical aphonia, or loss of voice, may persist for weeks, or even for years, the patient not being able to speak above a whisper. Weir Mitchell[8] had such a case in a lady who talked aloud in her sleep, and awakened herself with the unusual sound of her own voice; but when she became fully awake she was again aphonic. Persistent cough is sometimes one of the symptoms of hysteria. It is a peculiarly exasperating cough to those who are obliged to hear it, but it does not particularly harass the patient. Persistent vomiting,[9] sometimes along with great emaciation, may be seen in hysteria; also the condition known as "merycism," or chewing the cud. This is a pure neurosis, or nervous habit.

809. The paroxysmal symptoms of hysteria are those which occur in convulsive attacks.—These symptoms constitute what is known as the hysterical fit.

The hysterical convulsion, as usually described, has four stages. Beforehand, however, there are warnings, or prodromes, of the approaching seizure. These prodromes are mental. The patient presents a change of character. She is no longer able to apply herself to her accustomed work; she cannot concentrate her mind. She is abstracted, self-centered, depressed. She shuns society, and is irritable, repellant, and not inclined to make confidences. These changes show plainly the psychical nature of hysteria: it is a disease of disturbed cerebration. As the climax approaches, the patient's emotions are easily disturbed. Tears and laughter are readily excited, and alternate without apparent cause; in fact, this loss of emotional balance may usher in a fit. Hallucinations, delusional ideas, and disturbed dreams are common in this prodromal period. Thus, a lady under my care had nightmares and dreams of her scalp falling off, and these were followed by headache. In accord with the psychic disorder are the neglect of dress and disregard of the proprieties. The mental agitation may be so pronounced that it becomes maniacal in tone; the patient is constantly active, paces the floor, gesticulates, utters incoherent and exclamatory phrases, and seems to be in acute mental distress. In other cases there is a melancholy tinge: the patient broods and is sluggish in both speech and movement. In all that the

[7] Am. Text-Book of Nerv. Dis. loc. cit. p. 126.

[8] Diseases of the Nervous System in Women, 1885, p. 213.

[9] Lloyd, Hysterical Tremor and Hysterical Vomiting, Am. Journ. Med. Sci. Sep. 1893.

Case of hysteria—(Harriet B ——). First stage under hypnotism.

patient does and says in either case, the disturbed emotions and the loss of will power are the conspicuous phenomena.[10]

810. The hysterical fit has several stages.—The first stage of the hysterical convulsion is epileptoid; *i. e.,* it resembles epilepsy, but it is not identical with it. The patient falls convulsed; the muscles at first are rigid, but the rigidity soon passes into spasms; consciousness is obtunded, but seldom lost; respiration is embarrassed; sensation is abolished; but the patient seldom hurts herself, as in epilepsy, and especially, does not bite the tongue. The attack subsides gradually; the patient lies relaxed, semi-conscious, perhaps sleeping.

The second stage is one of renewed excitement, but not convulsive. The French call it the period of "clownism." In it the patients throw themselves into contortions, sometimes the most extravagant. They dance, leap, throw themselves on the ground, and exhibit all sorts of astonishing feats. This stage is especially prominent in epidemic hysteria, or the hysteria of crowds; and can be seen in camp-meetings and revival services. In the epidemic of St. Medard the movements were so extraordinary that, as Briquet tells us, it was thought necessary to attribute them to divine influence. By a reversal of the same logic they were attributed in some of the brutal witchcraft crazes to the influence of the Devil. All the dances, contortions, mimicries, and bizarre and grotesque feats which we read about in those horrid medieval epidemics, or which we see occasionally at present in the devotees of emotional religion, were and are instances of this "clownism," which constitutes the second period of the hysterical fit.

The third stage is more dramatic or histrionic; it arises by insensible gradations from the second stage. The French have described this third stage with much attention to *minutiæ*. According to Richer the patient assumes passionate attitudes. Among the most common are the attitude of the cross; of defense; of menace; of appeal; of lubricity; of ecstacy; of dread of animals, such as rats; of listening to music; of scorn; and of lamentation. These attitudes are the expression of emotional states of the mind; they represent delirious ideas and hallucinations, which by this time have assumed complete control of the mind. In this stage, therefore, the patient has passed into a condition of mild delirium; she is more truly in an insane, or unsound, mental state than in the preceding stages.

In the fourth period this character of mental alienation is still more pronounced. The delirium may be extreme; and in severe cases this

[10] Am. Text-Book of Nerv. Dis. loc. cit. pp. 98, 99.

may pass on into states of ecstacy, somnambulism, catalepsy, and lethargy. In this extreme stage the hysterical perversion is complete, and some of these patients become for the time irresponsibly insane. The patient in somnambulism or catalepsy is oblivious of her surroundings. This condition is, if anything, even more pronounced in lethargy or trance. Patients have been known to remain in such states for long periods, and to defy for the time all attempts at their resuscitation. Cases of trance, moreover, have lost nothing in the telling. Thus, the anatomist, Vasalius, is said to have had a "subject" who revived on the dissecting table at the first stroke of the knife; and Lady Russell returned to consciousness at her own funeral.

III. The medico-legal aspects of hysterical insanity.

811. Hysterical patients are impressionable.—Gilles de la Tourette has pointed out that the one mental trait that most characterizes hysteria is a proneness to receive morbid suggestions. These suggestions may come from without or from within; and when once firmly established in the mind, they dominate it completely, and are not far removed from insane delusions. They are certainly in the nature of fixed morbid ideas, over which the patient has lost control.[11] They may gain the mastery over some motor or sensory nerves, as in paralysis and anesthesia; and in the more profound disorders they act as veritable deliria, influencing the patient's conduct, and perverting the mind, as in the latter stages of the grand attacks. Among active causes are disturbed emotions and physical injury, which act as shocks to impair the mind, and to fix firmly morbid and uncontrollable ideas. The delirious and other perversions of the fourth stage are evidences of a radical disorder of the mental functions. Importance also attaches to the nocturnal dreams and nightmares of these patients. It is from suggestions prompted by these terrors of the night that a whole train of hysterical symptoms sometimes dates. Under this head come the disorders of sleep, such as motor shocks and palsies, sensory disturbances, hallucinations of sight and hearing, and even dreamlike delusions, which often store the mind with the evil promptings of disease.

These morbid dreams are seen sometimes in an exaggerated degree in traumatic hysteria, the patient living over again, night after night, the alarming incident. Important medico-legal questions may

[11] Kraepelin, Lectures on Clinical Psychiatry, translated by Johnstone, p. 254.

arise with reference to the hallucinations and nightmares of hysteria, as well as to the many other morbid ideas and suggestions. False accusations have been made by these patients while in a true delusional state. An historic instance was the witchcraft epidemic at Salem, Massachusetts, in the 17th century. This epidemic is said to have owed its origin to some hysterical children in the kitchen of a New England puritan parson; and it was supported in the perpetration of some of its greatest atrocities by the testimony of hysterical perverts.[12]

812. Hysteria and suicide.—Attempts at suicide have also been prompted thus; and the fact that they are usually abortive in hysterics is possibly because they are merely reflex acts from an hallucinatory and dream-like state. The explanation usually given, that the attempts are merely simulated, is totally inadequate to explain the exact motive prompting them, or the fact that they are occasionally successful.

813. Hysteria and hypnotism.—The hysterical patient is often an easy victim to hypnotism. The mental state, so open to suggestion, is peculiarly "hypnoid," as the French call it. This subject has medico-legal importance, and has already figured in the courts.[13] The most noted case was doubtless that of Eyraud, who was convicted in Paris of murder. His accomplice, a woman named Bompard, was defended on the ground that she was an hysterical pervert, and had succumbed to hypnotic suggestion. Such a defense is peculiarly open to abuse, and would probably be received with great prejudice, even ridicule, in an American court; nevertheless, it is well to bear in mind that patients in profound hysterical perversion are not simulators, but the victims of a genuine malady. Let the word "hypnotism" be abolished in this connection if it carries with it the idea of pretense; there will, nevertheless, remain in hysteria a state of delusion, of weakness, of loss of control, which cannot be abolished from the domain of mental pathology.

[12] See Lowell's essay on "Witchcraft" in Among My Books, p. 143; also Lecky's chapter on "Witchcraft" in his History of Rationalism in Europe.

Speaking of Bodin, who wrote an old work on Demonomania, Lowell says that "he loses sight of humanity altogether in his eagerness to make out his case, and display his learning in the canon and civil law. He does not scruple to exaggerate, to misquote, to charge his antagonists with atheism, sorcery, and insidious designs against religion and society, that he may persuade the jury of Europe to bring in a verdict of guilty." In the hands of such fanatics, hysterical perverts would be as clay in the hands of the potter; and it is a compensation to learn from Lowell that Bodin himself lived to be accused of sorcery. These retaliations were not uncommon.

[13] Tourette, L'Hypnotisme et les États Analogues au Point de Vue Médico-légal, Paris, 1889.

814. The power of suggestion is a form of undue influence.—It is well to recall also in this connection that the English law has always recognized the power of suggestion, or undue influence, in certain circumstances. This is so in the case of a wife who acts under the coercion of her husband. In some cases, says Blackstone,[14] the command or authority of a husband, either expressed or implied, will privilege the wife from punishment even in capital offenses. It is difficult to see wherein the principle of law that excuses a wife, in her perfect senses, when she acts at the criminal suggestion of her husband, is more reasonable than the principle which recognizes the power of suggestion over the disordered mind of an hysterical pervert.[15] And the old common law may have had reference to this state, for Blackstone, in the same passage, compares the English doctrine, which is at least a thousand years old, with the law among some of the northern nations on the continent, according to which the privilege was extended to any woman transgressing in concert with a man.[15½]

815. Vulgar errors about hysteria.—It is a vulgar error to confuse hysteria with fraud, simulation, and pretense. We read the story of the heroine of the Cock Lane ghost; or of some young woman decked in a bridal gown, who lies in bed and fasts, and is fed all the while by stealth; or of another vixen who gives birth to frogs, and we speak of them as cases of hysteria; but they are imposters, not hysterics. Hysteria may simulate many diseases, but it may be simulated in turn. There is no reason for identifying this profoundly interesting psychosis with the machinations of humbugs and charlatans. Besides, the simulation of hysteria is not an easy feat. The simulated disease bears a counterfeit stamp, and this can be detected by an expert. Hysteria is a genuine malady, often imposing great distress upon its victim; and, as Löwenfeld has said, hysterical persons often fulfil their duties well as daughters, wives, and mothers. There is no ground for charging them with fraud, merely because of the bizarre nature of their malady, when that malady raises a medico-legal question.

816. Hysteria is not the same as simulation.—This criticism applies especially in those cases in which a bodily injury has been sustained, and an hysterical paralysis, or other hysterical disorder, has resulted. Let it be granted that such disorder is purely of psychic origin; this

[14] 4 Com. 28.

[15] See *Reg.* v. *Alison*, 8 Car. & P. 418, for a curious instance of double suicide of husband and wife, in which the wife survived, and was acquitted, in accord with the legal principle of husband's control.

[15½] The subject of "undue influence" has been greatly elaborated by the courts. See § 1190½.

does not prove that it is unreal. All the insanities are psychic, yet no one will dispute their genuineness. An injury that involves the normal action of the mind, and entails as a result some grave physical defect, such as a paralysis of the arm, is a very real injury. If it is thought desirable to test the involuntary nature of these *stigmata*, let the sceptic himself endeavor to keep his arm contractured against his chest for a month, or to walk on his toes for an equal length of time, or to present an anesthesia of his body which can deceive experts armed with ingenious tests.[16]

Sir Benjamin Brodie, an eminent English surgeon, who described the hysterical affections which so often simulate organic diseases of the joints, has uttered in the form of an aphorism the truth about hysteria: it is not that the muscles do not obey the will, but the will itself does not act.[17] In other words, hysteria is a mental affection.

817. Hysteria is not moral insanity.—Finally, it is necessary to distinguish hysteria from some of the forms of degenerative insanity; such, for instance, as the so-called moral insanity and paranoia. The word "hysteria" has been used indiscriminately, even by alienists, for all odds and ends of peculiar and perverted mental phenomena. However strange the case, it is enough to call it hysterical, and all is explained. Hence it is not uncommon to see the *stigmata* of hysteria confused with those of degeneracy, or *vice versa*. We read descriptions of alleged hysterics whose symptoms have been the insanity of doubt, or morbid scruples, or morbid impulses, such as mysophobia, agoraphobia, pyromania, or kleptomania; but these are not instances of genuine hysteria, but of degeneracy, as Gilles de la Tourette has forcefully pointed out.[18]

IV. The insanity of chorea.

818. A brief description of St. Vitus' dance.—Chorea, or St. Vitus' dance, is a disease of the nervous system which is characterized by a disorder chiefly of the motor, or neuro-muscular, apparatus. The patient is the victim of disorderly movements of the muscles of the face, limbs, and trunk, which he is quite powerless to control. These movements are not only involuntary, but also wildly inco-ordinate;

[16] Reference is made to the following works on hysteria: Guinon, Les Agents Provocateurs de l'Hystérie, Paris, 1889; Gilles de la Tourette, Traité de l'Hystérie, Paris, 1891; and the author's article on "Hysteria" in the text-book edited by Dercum. The work by Janet, État Mental des Hystériques, is valuable in a medico-legal study; and Charcot's writings, and those of the French school generally, must not be neglected.

[17] Lectures Illustrative of Certain Local Nervous Affections, London, 1837.

[18] Op. cit. Chap. XI.

and as they occur in the face, tongue, neck, trunk, and extremities, they give the patient a peculiar and distraught appearance. These movements are persistent during waking hours, usually cease during sleep, are made worse by voluntary efforts, and are often associated with or followed by some weakening of the affected muscles.[19] A true paralysis, however, is rare in chorea. The disease is commonly seen in childhood and adolescence, but cases occasionally occur in adult life; and a very severe type is sometimes seen in pregnant women.[20]

Chorea was first described accurately by Sydenham[21] in the seventeenth century, and since his time it has been widely studied. It is often associated with rheumatism; and the trend of opinion to-day is towards regarding it as one of the infectious diseases; but no distinct microbe has yet been isolated. From the medico-legal standpoint, chorea has no special importance except as it may cause mental symptoms.[22]

819. The mental disorder in chorea.—The mental symptoms seen in chorea are numerous; but they are mostly included in the forms known as confusional insanity and delirium. In mild grades there may be merely slight disorders in the intellectual and moral faculties, shown in change of character, irritability, and emotional disturbance; especially in a tendency to depression. The memory is impaired and the attention is fixed with difficulty. Hallucinations are also noted, especially towards night, in the period between sleeping and waking; during the daytime they occur more rarely; they involve sight and hearing; especially the former. These hallucinations may not be associated with serious derangement, but, on the other hand, they may mark the onset of a true delirium. In severe cases such a delirium is sometimes seen, and may be a grave complication. The patient passes into a stage of delirious or maniacal excitement, with all that that term implies, and such as has been described elsewhere in these pages. This delirium, associated with the extreme disorder of the choreic movements, inability to take food, and with consequent anemia and exhaustion, may pass into a profound coma and end in death.[23] In some cases chronic insanity supervenes, and the patient becomes an inmate of the asylum.[24] These grave cases are especially dangerous when they develop during pregnancy.

[19] Camp. Med. Bull. Univ. of Penna. May, 1904.

[20] Lloyd, "The Chorea of Pregnancy," in Hirst's System of Obstetrics, Vol. II. p. 590.

[21] The entire Works, etc., London, 1763: "Schedula Monitoria," p. 552.

[22] Sinkler, "Chorea Insaniens," in Dercum's Text-Book, p. 250; Digoy, Thèses de Paris, 1890.

[23] Marcé, L'État Mental dans la Chorée, Paris, 1859, p. 19.

[24] Schuchardt, Allg. Zeit. f. Psych. 1887; Diller, Am. Journ. Med. Sci. 1892.

820. Fatal cases may occur.—Goodell[25] recorded a case of rapidly fatal chorea in a young woman who was illegitimately pregnant; it required the united aid of three persons to control the patient while the obstetrician gave the necessary attentions. Fortunately these cases are not common, for in the report of the collective investigation by the British Medical Association only one case of delirium was found in four hundred and thirty-nine cases of chorea; but all these cases did not occur in pregnancy; the chorea of pregnancy would show a much larger proportion of cases with mental disorder.[26] In the chorea of childhood, cases of mania or delirium, followed by death, have also been seen.[27]

821. Chronic insanity is not common after chorea.—I have seen one case in the Pennsylvania Hospital for the Insane, in a woman aged twenty-five years, in whom the St. Vitus' dance developed soon after the birth of her first child. The first symptom of insanity occurred when she discovered that she was taking arsenic for her chorea; she immediately conceived the delusion that her husband was trying to poison her. Other delusions followed, as that her children had been murdered by her husband, although she occasionally saw the children, alive and well. She became slightly demented; her memory was impaired; she was confused and silly; laughed impulsively and without cause, and shed tears. She refused food, believing it to be poisoned. The choreic movements had continued for some years; the patient required to be supported when she walked, her limbs jerking about so much that locomotion was almost impossible. Her speech was affected, and she could not write, the pencil staggering about and finally flying from her grasp. The entire muscular system of the head, neck, trunk, and limbs was contorted by a series of jerking movements quite beyond her control. The tongue was protruded with a jerk, and was in constant irregular movement. The limbs twitched about when the patient slept. This case showed the tendency, sometimes seen in chronic insanity, for a patient to develop delusions of a more or less systematized kind.

V. The medico-legal aspects of the insanity of chorea.

822. The mental disorder is mild in most cases.—Sydenham, in his

[25] Am. Journ. of Obstetrics, Vol. III. p. 140.

[26] Bradley (Am. Journ. Insanity, April 1904, p. 777) reports a fatal case of chorea insaniens in a young woman, aged nineteen years, of only a few days' duration. The disease was maniacal in type, and the exhaustion was rapid. The patient had been married seven weeks. On autopsy the uterus was found pregnant, with an embryo probably ten weeks old.

[27] Tuckwell, "Maniacal Chorea," B. and F. Med. Chi. Rev. October, 1867.

original description, likened the choreic child in some ways to an "ideot," but he had in mind merely a superficial likeness. In chorea there is often seen a certain weakness, fatuity, or absence of mind, which is but slight in the majority of cases, and which is probably a mere secondary effect of the peculiarly harassing symptoms. But a state of mental weakness may be wrongly ascribed to some patients, and for the following reason: the constant twitching of the patient's muscles, with the grotesque gestures and odd and foolish grimaces, quite involuntary, but looking like purposive acts, gives to the face and deportment a semblance of imbecility which is misleading.

823. Grave cases may occur.—In the grave cases of delirium and confusion above referred to, the mental derangement is a most serious complication, and entails an entire loss of responsibility. As such patients, however, are peculiarly helpless from their physical disorder, they are not likely to commit acts of violence, and, in fact, there is no case of which I have knowledge that has ever been the subject of medico-legal inquiry.[28] If such case should occur, it would have to be judged as a case of delirium or confusional insanity, such as is described elsewhere in these pages.[29]

824. Hereditary chorea.—An hereditary form of chorea is met with, called Huntington's chorea.[30] It rarely occurs before the age of thirty, and it is inherited usually from an immediate and direct ancestor. The movements, as a rule, are more extreme, more rhythmical, and more inco-ordinate than in the chorea of childhood. Mental disorder is found in all cases. The usual form is melancholia, with suicidal impulses. There are also delusions of persecution; the patients are suspicious, unsocial, even violent.[31] Still another form of chorea is associated with senile dementia, and is an evidence of degenerative changes in the brain.[32]

[28] Regal (Ann. d'Hyg. Pub. 1873, 2 S. XXXIV. p. 204) reported a case of chorea that was referred to him for an expert opinion by the French court at Gaillac. It was the case of a child of ten years who had had an attack of ordinary acute chorea. The attempt was made to prove that the disease had been caused by fright; and, presumably, to base upon this alleged fact a claim for damages. The case did not involve a question of insanity.

In *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440, the prisoner was alleged to have had chronic chorea; but there seems to be some doubt whether epilepsy was not intended.

[29] Kraepelin, Lectures on Clinical Psychiatry, translated by Johnstone, p. 254; Steinen, Antheil der Psyche am Krankheitsbied der Chorea, Strasbourg, 1875; Wells, Journ. Ment. and Nerv. Dis. 1891.

[30] Huntington, Med. and Surg. Rep. April 15, 1872.

[31] Sinkler, "Hereditary Chorea," in Dercum's Text-Book, p. 252.

[32] That the insanity of chorea is not altogether a rare affection is shown by the long bibliography in the Index-Catalogue, Vol. III. p. 166. Sinkler's article also is rich in literary references. See also Berkley, Mental Diseases, p. 569.

VI. The mental symptoms of neurasthenia.

825. Neurasthenia is a term introduced by Beard.—This term[33] denotes a wide range of symptoms in the nervous system. Weakness and irritability are its commonest expressions. It is caused by exhaustion of the nerve-centers, and is often seen in persons who are by heredity predisposed to nervous disorders. The term, as used by many authors, includes so much that it is hard to limit it.[34] It applies not only to physical disorders, but also to mental derangements; and as these latter alone interest us here, this article will be limited to them.

826. Fixed ideas, morbid impulses, or obsessions.—The mental symptoms of neurasthenia which have medico-legal interest are those which are caused by fixed ideas, or by morbid impulses and fears. This is a broad subject. Fixed and morbid ideas are common in many forms of insanity, but those that occur in neurasthenia have a special character. They are not, properly speaking, delusions or hallucinations, but are best described as obsessions.

By the term "obsession"[35] is meant a morbid and fixed idea, which tends to control the patient's conduct, against his volition, and without involvement of his intelligence. Its character is essentially domineering, and it usually involves the emotions secondarily. It differs from an hallucination in the fact that it does not involve the senses; and from a delusion in that it does not involve the intellect; and from both in that it does not involve belief.[36]

The patient himself recognizes its morbid character, and in most instances his life is an ineffectual struggle against it. According to Magnan[37] an obsession is a mode of cerebral activity in which an idea forces itself involuntarily into consciousness. For instance, a man is beset with the idea that he must solve some metaphysical or mathematical problem; or with a morbid fear of crossing a certain bridge; or with an impulse to commit a criminal act, without motive, and against which his whole soul revolts. In none of these cases is the intelligence seriously disordered: the patient recognizes fully the morbid nature of the besetment; he strives to cast it off; but his efforts are often ineffectual or only partly effectual. In short, his mind is dominated by a fixed idea which, to use metaphysical terms,

[33] Boston Med. and Surg. Journ. 1869.

[34] Dercum, "Neurasthenia," in Text-Book of Nerv. Dis. p. 51.

[35] The term "obsession" was originally applied to one who was possessed of a demon. Foster, Encyc. Med. Dictionary.

[36] Shaw, "Obsessions," Journ. of Ment. Sci. April, 1904, p. 234.

[37] Ann. Med. Psych. March-April, 1896.

controls his will, does not impair his intellect, and involves his emotions secondarily.

827. Varieties of obsessions.—There are many kinds of obsessions, and these have been classified in various ways. The following are the most common: 1. Obsessions of doubt: ceaseless attempts to solve some problem, often trivial, seldom useful. 2. Obsessions of fear: morbid dread of all kinds, as dread of public places, of high places, of infection, of contamination, of sacrilege, and of animals. 3. Obsessions of impulse: morbid besetments to commit some particular act, as to count objects, to touch objects, or, in graver cases, to commit homicide or suicide.[38] The above list practically includes all varieties of obsessions, although it is possible to engage in all sorts of distinctions and refinements, according to the subject-matter of these fixed ideas.[38½]

828. The insanity of doubt.—Patients with obsessions of doubt are impelled to engage in the solution of useless problems. These problems may be metaphysical, arithmetical, logical, etc. They are distinguished especially by their inutility. In other words, even if solved satisfactorily, they do not conduce to the patient's welfare or to the advancement of science. They are often trivial; and this fact is recognized by the victim himself, and forms an element of the vexation which the patient suffers in his vain attempts to free himself from them. These doubting spells are paroxysmal, and the patient may, for a time, be entirely absorbed in them; he cannot disengage his attention, or apply his mind to anything useful.[38⅔]

Séglas[39] calls attention to the fact that it is not strictly correct to say that in such cases the intelligence is not involved; it is involved to the extent of being absorbed and distracted. The patient, in severe paroxysms, suffers with physical distress, such as fulness in the head and the state known as cenesthesia, or involvement of the general sensation which underlies the idea of personal identity. He is, for the time, confused and distraught. A patient may be morbidly absorbed, for instance, in such an insoluble problem as that of pre-

[38] Régis, Mental Medicine, translated by Bannister, p. 261.

[38½] Winslow (Plea of Insanity, p. 66) quotes from Mr. Sampson's work (Criminal Jurisprudence) the case of a gentleman who, after witnessing an execution in Newgate, conceived a mania for collecting the ropes with which criminals had been executed; and this became such a craze that he could talk of little else, and was always exhibiting his trophies. His society became unbearable, and he received the nickname of "the man with the pensile idea." He eventually hanged himself with one of his ropes. The case, however, is not an instance of obsessions.

[38⅔] Berger (Arch f. Psych. VI. I.) has given the name "Grübelsucht," or metaphysical mania, to this affection. See a résumé of his paper by Ireland in Journ. Ment. Sci. Jan. 1878.

[39] Les Maladies Mentales, Paris, 1895, Leçons III. IV. and V.

destination and free will, or he may wrestle with some self-imposed task in logic or arithmetic which does not admit of satisfactory solution; every attempt fails, and throws the unfortunate victim into renewed efforts to reach a conclusion. He becomes a metaphysical or arithmetical maniac, popularly so-called, although his affection is not a true mania. For these patients a syllogism may be a nightmare; a game of chance may be a spectre that haunts them night and day. They are engaged in endless ratiocination; their minds revolve about one fixed idea until they are incapable of the ordinary processes of thought. Such are the morbid effects of true obsessions.

This mental affection has been called by the French the *folie du doute,*[40]—the insanity of doubt; and it was first described by Falret.[40½] To this class belong also the over-scrupulous,—those who constantly resolve some ethical problem. They are beset with the idea that they are eternally doing something wrong. Their lives are passed in interrogating their consciences. The scruples are often trivial in the extreme.[40⅔]

829. Morbid fears are numerous.—The obsessions of fear are almost as numerous as the thoughts in the human mind. There is no end to the morbid terrors which may arise to plague these victims. Therefore the tendency to invent a new term, usually from the Greek language, for each of these phobias, is to be deplored. It will not be denied by any careful observer that these neurasthenic obsessions are identical in their essence and character, although they may change and shift about. What utility, then, is there, as M. Régis asks,[41] in creating for each of them a special name and a special symptomatology, as though we wished to erect them into distinct diseases? Among the common forms of morbid fears are agoraphobia,[42] or fear of pub-

[40] Lloyd, "Note on a Case of Insanity of Doubt." (Journ. Nerv. and Ment. Dis. Vol. XIV. Sept.–Oct. 1887.) This patient, a woman, had been known to get in and out of bed at least twenty times on retiring at night because of some morbid impulse which made her feel that she had not performed the act aright, and that unless it were done in a certain precise manner it would, in some way, be the cause of disaster to her, involving disease or her death, before morning. She would oblige her husband to remain with her while dressing until she had put on and taken off, innumerable times, one of her skirts, from a similar morbid impulse. Her life was consumed in such vain and intolerable acts. She ceased reading or visiting, became more and more absorbed in her obsessions, and had finally to be taken from home. In such a case it is not strictly accurate to say that the intellect is not involved.

[40½] Des Maladies Mentales, Paris, 1864. In Deuxième Leçon, p. 136, Falret refers to the *"lesions des penchants."*

[40⅔] "I have known a neurasthenic degenerate who . . . would only leave the church walking backward, so as not to turn his back on the altar, and who, before making use of the cabinets (water-closets), read over and over the pieces of paper he used without being able to assure himself that he did not involuntarily profane any sacred word." —Régis, op. cit. p. 263.

[41] Op. cit. p. 259.

[42] Legrand du Saulle, Gaz. des Hôpitaux, 1877 and 1888.

lic places; claustrophobia, or fear of closed places; and mysophobia, or fear of contamination.

830. Mysophobia is a type.—As this latter is one of the worst of these obsessions, and most serious in its consequences, it may be taken here as a type. In mysophobia the patient is beset with a constant haunting terror of contamination. The victim, often a woman, sees in every object of contact a possible source of defilement. In time this morbid fear comes to dominate her whole life. Her time is spent in avoiding every source of supposed danger, and of counteracting its supposed effects. She constantly changes her clothing, as constantly washes her hands, will not touch a doorknob, will not venture upon the public streets, regards her food with apprehension, and dreads the contact of her family and her friends. The emotional distress becomes profound, and the patient may fall into such a state of agitation and exhaustion as to require constant attention. I recently saw a lady, the victim of a whole series of such obsessions, who required to be removed to an asylum. She needed the attention of two trained nurses, and when the physician was admitted to her room, she had to be hastily covered with a sheet for decency's sake, as she was entirely nude, struggling with her attendants against all attempts to put clothing on her, and demanding water with which to wash away the impurities with which she believed she was infected. This was an extreme case, and it illustrated clearly the dominion which obsessions may gain over the mind. In such a case, the intelligence is in considerable disorder from the effects of the morbid fears, and the patient is practically as much disturbed, though in a different way, as in mania or agitated melancholia. But the obsessions, it should be noted, are not identical with delusions of suspicion: the patient does not accuse anyone of attempting to poison her or to contaminate her. In milder forms the patients content themselves with frequent visits to the wash-basin, and they acquire curious tricks, and resort to odd expedients for avoiding contamination; as, for instance, always using a piece of clean paper with which to cover the doorknob. In all these phobias, of whatever kind, there is emotional disturbance, more marked, as a rule, than in other forms of obsession. Thus, the morbid dread of crossing a bridge, or of going up onto high places, is accompanied with the physical signs of distress, such as rapid action of the heart, increased respiration, and the usual reactions of fright.

831. A true form of impulsive insanity.—The obsessions of impulse are such as impel the patient to perform certain acts. The loss of

self-control here is especially marked. The impulsive acts themselves are often harmless, trivial, ridiculous. Dr. Samuel Johnson was the victim of such an obsession: he had to touch the posts as he went long the streets; if he missed a post, he was not satisfied until he went back and touched it.[42½] The morbid impulse which some persons feel when on a high place to throw themselves off is another example. This becomes so urgent in some persons that they will not ascend a high building. Some persons, again, must always enter a room with the right foot first; others must always count objects, such as trees in a yard, the books on a table, the buttons on the coats of those they meet. These are minor examples.

In severe cases the morbid impulse is a more serious affair. The victims, perfectly innocent, feel impelled to do or say something that is outrageous or even criminal; they utter oaths or indecent words, and often fall into paroxysms of excitement in vainly trying to control these obsessions. A case occurred in a modest and virtuous woman, who would suddenly start up, ejaculate some indecent words, and then collapse in shame and terror. Some of these poor wretches, highly religious, are tormented with impulses to do sacrilegious acts in church; in the most severe cases these impulses are associated with extraordinary perversions.[43] These involuntary blasphemers display the full power of obsessions; their morbid and fixed ideas have such control over their minds that they impel them to violate their most sacred and instinctive feelings; and this, too, it must be noted, entirely without motive. Thus, one of these patients was tormented with an impulse to use filthy expressions about Christ.[44]

Such is the tyranny of these fixed ideas that they become to the victims themselves the most awful monsters, from which the obsessed persons struggle in vain to be free. In some cases, as described by Gilles de la Tourette, the patients perform certain automatic acts, the so-called "ties," in response to their obsessions. These become morbid habits, and present the appearance almost of a physical disease.

832. Criminal impulses, such as kleptomania and pyromania.—Again, there are obsessions of criminality. These are morbid impulses to commit crime. Among the commonest are kleptomania, or the im-

[42½] Dr. Johnson's case was an instance, such as is not uncommon, of a man of great intellectual power being the victim of hypochondria and neurasthenia. The readers of Boswell's "Life" will find many instances to confirm this view. Boswell once set the poor man to debating with himself what he would do if shut up in a high tower with a baby.

[43] Raymond and Janet, Les Obsessions et la Psychasthenie, Vol. II. p. 477.

[44] Church and Paterson, Nerv. and Ment. Dis. p. 694.

pulse to steal, and pyromania, or the impulse to set fire. It is important to note that the true obsession is accompanied with resistance and distress: the patient does not steal or set fire from a criminal motive, but from a morbid impulse, which is fully recognized as such, but is resisted with great difficulty or not at all. This is a characteristic of all obsessions: they excite opposition in the patient; they are yielded to, as it were, only on protest. From the medico-legal standpoint this distinction is highly important.

833. Suicidal and homicidal impulses take the form, in some cases, of genuine obsessions.—These have the same characteristics: they are without criminal motive; they excite the most active terror and resistance; the patients flee from them, as it were, and even beg to be placed under restraint so as not to be able to yield to them.[45] Homicidal obsessions have been especially noted in women, sometimes towards their own children.[46] In fact, the object of the homicidal impulse is usually some one who is near and dear to the patient, and is often a child. There is still another group, consisting of the perverts whose obsessions are of a sexual nature. These have been described in great detail in a well-known work by Krafft-Ebing.[47] Some writers include in still a separate class those patients whose malady consists in an absence of will power; the so-called "aboulic" cases. These are the patients who think they cannot do things; the "will" is paralyzed. If they are sitting, they cannot rise; if they are standing, they cannot walk. But, in fact, such patients are merely under the control of fixed and morbid ideas, or obsessions; and they do not differ radically from the impulsive cases.

834. A critical analysis of obsessions.—If now we come to analyze briefly the groundwork of obsessions, we find much in common among them. These common characteristics have been stated in regular form in the report adopted by the International Congress of Mental Medicine, in 1889. Obsessions, according to that report, are all accompanied with consciousness of the disease on the part of the patients. They are usually hereditary. They are periodical. They are accompanied with distress and anxiety, internal conflict, and emotions of various kinds. They are not accompanied with hallucinations, nor do they change into delusions; but they may be complicated with other forms of insanity, and they do not terminate in dementia.

[45] Clouston, Mental Diseases, pp. 244, 245.

[46] Lloyd, "Puerperal Insanity," in Hirst's Syst. of Obstetrics, Vol. II. p. 587.

[47] Psychopathia Sexualis, translated by Chaddock, Phila. 1892.

835. The intelligence may be affected.—It is proper to add, however, that some of the above statements are considered by good authorities to be too absolute. The intelligence, especially the self-consciousness, is, according to Seglas, not always unaffected. The extreme disorder of the emotions, the self-concentration upon a very limited range of fixed ideas, is hardly compatible with a full, clear, and normal action of the intellect in all cases. The attention, certainly, is so engrossed that it cannot be diverted into normal channels; the emotions also are much involved; but the memory is not affected. The central and essential disorder in all the obsessions is the loss of power of normal control over the mental processes; and this occurs under the mastery of fixed ideas, or imperative conceptions. This state of mind is essentially morbid.

836. The pathological nature of obsessions.—The proper place of the obsessions in mental pathology has been much debated. By many authorities they are regarded as among the *stigmata* of degeneration, and as allied with paranoia. Thus we read of "rudimentary paranoia" and "abortive monomania." But this is an extreme view, for although many of these patients are undoubtedly of the degenerative type, not a few of them are merely neurasthenic in the sense of being temporarily in mental ill-health. Certainly the milder forms of obsessions are often seen in persons of good heredity and of otherwise sound mind.[48]

837. Their resemblance to hallucinations.—Obsessions have been likened to hallucinations; for, as the latter are due to a morbid action of the brain, resulting in false sensory concepts, so the former are due to a morbid action of the brain, bringing into consciousness false motor concepts;[49] both are alike involuntary. The analogy does not hold good all through, however, for hallucinations involve belief, while with obsessions it is just the contrary. Still, as for belief, it must be granted that obsessions control conduct, and this is very near to controlling belief,—a fact which few writers seem to realize in this connection.

Burton, the author of the Anatomy of Melancholy, is said to have predicted his own death on a certain day, and then in order to verify the prediction, to have killed himself on that date. If there is any

[48] The French alienists have submitted the whole subject of obsessions to exact analysis. The following works are valuable for reference: Legrand du Saulle, La Folie du Doute, Paris, 1875; Raymond et Janet, Les Obsessions et la Psychasthenie, Paris, 1903; Séglas, Leçons Cliniques sur les Maladies Mentales, Paris, 1895; Régis, Mental Medicine, translated by Bannister, Utica, 1894. Raymond and Janet report 236 cases.

[49] Stearns, Mental Diseases, p. 67.

truth in this story, it probably indicates a mind obsessed. Among these morbid fears is a dread of dying on some particular day, and an impulse to suicide is not uncommon.[49½]

VII. The medico-legal aspects of obsessions.

838. Obsessions are involuntary.—There are three things that strike the medical jurist when he makes a study of obsessions. In the first place, there is the involuntariness of these mental states: they are above and outside the dominion of the will, except as they excite its opposition; they rise into consciousness quite spontaneously; they cause painful emotions, never the reverse; they are repelled and resisted by the patient to his utmost power; and they overcome resistance without seriously impairing the judgment.

839. They are without motive.—In the second place, there is the absence of motive: the act has no reference to anything useful or desirable to the patient. On the contrary, as already said, the impulses are always annoying, repulsive, or alarming; their morbid nature is fully recognized by the patient, who wishes earnestly to be cured of them.

840. They are persistent.—In the third place, the obsession is persistent: it is not momentary, not the outburst of an instant, as in the case of a passion, but it usually pre-exists for long periods, and it may endure for even a life-time. In short, it is not terminated by the act, although it may be temporarily relieved by the act; but it recurs, and is persistent.

841. Obsessions are not ordinary criminal impulses.—From this brief analysis it appears evident that obsessions are entirely different from criminal impulses; there is no deliberation, no intention, no passion, such as anger, jealousy, or revenge, to act as an impelling force; in short, there is no motive. On the other hand, there is resistance, aversion, recognition of the morbid character of the act, and loss of power of control. Moreover, the act is not the outcome of a state of things outside the patient,—or objective,—but entirely within the patient,—or subjective. In all these particulars an obsession is distinct from a criminal impulse.

It is also evident that the doctrine of obsessions gives no countenance to the defense of impulsive insanity, as this latter is often presented in the courts. This defense is usually made in favor of some-

[49½] A recent writer, Dumaz, has attempted to show that Joan of Arc was the victim of obsessions. "Psychologie de Jeanne d'Arc." Ann. Med.-Psych. LXII. t. XIX. Mai, 1904, p. 20.

one who has killed another in a passion of revenge, jealousy, or anger. The motive of the prisoner is evident; the occasion ripe; the opportunity sought; the act even premeditated; but the defense is based upon an alleged disturbance of the emotions, purely transitory, which is variously called impulsive, emotional, or transitory insanity. But such a form of insanity, even if it exists, has no resemblance whatever to the insanity of obsessions, as a simple reference to the foregoing analysis will demonstrate. Unfortunately, however, it is from just this class of criminal homicides, who are miscalled impulsive lunatics, that the term "irresistible impulse" derives all its opprobrium, and that the courts imbibe their prejudices.[50]

842. These cases seldom come before the courts.—It would in fact be easy to demonstrate that the courts have had but little to do with cases of genuine obsession, and that their decisions on "impulsive insanity" usually refer to other kinds of cases; but from these decisions it would also not be difficult to show that there is a wide diversity of opinion among the judges about loss of self-control as a test for responsibility.

843. The legal prejudice against irresistible impulses.—Irresistible impulse is no excuse for crime, according to a large number of courts.[51] "It will be a bad day for this state," says one judge,[52] "when an uncontrollable impulse shall dictate a rule of action in our courts." Baron Parke[53] said that if the excuse of irresistible impulse, coexisting with the full possession of the reasoning powers, were allowed as a defense, it might be urged in justification of every case. Baron Rolfe[54] said that the object of the law is to compel people to control their impulses. A New York judge[55] said that the doctrine of "uncontrollable impulse" was a new element in the test for insanity, and that the doctrine that a criminal act may be excused upon the notion of an irresistible impulse, when the offender has the ability to dis-

[50] See chapter on "Mania" in the present work, p. 607. According to Foss (Judges of England), in the olden time, when a bishop was so unfortunate as to have a son (a thing which occasionally happened with those holy celibates), this son was called the bishop's nephew, by courtesy. So it was with Peter de Rivallis and his reputed father, the Bishop of Winchester. Rivallis became one of the Barons of the Exchequer. However, it is not well to carry this principle into psychiatry. Things should be called by their proper names.

[51] *People* v. *Carpenter*, 102 N. Y. 238, 6 N. E. 584; *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

[52] *State* v. *Pagels*, 92 Mo. 300, 4 S. W. 931.

[53] *Reg.* v. *Barton*, 3 Cox, C. C. 275.

[54] *Rogers* v. *Allunt*.

[55] *Flanagan* v. *People*, 52 N. Y. 467, 11 Am. Rep. 731.

cern his legal and moral duty in respect to it, has no place in the law. He held that "the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them." [56] The courts very properly do not sustain the doctrine of an irresistible impulse, under the influence of which a person committing a homicide may be sane the instant before he struck the fatal blow, and sane the instant afterwards, but entirely *non compos mentis* at the instant of doing the act.[57] Cases supporting opinions similar to the above could be marshaled in large numbers;[58] but it is safe to say that none of the above cases refers to genuine obsessions, or imperative conceptions. These opinions, and others like them, have been inspired simply by the judicial instinct to reject the manufactured defense of impulsive insanity as a cloak for crime.

844. Irresistible impulse is a valid defense.—On the other hand a very large number of legal opinions can be cited in which loss of control, or loss of will-power, is fully recognized as a valid defense. Said Lord Denman:[59] "If some controlling disease was, in truth, the active power within him, which he could not resist, then he will not be responsible." Chief Justice Gibson[60] described perfectly the power of an obsession when he spoke of an "unseen ligament pressing on the mind." Sir Fitzjames Stephen[61] contended that loss of will-power is an important factor in the irresponsibility of the insane,—an opinion which has direct bearing on the question of obsessions. Some American courts have held that there is no responsibility if the mind is affected with insanity to such a degree as to create an uncontrollable impulse to do the act by overriding the reason and judgment.[62] In a noteworthy opinion Justice Somerville[63] held that a man is not responsible if, by reason of duress of mental disease, he has so far lost power to choose between right and wrong as not to be able to avoid doing the act, so that his free agency was at the time destroyed, and at the same time the crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product or offspring of it solely. This is a perfect statement of an obsession, although it was not given in that kind of a case.

[56] See also *Willis* v. *People*, 32 N. Y. 717.

[57] *State* v. *Soper*, 148 Mo. 217, 49 S. W. 1007; *State* v. *Miller*, 111 Mo. 542, 20 S. W. 243; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

[58] 16 Am. & Eng. Enc. Law, p. 618.

[59] *Reg.* v. *Oxford*, 9 Car. & P. 525.

[60] *Com.* v. *Mosler*, 4 Pa. 264.

[61] 2 History Crim. Law, pp. 170, 171.

[62] *Hopps* v. *People*, 31 Ill. 391, 83 Am. Dec. 231; *Daccy* v. *People*, 116 Ill. 555, 6 N. E. 165.

[63] *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854.

In Indiana it has been held that a person may have capacity to know right from wrong, and to comprehend the nature and consequences of his acts, and yet not be criminally responsible; for if the will-power is so impaired that he cannot resist the impulse to commit a crime, he is not of sound mind.[64] This statement clearly includes obsessions. Justice Brannon, of West Virginia,[65] recognized that a knowledge of right and wrong is not the only or a sufficient test, but that there must be also the power to choose; and he points out that this power is implied in the words "wilful, deliberate, and premeditated." At the same time he says that for himself he cannot see "how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through an irresistible innocent impulse." This is a frank and praiseworthy confession of judicial ignorance, and is more commendable than a dogmatic statement that such an impulse cannot exist. Alienists, who have direct personal knowledge of the insane, know that such impulses can exist, and that they exert a powerful sway over the mind, and that obsessions, or imperative conceptions, are striking examples.

It has practically been held by many courts[66] that an irresistible impulse may be a defense, when it is the result of mental disease existing to so high a degree that, for the time, it overwhelms reason, judgment, and conscience; but such defense cannot be sustained if the defendant knew the difference between right and wrong, and that his act was morally a crime, though impelled to its commission by overmastering anger, revenge, or other inordinate passion. This draws a clear distinction between an obsession and a criminal emotion, and is an admirable statement except for its insistence upon the knowledge of right and wrong.

845. This defense must be closely scrutinized.—In Pennsylvania[67] an irresistible impulse to kill, completely subjugating the will and intellect, is a good defense, but this form of insanity, because of its close relation to vice, must be severely scrutinized; and if it amounts to less than an absolute dispossession of the free and natural agency of the mind, or arises from anger, jealousy, revenge, or mere deprav-

[64] *Goodwin* v. *State*, 96 Ind. 550; *Conway* v. *State*, 118 Ind. 482, 21 N. E. 285; *Plake* v. *State*, 121 Ind. 435, 16 Am. St. Rep. 408, 23 N. E. 273.

[65] *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982. This opinion by Justice Brannon gives a very full discussion of the whole subject of "irresistible impulse," with citation of many authorities. It is especially valuable to medical experts who wish to obtain a grasp of this subject from the legal standpoint.

[66] 16 Am. & Eng. Enc. Law, p. 618.

[67] Pepper & Lewis's Digest, p. 14,557.

ity, it will not avail.[68] This definition might be made to include obsessions, although its framers indubitably did not intend it for such, since obsessions do not "subjugate the intellect," although they control the will.

846. This subject is not treated uniformly in the courts.—But in none of the cases cited above was the subject of obsessions, as alienists understand that term, under advisement. The legal authorities are quoted here merely to show that the subject of self-control, as affected by disease, and as a factor in criminal responsibility, is not treated uniformly by the courts. Some judges maintain, others deny, that this element enters into the legal tests.[69] This subject has direct bearing on obsessions, because the most important factors in these perversions are their absolute involuntariness, their absence of motive, and their dominion over the will.

847. Irresistible impulse may be simulated.—The truth is that comparatively few of these cases of obsessions come before the courts. An occasional case of pyromania or kleptomania is heard of in the newspapers, but, on inquiry, such cases are usually found to be simulated. They are merely common criminals whose lawyers have sought to shield them behind the defense of a very complex and little-understood psychosis. There is all the more reason that the genuine cases, when they do occur, should be treated with the consideration which they deserve.[69½] There is no more real insanity, no more genuine mental suffering, than that which is caused by the tyranny of an imperative conception.

848. Homicide is rare as a result of obsessions.—Finally, it should be well understood that but few homicides are committed by these patients. The besetment is a source of haunting fear to the patient, like a hypochondriacal delusion, but in most cases the criminal impulse is successfully resisted. These cases come for adjudication more often to the hospitals than to the courts.

849. All insane impulses are not obsessions.—Insane impulses may arise from delusions, from hallucinations, from maniacal excitement,

[68] *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356; *Com.* v. *Freth*, 3 Phila. 105; *Sayres* v. *Com.* 88 Pa. 291. Also numerous other references in Pepper and Lewis, op. cit.

[69] See chapter on "The M'Naghten Rules in America," p. 554.

[69½] A genuine and very typical case of kleptomania is narrated by Ballantine (Experiences of a Barrister, p. 211) in the wife of an eminent London physician, Dr. Ramsbotham. She was put on trial, but the jury reached no conclusion. After her death, "every drawer and cupboard in the house was found to be full of new goods, which she must have been in the habit of abstracting for many years." Ballantine's comments are to the point, and worth reading.

from melancholic depression, and from other morbid states of the mind as well as from obsessions. In other words, these imperative ideas are only one source, and not the only source, of insane impulses. This distinction should be borne in mind when the attempt is made to prove that any or every impulsive act of the mind is necessarily an evidence of a morbid condition, and always the same. Impulses may arise in normal minds; they are only morbid when they spring from a diseased source. In the case of a young mother who threw her child overboard in an access of puerperal insanity, and was acquitted by the jury without their leaving their seats, the impulse was probably not due to an imperative idea, but to some delusional state.[70]

850. Dogmatic statements on this subject.—Legal writers are much too dogmatic in their discussions of such subjects as insane impulses. Sir Fitzjames Stephen,[71] a very careful writer in the main, has said: "Knowledge and power are the constituent elements of all voluntary action; and if either is seriously impaired, the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts, as that a man who does not know the nature of his acts is incapable of self-control." This is a purely academic statement, cast in an illusive rhetorical form, and is not warranted by daily experience among either the sane or insane. It is a matter of frequent observation that men may lose the power of self-control and yet know perfectly what they are about. Grief is a familiar example. In insanity one of the most perfect examples is seen in this very case of obsessions.

851. Is dipsomania an obsession?—Dipsomania, or the impulse to drink, is not properly an obsession, although some authors describe it as such. It is a physical craving, not a mere imperative idea, and is described appropriately under the head of alcoholic insanity.[72]

852. Sexual perversions in this connection.—Perversions of the sexual instinct, together with extraordinary obsessions, are sometimes seen, and may be of medico-legal interest. Such cases usually occur in degenerates; and they have given rise to a somewhat extended and unsavory literature, which is represented in the works of Krafft-Ebing[73] and his imitators.

[70] *United States* v. *Hewson*, Brunner, Col. Cas. 532, Fed. Cas. No. 15,360.

[71] Op. cit. Vol. II. pp. 170, 171.

[72] Kerr, Inebriety, or Narcomania, New York. 3d ed. pp. 218. 219.

[73] Psychopathia Sexualis; also Suggestive Therapeutics in Psychopathia Sexualis, by Schrenck-Notzing. Translated by Chaddock, Phila. 1895.

CHAPTER XLI.

EPILEPTIC INSANITY.

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I. The medical aspects of epileptic insanity.

853. Definition of epilepsy.—Epilepsy may be defined as a disease which is marked by spasms, occurring suddenly and in paroxysms,

and accompanied, as a rule, with loss of consciousness and other mental symptoms. The spasms of epilepsy are its most dramatic and conspicuous symptoms. They dominate the scene, and to most persons they seem to be the very essence of the disorder. In a large number of cases this appears true. The spasms, or the epileptic fits, are the chief and almost the only symptoms; and in such cases epilepsy appears to the uninitiated to be not a mental disorder so much as a mere nervous affection.

854. A disease of many names.[½]—Epilepsy has been called since ancient times the *morbus sacer,*—the sacred disease; a name which indicates the awe with which it was regarded, and its association with the gods. Hence, also, it was the *morbus deificus,* because it increased the sanctity of priests and especially of priestesses, who were much given to fits.[1] It was also the *morbus Herculeus;* possibly because Hercules was one of the gods who had it; and in a later age it was called the *morbus dæmoniacus,* because the victim was believed to be possessed of a demon.[1½] It was likewise the *morbus comitialis,*—the disease of the assembly,—because in Rome, when a man fell in a fit in the comitia, the business was at once suspended; not from humanity, but from superstition; for the Romans looked upon epilepsy as a visitation of the gods; and in Roman law it was

½ Spratling (Epilepsy and Its Treatment, 1904) gives a long list of these names. *Morbus caducus* (the falling sickness) was much used by the Romans and after them by the English. Shakespeare makes Brutus say of Cæsar, "He hath the falling sickness." (Julius Cæsar, Act I. Sc. II.)

[1] Gowers (Epilepsy, etc. 2d ed. 1901, p. xvii.) quotes from an old document ("Ancren Ruele," *circa* 1200, edited by Morton, Camden Soc., 1853) the following: "Another property which is very good for an anchoress, although it is hated; that is the falling sickness. For it is very necessary for an anchoress of holy and highly pious life to have the falling sickness. . . . She would otherwise grow presumptuous." As Gowers says, this passage shows how familiar the name was one hundred and fifty years after the Norman conquest. It also shows the religious prejudices in favor of epilepsy.

[1½] Gospel of Mark, ix. 14–29.

It was a common thing, in ignorant and superstitious times, to exorcise disease, and it is not remarkable that epilepsy came in for a due share of this ritual. Epilepsy, in fact, lent itself in a peculiar way to this cult: the violence of the fit, its sudden onset, and complete disappearance after a few minutes, all encouraged the idea that it was caused by a demon, and gave a fine opportunity for the display of the powers of the exorcist. The account in St. Mark is too plain to be misinterpreted by even the most careless and credulous reader.

Payne, in a recent and valuable work, gives some of the formulæ which were used in Anglo-Saxon times to drive out devils. *Fuge diabolus, Christus te seguitur; quando natus est Christus, fugit dolor.* This sounds like a priestly conceit, and probably was such. Here is a prescription for a lunatic: "In case a man be month-sick (lunatic), take skin of mere-swine (porpoise), make it into a whip; swinge him therewith; soon he will be well. Amen." (English Medicine in Anglo-Saxon Times. The Fitz Patrick Lectures for 1903. Oxford, 1904, p. 125 *et seq.*)

called particularly the *morbus sonticus,*—the serious disease,—or one that exempted from public duties and from responsibility.[2]

855. The epileptic fit is of several grades.—There is the grand mal, or the severe attack, in which the patient falls unconscious and convulsed. The spasms are general and severe; the tongue may be bitten, froth issues from the mouth, the urine may be passed, injuries may be received, and the victim remains for a long time in a deep sleep. In the petit mal, or slight attack, all the symptoms are less severe: consciousness may be obscured but for a moment, the spasms may be localized and mild, or even absent, and automatic actions may be performed. All grades are seen between the grand and the slight attacks. In "Jacksonian" epilepsy the fit begins, and may remain localized, in a small group of muscles; it is also called "focal" epilepsy. Masked epilepsy is a form in which convulsions are absent, or so slight as to be unobserved, and mental symptoms alone are seen; so also in psychic epilepsy, or substitutional attacks, the fit is entirely substituted by a mental affection, or psychosis. Nocturnal epilepsy is that form which occurs only during sleep; somnial epilepsy is a better term, because the attacks may occur even in the daytime during sleep; cases have been known to preserve this type for many years. In procursive epilepsy the patient runs for some distance before falling in the fit. These various forms of epilepsy are of great medico-legal importance, because questions of responsibility often turn on the gravity or character of the attacks.

It thus appears that the symptoms of epilepsy may be divided into two great classes: the physical and the mental.

856. The physical symptoms of epilepsy described.—The physical symptoms are sensory and motor. The former occur especially at the beginning of the attack, and constitute the "aura." This consists usually of a momentary sensation; the patient feels a tingling in the fingers or some other parts, or an odd and indescribable sensation in the stomach; this mounts rapidly towards the head, and when it reaches there the patient loses consciousness. These auræ are of great variety in different patients, but are always the same in the same individual.

The motor symptoms are the convulsions proper. In the grand attack, as the aura mounts and consciousness is lost, suddenly and in a moment of time the victim utters a cry and falls convulsed. The

[2] The Twelve Tables. But *sonticus* was not confined to epilepsy: it might mean any grave disease.

J. P. in a grand mal seizure, during which consciousness was partially retained. The fit is more marked on the left than on the right side, as indicated in the photograph by the prominence of the muscles in the left arm, where the contractions are tonic. The convulsion in the left leg is clonic, as shown by the blurred outline of the left knee. This patient is subject to classical attacks of Jacksonian epilepsy, affecting the left arm only. He is able to carry on a conversation while such attacks are in progress.
(From Spratling on Epilepsy.)

initial spasms are tonic: the muscles are rigid, the hands clenched, the limbs extended, the respiration oppressed, and the tongue probably caught between the teeth. This stage passes quickly into one of clonic movements: the rigid muscles take on quick and jerking motions, which spread over the whole body. The respiration becomes labored; froth, sometimes mixed with blood, issues from the mouth; the urine in some cases is passed involuntarily; and the patient presents a terrifying appearance.

As the attack subsides, the clonic spasms relax, the patient heaves deep sighs, the congestion disappears from the face, and a coma supervenes and gradually merges into a deep sleep. In some cases there may be a temporary paralysis of some muscles after the attack. Automatic movements, as running, fighting, spitting, and various other acts, are seen in some epileptics just before the attacks, or even constituting part of the attacks. In minor attacks the convulsions may be limited to a few muscles, and may even escape observation. Many varieties and grades are seen.

857. The mental symptoms.—The mental symptoms of epilepsy are of the very first importance. It is too much the custom, unfortunately, to regard epilepsy as a mere nervous disorder, characterized only by a fit. Nothing can be wider from the truth than this.[3] Epilepsy, or that for which it stands, is much more than a fit. Its essential factor is a disorder of the brain, probably a degenerative process,[4] which involves not only the motor and sensory organs, but also the higher intellectual spheres of the cortex. Hence, as was recognized long ago, epilepsy has important relations to the mental health.[5]

The mental symptoms of epilepsy may conveniently be divided into those that occur before, during, and after the seizure, as well as those that substitute or take the place of the fit, and, finally, those that persist during the intervals between the paroxysms.

858. The symptoms before the fit.—The pre-paroxysmal symptoms in epilepsy are varied. Change of character, irritability, moodiness, and moral perversions may occur, and very often the approaching fit can be foretold by those who know the patient. A type of explosive and very violent mania is characteristic of epilepsy, and may occur at this stage. It may appear just before the fit, suddenly and in great violence, or a more gradual type may begin some days before in

[3] Falret, Des Maladies Mentales, p. 477.

[4] Bevan Lewis, Mental Diseases, 2d ed. pp. 255 and 575.

[5] Lloyd, "Epilepsy," in Starr's Text-Book of Diseases of Children, 2d ed. p. 750.

an insidious, cumulative way.[6] In these gradual cases loss of self-control is a marked feature. The patient becomes talkative, fault-finding, magnifies trifles, is suspicious, and even delusional; cannot sleep, has bad dreams, suffers from headache, is flushed and excited. The delusions are of the persecutory type: the patient believes that persons have designs against him. There may also be hallucinations. In some cases there is melancholic depression; but this is rare before the seizure.

The type of mental disorder in this stage is maniacal. There is exaltation, with a tendency to incoherence; and in some cases there is also great ill-humor, with combativeness. There may also be religious excitement: the patient resorts to his Bible and to prayer, but he is not humble. He may have visions, as in Clouston's patient, who saw Jesus Christ and the prophets as a prelude to the grand attack.[7] The consciousness is more or less affected in these cases, and the patient may have but little, if any, memory of what he does. As a rule, this disordered mental state subsides after the fit. The patient wakes from the terminal sleep quite relieved, and with slight recollection of what has preceded the paroxysm. But exceptions to this rule occur, for in some cases a stuporous condition lasts for a day or two, and the patient may have fragmentary delusions. In fact, these persisting delusions may lead to overt acts.

859. Epileptic automatism.—A very characteristic state in epilepsy is automatism; and this may be seen sometimes before the seizure. The patient performs unconsciously certain acts which have all the appearance of being intentional. In procursive epilepsy the patient runs for some distance;[8] some epileptics in this state begin to undress themselves; others perform quite complex actions, and these are usually repeated in successive fits.

860. Varieties of the aura.—The aura is not always sensory: it may be mental. The patient may have an hallucination as an aura: he sees or hears something that does not exist. One patient always saw an odd-looking little old woman, advancing to strike him; as the blow was about to fall, unconsciousness set in and the convulsion began.[8a]

[6] Spratling, op. cit. p. 445.

[7] Clouston, Mental Diseases, p. 289.

[8] Gould and Pyle (Anomalies and Curiosities of Medicine, p. 852) refer to an epileptic Englishman who, in an attack of procursive epilepsy, ran "from Peterboro to Wittlessy" (however far that may be).

[8a] Gowers' oft-quoted case, in which the patient always saw an old woman in a brown dress, may be recalled here. (Epilepsy, etc., 2d ed. p. 78.) Gowers, in the work quoted, describes with great fullness the various kinds of epileptic auræ, such as flashes of light, bad smells, noises in the ears, etc. A patient of Gregory's always saw an old woman, also, but she was dressed in red. Benswanger, Die Epilepsie, Nothnagel, Sp. Pract. u. Therap. Bd. XII.

Of still more significance is the purely psychic aura; in this form the patient has some association of ideas rise suddenly in his mind, usually of a disturbing or even terrifying nature. Not a few epileptics are seen to exhibit the signs of acute terror at the onset of a fit.

860½. The ocular symptoms in epilepsy.—The state of the pupils during the epileptic fit is a subject of some medico-legal importance. It is commonly said that the pupils dilate and are immobile to light. Spratling[8b] does not recall a single instance in which both pupils were not more or less dilated; in some cases extremely so. Gowers[8c] says that dilatation is present during the tonic stage of the fit, and it is rare for the pupil to be seen in any other condition than dilatation. But loss of pupillary reaction is not invariable in fits of moderate intensity. Onuf[8d] says there may be an extreme initial contraction of the pupil; and Gowers concurs in this, but says that dilatation soon supervenes. In former days, the immobility of the pupil was considered diagnostic of epilepsy, and served to distinguish this disease from hysteria, and also from simulation. But some doubt has been thrown on both these claims; and yet the dilatation and immobility of the pupil cannot be feigned by an act of will; but Voisin suggests that this condition can be secured with belladonna. In belladonna poisoning, however, the dilatation of the pupil persists for days, and this fact should serve to distinguish it. The subject was ventilated in court in the *Laros Case*.[8e] (See the chapter on "Simulated Insanity," page 891, *post*.) Reynolds[8f] called attention to the oscillation of the pupils towards the end of the fit. The eyeballs are sometimes extremely deflected towards one or the other side.

A curious phenomenon, partaking of the character of an aura, is the symptom known as micropsia or macropsia, as the case may be. To the patient, just at the beginning of the convulsion, objects seem to approach or recede; hence to increase or diminish in size.[8g]

There are no characteristic changes within the eye as revealed by the ophthalmoscope during or just after the fit.[8h]

861. The mental derangement during the fit.—The paroxysmal mental symptoms are extremely varied. The most common is loss of consciousness; this is so common, in fact, that it is not unusual

[8b] Op. cit. p. 268.
[8c] Op. cit. p. 105.
[8d] N. Y. State Med. Journ. 1904, IV. pp. 71–74.
[8e] Voisin, Les Épilepsies, 1896; Féré, Les Épilepsies et les Épileptiques, Paris, 1890; Hoche, Berl. Augen. Huschwald, 1902.
[8f] Epilepsy, 1861, p. 112.
[8g] Veraguth, "Ueber Mikropsie und Makropsie," in Deut. Zeit. f. Nervenheilk. Bd. 24, 5, 6.
[8h] Gowers, Manual of Med. Ophthalmology, 4th ed. 1904.

to say that it is always observed in some degree; but the best authorities now agree that consciousness may be preserved, in part, at least, in some cases of epilepsy. In the grand mal, however, the loss of consciousness is profound; and in the vast majority of milder cases the consciousness is affected in some degree. There may be confusion, loss of the sense of personal identity,[9] or merely the so-called "blanks" which are seen in petit mal; but in some degree or form it is almost sure to be observed. This is the rule in epilepsy; hence, the presumption is always in favor of it.

862. Concealed, or masked, epilepsy.—It is in the paroxysmal stage especially that we have some of the most puzzling forms of mental disturbance. Among these are the masked cases, in which, instead of there being a frank, well declared fit, the chief symptoms are mental, and the convulsive symptoms are not present, or are so slight as to be unobserved. In such cases the mental symptoms are almost as varied as the patients themselves, but the epileptic automatism is especially well seen in some of them. The action is complex, and has all the appearance of being deliberate. Gowers[10] relates instances of such patients undressing themselves at inconvenient times and places; of a clerk who pocketed what did not belong to him; of a cabman who drove without object and without accident through the most crowded streets of London; and of a woman who threw her baby downstairs. In these cases the consciousness is obscured, and the patients have no recollection afterward of what they did. These actions are by no means always of a criminal cast: the vast majority of epileptic automatons are quite harmless.

A much graver type is the maniacal. This resembles closely the epileptic mania already described, but, when it occurs as a substitute for the fit, it may be dangerous in the extreme. Such patients are capable of deeds of resentment and of great violence. This is the true masked epilepsy,—the *épilepsie larvée* of French authors, following Morel and Falret. It were better for these patients if they had a downright convulsive attack; in fact, the maniacal excitement may be due in some way to the fact that the convulsion is suppressed. Some epileptics declare that they feel better when they are having an occasional fit, and it is often observed that after a full and frank seizure the mind is clearer and more vigorous.[11] Hence, these abortive attacks, showing themselves in mental symptoms, are, in every sense,

[9] Herpin, L'Épilepsie, p. 438.

[10] Dis. of Nervous Syst. 2d ed. Vol. II. p. 746.

[11] Spratling, op. cit.

abnormal and irregular. They are sometimes called "psychical equivalents."

863. The mental symptoms following the fit.—The post-paroxysmal mental symptoms are usually pronounced. After the grand mal the patient remains in a coma, with stertorous breathing; this terminates in a deep sleep, from which the patient awakes, ill and confused, and usually with a severe headache. This stage of coma and sleep varies greatly in different patients. In some cases there is left an irritable and confused state, with a tendency to impulsive and resentful acts; and in others there may be an active manifestation of maniacal furor. Delusions remain sometimes as a sort of residue of those which the patient had before the seizure, and, as consciousness and self-control are entirely destroyed for the time by the fit, this mental state may be violent and dangerous. At this time, also, automatic actions occur. Dr. Orange, of Broadmoor, relates the case of a woman who had an attack of petit mal while holding her child on one arm and cutting bread; on the return of consciousness she proceeded to use the knife upon her child, and amputated its arm.

864. The permanent effects of epilepsy.—Long-continued epilepsy has an injurious permanent effect upon the mind in many cases, but there is a surprising lack of rule in this respect. It is not all epileptics who suffer mental deterioration, for some of them retain a practically normal mind. Degeneration occurs in cases especially in which the disease has begun early in life, and is marked by frequent and violent seizures; but even here exceptions occur, for some epileptics suffer but little mental change even from severe convulsions, while others are impaired in mind even though their attacks are not of exceptional frequency and violence. There is, in fact, no positive law to be laid down. Reynolds[12] found mental soundness in rather more than one third of his cases; while in little less than two thirds there was more or less deterioration: a rather high rate. The more common effects are weakening of the mind, loss of self-control, impairment of memory, and even more pronounced insanity, such as mania, melancholia, and delusions. Some epileptics become suicidal, especially in the depression following the fit. Epilepsy is also associated with idiocy and imbecility. It may terminate in dementia.[13]

[12] System of Medicine, Vol. I. p. 774. Consult, also, Féré (Les Épilepsies et Les Épileptiques, Paris, 1890). Féré gives in detail the physical and mental *stigmata* of epileptics. Such marks are ten times more frequent than in healthy persons.

[13] Ireland (Blot upon the Brain, 2d ed. Paper II.) discusses the historical evidence of the alleged epilepsy of Mohammed, Julius Cæsar, and Napoleon Bonaparte. The historian, Gibbon, in his Decline and Fall, calls Mohammed's epilepsy a "calumny" of the Greeks.

865. The epileptic status and other complications.—A very grave complication is the epileptic status. In this condition the patient passes rapidly from one convulsion into another. He is comatose, with high temperature, weak pulse, and stertorous respiration. In this state he may die.[13½] A patient of the author's had more than one hundred fits in twenty-four hours, but recovered.[13⅔] There are certain other complications; and death has resulted from asphyxia, due to spasm of the chest muscles, or even from rupture of the heart.[14] Attacks resembling angina pectoris, also peculiar spasmodic affections of the larynx, are sometimes epileptic in character. Nocturnal incontinence of urine, especially if persisting after early childhood, may excite suspicion. Trousseau[15] reported the case of a French nobleman who had this symptom, also dislocation of the shoulder during sleep, leading to a correct diagnosis of epilepsy. Nocturnal epilepsy may, indeed, remain a practically concealed disease for many years; even if known to the family, it may be unknown to the world at large. I have known a case to preserve this type for more than twenty years.

866. The causes of epilepsy.—Among the chief causes of epilepsy are heredity, the infectious diseases, alcoholism, and injuries to the brain. Many cases occur in which a cause cannot be demonstrated.

Great ingenuity and vast medical knowledge have been expended in the discussion. Sprenger, who wrote a life of the prophet, reproduces the traditions. Much reliance has been placed upon the well-known fact that epileptics sometimes have religious delusions, hallucinations, and exaltation. But there seems to be not much satisfactory proof that Mohammed was epileptic; his attacks seem rather to have been instances of mere religious exaltation. The point cannot be settled.

What we know about Cæsar's attacks rests upon a passage in Suetonius (XII. Cæsares, Cap. 45) which indicates that this nervous disorder, whatever it was, appeared only toward the end of his life.

"It is said that he was tall, of a fair complexion, round-limbed, rather full-faced, with eyes black and piercing; and that he enjoyed excellent health, except towards the close of his life, when he was subject to sudden fainting-fits and disturbance in his sleep. He was likewise twice seized with the falling sickness, while engaged in active service." (Thomson's translation, Bohn's Classic, Lib. p. 30.)

The only authentic statement which might lead us to believe that Napoleon ever had an epileptic fit is in Tallyrand's writings (Memoires, Paris, 1891, p. 295). It is not decisive.

Lord Byron, in a letter written shortly before his death, tells of some kind of seizure he himself had in Greece, after he had been drinking to excess. It might have been epileptic. Life and Letters of Lord Byron, published by Murray.

[13½] See a recent paper by Clark and Prout in Am. Journ. of Insanity, Vols. LX. and LXI.

[13⅔] In another patient of the author's, seen in the Philadelphia Hospital, the epileptic status lasted four days, during which time the patient, a girl aged nineteen years, had one hundred and twenty-nine fits. Just before her death her temperature rose to the extraordinary height of $108\frac{4}{10}$ by the rectum.

[14] Lloyd, op. cit.

[15] Quoted by Legrand du Saulle, Méd. Légale, p. 804.

II. The medico-legal aspects of epileptic insanity.

867. Epilepsy in the courts.—Epilepsy, as a cause of mental unsoundness, sometimes comes before the courts. In such a protean disease, one in which the mental symptoms are seen in such profusion and variety, it is small wonder that a great variety of opinions should arise.[15½] The special difficulty in these cases, however, comes from the fact that the epileptic seizure is usually explosive in type, and that it usually subsides rapidly, leaving the patient in a practically normal state. This explosive attack, when it leads to crime, raises nice questions as to the state of the consciousness, and consequently of the patient's will-power, and his ability to form a criminal intent.[15⅔]

868. Opposing views.—There are two extreme views held of epilepsy.[16] On the one hand not a few physicians seem to hold that if a patient has ever had a genuine epileptic seizure, he is necessarily of impaired mind. For them, the slightest indication, even at a remote period, that a prisoner had had a fit, is enough to raise a presumption that he is irresponsible. This is not a scientific view, and it is not a legal presumption.

On the other hand, there are some persons, especially members of the bench and bar, who do not seem able to grasp the idea that because a man has epileptic fits occasionally he may become thereby of unsound mind. This prejudice is aroused in part by the fact that the defense of epileptic insanity has been grossly abused in some of our American courts. It is also due to the fact that the mental symptoms in epilepsy are not matters of common observation, and sometimes require very exact study to demonstrate them. Between these two extreme views the truth lies somewhere.

869. Criminal epileptics or epileptic criminals.—Epileptics have been tried and hanged for murder. The most noteworthy cases were those of Bowler,[17] in England, and of Winnemore,[18] in Philadelphia. These patients enjoy no exemption, therefore, in the eyes of the law; but in the eyes of science the execution of a confirmed epileptic must always be an abhorrent spectacle, unless it be proved conclusively that the condemned man's crime could have had no relation with his disease. Therefore, it is incumbent upon us to consider carefully what

[15½] See a polemical paper on "True and False Experts" in the Am. Journ. of Ins. July, 1878, with references to the cases of Montgomery and M'Farland.

[15⅔] Chapin, "The Consideration of the Epileptic by the Courts," in Medicine, Feb. 1904.

[16] Spitzka, Insanity, chapter on "Epileptic Insanity."

[17] 1 Collinson, Lunacy, 673, note.

[18] *Com.* v. *Winnemore*, 1 Brewst. (Pa.) 356.

are the mental states in epilepsy that can absolve from guilt, and what are the presumptions in law and in science.

870. Some conditions of irresponsibility.—It will scarcely be denied that the violent maniacal furor which may precede, or substitute, or follow, the fit, is conclusive proof of irresponsibility. Epileptic insanity, according to the best of authority, can take the form of a more acute maniacal condition than almost any other insanity, with the exception of mania from alcohol. "There is no other form of insanity outside of asylums," says Clouston,[19] "so frequently the cause of murders." No maniacs show such blind, uncalculating violence and frequent fury as the epileptic. "He is one of the most dangerous subjects," says Bevan Lewis,[20] "we have to deal with in our asylums." In this state consciousness is entirely obscured, as a rule, and the patient has no recollection afterwards of what he did during the fury. These two elements, unconsciousness and automatism, are such common features in epilepsy that they should be thought of in any kind of paroxysm. This applies, therefore, to the outburst of mania or fury.

It is just this element of automatism, however, that may give the acts of an epileptic the appearance of deliberation which is so misleading. It is needless to say that the extreme fury of an epileptic maniac, with its appearance of impulsiveness, would not fall within the provision of such a law as the New York Penal Code,[21] which says that a morbid impulse to commit a criminal act, in a person who is capable of knowing that the act is wrong, is no excuse. The epileptic maniac certainly cannot distinguish right from wrong, or know the nature of his acts in any respect. It is also necessary to remember that such attacks can be substitutional, and therefore it is not requisite that they should be attended with a fit proper.

871. States of mental perversion.—The irritability, exaltation, and loss of self-control, both before and after the fit, are marked characteristics in epilepsy, and are a part of the mental perversion. In this stage no genuine epileptic can be accounted responsible. If, to use the language of Chief Justice Gibson[22] in another kind of case, "an unseen ligament is pressing on his mind," or, according to Lord Denman,[23] "some controlling disease was, in truth, the active power within him, which he could not resist," then he is not responsible. In

[19] Op. cit. p. 288.
[20] Op. cit. 2d ed. p. 268.
[21] Penal Code, § 23.
[22] *Com.* v. *Mosler*, 4 Pa. 264. Judge Gibson added: "It ought to be shown to have been habitual, or, at least, to have evinced itself in more than a single instance." This applies clearly to symptoms of epilepsy.
[23] *Reg.* v. *Oxford*, 9 Car. & P. 525.

this state, consciousness is not necessarily lost, and the patient is not necessarily under the influence of delusions, but he is in a state of diminished self-control which is just as truly a part of his disease as is the convulsion itself. It would be monstrous to attempt to draw a sharp line of demarcation between the disordered intelligence which heralds the approach of a fit and the fit itself. No mortal power can do this. Therefore the attempt, such as was made in the *Case of Laros*,[24] on the part of some medical witnesses, to lay down hard and fast rules as to just how many days before and after a fit an epileptic may be deemed irresponsible, must be futile. There is no possible rule on such a subject. Each case must be judged by itself. During this stage, however long it may last, the epileptic patient is peculiarly liable to impulses.

872. Psychical epilepsy.—In the condition known as psychical epilepsy, a trance-like or automatic mental state supervenes upon, or may even substitute, a fit; and during this state the patient is unconscious. He is like a somnambulist. He may go about doing things even in his accustomed way, but with no more consciousness than a machine; and after the attack ends he has no recollection of it. Crimes may be committed, such as theft, arson, rape, and homicide.[25] This mental state is not easy to prove before a court and jury, and a prejudice exists against it, for the idea has undoubtedly been seized upon by ingenious lawyers for manufacturing a defense in desperate cases. In order to constitute a good defense it must be proved to have occurred in a patient who is, without doubt, a genuine epileptic. In the *Laros Case* this defense broke down, in part at least, because the proof that the prisoner had ever had epileptic fits was inconclusive.

Medical jurists will be in error, however, if they suppose that even in a case of undisputed epilepsy the courts will allow a presumption in favor of such an obscure condition as psychical epilepsy. The burden of proof will be on the defense, and this fact may as well be recognized. In favor of psychical epilepsy would be such facts as that it had occurred before in the patient, that he was subject to convulsions, that his act was without motive, and that the attendant circumstances showed that he was in an automatic state.[26]

[24] *Trial of Allen C. Laros*, etc., Easton, Pa., 1877.

[25] Spratling, op. cit. p. 445.

[26] *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 163. In this case a defense of epileptic insanity was attempted, against expert advice; the counsel for the prisoner insisting that it was the only ground upon which a defense could be set up. There was little, if any, evidence to support it, and the prisoner was convicted and hanged. These facts do not appear in the report of the case, but the present writer knows, for it was he who gave the aforesaid advice. See also *Com.* v. *Hillman*, 189 Pa. 548.

873. **The minor attacks not always, but sometimes, dangerous.**—The minor attacks of epileptic automatism, such as occur in petit mal, or even in some of the more severe cases, are not so dangerous as the maniacal fury. Most of these automatic acts are entirely harmless, such as undressing, running long distances, etc.; but they are often accompanied with, or followed by, states of great irritability, because of which the patient may do acts of violence, especially if he be opposed or controlled. I know of a case of an insane man who, in one of his epileptic spells, ran more than a mile in the country, and when brought back was in a maniacal and dangerous mood. Here, again, impulsiveness and unconsciousness are chief traits. A particularly dangerous temper may develop in patients who are subject to a series of attacks; between these rapidly recurring fits the mind may be much impaired, and the patient may become very irritable and impulsive.

874. **Consciousness is not always a reliable test.**—The whole problem of responsibility in an epileptic cannot be reduced to the question whether the patient is conscious. Undoubtedly most epileptics are unconscious during their spells; absolutely so in grand mal, partially so, at least, in the minor attacks. But the intervals between fits must not be ignored, and those permanent mental changes which so frequently occur must be considered. An epileptic who is weakened in his mind, who has loss of memory, who has loss of will-power or self-control, or who is suffering with a melancholic depression, any or all as permanent effects of his distressing malady, is not a responsible being in the contemplation of any just and rational system of law. To such an unfortunate applies particularly the *dictum* of Lord Chancellor Lyndhurst,[27] that if a man's mind is impaired in part, he is of unsound mind.

875. **The legal presumption in epilepsy.**—To what extent will epilepsy raise a presumption of mental unsoundness? It is difficult to answer this question, but it is within the limits of prudence to say that in the past it does not seem to have acted to raise any presumption whatever in law. In view of the fact that lucid intervals are so readily presumed in English law, it is not likely that any court will hesitate to assume that an epileptic is sane until he is proved to be the contrary. In a disease in which, as a rule, very prolonged periods of normal health occur, this attitude of the law may be counted on. It is an attitude which is consistent with tradition and with what the

[27] *Dew* v. *Clarke*, 5 Russ. Ch. 166, 6 L. J. Ch. 186.

lawyers would probably hold to be sound practice. And, indeed, it is difficult, even for a medical expert, to say why such a rule should not stand. It practically does not militate against the patient so much as is supposed, for it is perfectly consistent with the admission of all proof in his favor.[28]

A presumption in law is nothing but an hypothesis, based upon probability; it is always open to assault, and the burden of proof can be shifted, if the prisoner has a good case.[29] It is, moreover, in the case of epilepsy not a scientific statement to claim that a crime must necessarily be the result of the disease. This may be a presumption in science, but, as in the case of every presumption, it may be overthrown by proof. Therefore, it seems that the statements of some scientists on the subject of epilepsy are extreme. Murder by an epileptic, says Clouston,[30] should usually be looked upon as being as much a symptom of his disease as larceny by a general paretic. This is too ultra a statement with which to go into a court of justice. Marcé has given a more temperate statement, when he says that all epilepsy warrants, upon the event of a criminal act, the suspicion of mental disorder; and this suspicion is increased in the absence of a motive.[30½] But a suspicion is not enough in law either to convict or acquit: it must be supplemented with proof.

876. Epilepsy raises no "immediate" presumption.—"The proof of epilepsy," said Chief Justice Agnew,[31] "furnishes no immediate presumption of insanity." By the word "immediate" he seems to imply that epilepsy may raise a remote presumption. But it has been

[28] This logical process is well illustrated in the charge of Judge Meyers to the jury in the case of *Com.* v. *Laros*, op. cit.

[29] *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947. See this case for a statement by Lord Brougham about presumption and the shifting of the *onus probandi* in cases of lunacy.

[30] Op. cit. p. 288.

[30½] Quoted in the *Laros Case*, reported by Edgar, p. 169.

[31] *Laros* v. *Com.* 84 Pa. 209. The *Laros Case* is one of the *causes célèbres*, and was tried at Easton, Pennsylvania, in 1876. Laros, a young man, aged about twenty-two years, was a school teacher, temperate, industrious, moral, and a member of the church. On the evening of May 31st, 1876, he put a large quantity of arsenic, which he had bought openly in Easton, into the family coffee pot, and poisoned his father, mother, four brothers and sisters, a young grandchild of his parents, and a hired man. Three of the victims—father, mother, and hired man—died. There was no adequate motive for such a monstrous crime, unless it was the desire to obtain a small amount of money, and detection was inevitable. The defense was based on the allegation of epileptic insanity, and the trial brought out a great amount of expert testimony. The report is too voluminous even for satisfactory condensation here. The prisoner was found guilty, and appealed to the supreme court, which decided against him; but he eventually escaped the gallows. Trial of Allen C. Laros at Easton, Pa., August, 1876, for the Murder of His Father, Martin Laros, by Poison, and His Defense, based upon the Allegation of Epileptic Insanity, by F. W. Edgar, of the Northampton County Bar, Easton, 1877.

held in distinct language that evidence to support a plea of insanity is insufficient when it merely shows that the prisoner was an epileptic, and that epilepsy weakens the intellectual powers, and, in some cases, produces total insanity; but fails to show that the prisoner was in any way affected by the disease on the day of the killing.[32] Therefore, in such a case it was held that a witness was incompetent to express an opinion as to the prisoner's mental condition on the day of the crime, because he had not seen him for four months, and had not seen him in a fit for seven months.

Thus particular is the law as to the mental state at the exact moment of the act: it does not avail to prove the prisoner's mental state at a remote period. In cases of epilepsy this seems a rule liable to abuse, for this disease acts in paroxysms, often far apart, and these paroxysms usually resemble each other; therefore it would seem that one familiar with many of these attacks would know something about all of them. Nevertheless, the rule of law has some reason in it, for a person who had not seen the prisoner for some months is hardly competent to testify that at the moment of killing he was in an epileptic condition.

But the law is not always consistent with itself in this matter of epilepsy. Judge Brewster quoted approvingly the statement[33] that it is unjust to hold an epileptic fully responsible immediately before or immediately after the fit. This is practically admitting a presumption of insanity.[34] As to the value of preponderating evidence, which may be a question of immense importance in epilepsy, it has been held by the supreme court of Pennsylvania that the evidence of insanity need not be "clearly" preponderating, but only "fairly" preponderating.[35] This in effect acquits the prisoner, if a reasonable doubt is raised in his favor; and although the heinous nature of an epileptic's crime is, in itself, no proof of insanity, it may lend weight to other proof.[36]

877. Why the defense of epilepsy proves weak.—As a defense, the

[32] *Com.* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228. The prisoner, while a patient in a hospital, murdered a sister of charity, who was acting as a nurse. The deed was most brutal and unprovoked. The evidence of epilepsy, as given in the report, is not satisfactory from either a legal or scientific standpoint.

[33] 1 Wharton & Stillé, Med. Jur. 4th ed. § 144.

[34] Judge Brewster (*Com.* v. *Winnemore*, 1 Brewst. [Pa.] 356) also quoted the "beautiful maxim of the law:" *Tutius semper est errare in acquitando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ;* and in the next breath refused the prisoner a new trial, and sentenced him to be hanged!

[35] *Coyle* v. *Com.* 100 Pa. 579, 45 Am. Rep. 397. Judgment was reversed and a new trial ordered in this case, because the court below had charged that the proof of insanity must be "clearly" preponderating. It should have been "fairly" preponderating.

[36] *Laros* v. *Com.* 84 Pa. 210.

allegation of epilepsy has proved weak in many of the recorded cases, and for the simple reason that it was based on insufficient proof.[37] It is a strong defense in an undoubted case, but a broken reed when based on nothing more than a few doubtful fits at some periods more or less remote. In one case the "fits" were merely those of St. Vitus' Dance,[38]—a disease, however, which may affect the mind. In the case of a Texas horse thief, who alleged epilepsy as a defense for his having mounted another man's horse and ridden away, the court held[39] that a defense of insanity, supported only by evidence that the defendant was subject to epileptic fits, and that his mother had been temporarily deranged, is not established when the other evidence clearly shows that he knew he was committing a wrong. It has been held proper to attempt to prove hereditary epilepsy by proving that the father was subject to the disease; but this fact does not prove the prisoner insane, especially when it is not satisfactorily proved that he himself had ever had a fit.[40] But in one case of assault with intent to kill, in which it was practically admitted that the prisoner was an epileptic, the supreme court refused to interfere, even though the appeal was based on the allegation that the state prison was not a proper place for such a patient, the court deciding that there was no other place for him.[41]

878. Epilepsy may be a good defense.—Epileptic insanity is not incompatible with both crime and genius, as was illustrated in the case of Charles Cawley, of Pittsburg. This youth killed his mother, three sisters, and a brother, and was acquitted in December, 1903, after a merely formal trial. The defense was epileptic insanity, aggravated by overworking to perfect a patent. While in jail, awaiting trial, the prisoner received his patent from the government.

879. It may lower the grade of the crime.—Epilepsy, according to Mr. Wharton,[42] may be put in evidence to lower the grade of the offense, though it does not amount to insanity. In saying this, Wharton claims that he does but follow the authorities which declare that nervous diseases and drunkenness, though no defense to crime, may be used to show that an assault was not deliberate. This is hardly consistent with the legal principle that insanity does not operate to lower the grade of crime,—that a man is either sane or insane,

[37] *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 163.

[38] *State* v. *Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440.

[39] *Lovegrove* v. *State*, 31 Tex. Crim. Rep. 491, 21 S. W. 191. This case is not quoted in the text as an instance of "procursive" epilepsy.

[40] *Walsh* v. *People*, 88 N. Y. 458.

[41] *Fogarty* v. *State*, 80 Ga. 450, 5 S. E. 782.

[42] 1 Whart. Crim. Law, § 24.

responsible or not responsible.[43] Sir Joseph Jekyll, in the *Duchess of Cleveland's Case,* said: "The law will not measure the sizes of men's capacities, so they be *compos mentis.*" It is difficult to see why an exception should be made in the case of epileptic insanity.

880. The frequency of epilepsy in criminals.—Epilepsy is not so frequent in criminal lunacy as might be supposed. Out of a population of 640 criminal lunatics at Broadmoor, not more than 28 were epileptic.[44] But probably not all these cases were homicidal, for it must not be ignored that epilepsy is sometimes the cause or accompaniment of moral degeneracy that may lead to a variety of crimes other than homicide.[44½]

Lombroso has pointed out an anthropological resemblance between epileptics and criminals. According to Ferri the districts in Italy which furnish the greatest quota of criminals supply also the greatest number of epileptics.[45]

881. The courts have sustained the wills of epileptics.—There is no inherent reason why the wills of epileptics should not be sustained. Certainly, no alienist could be found to claim, as a universal principle, that epileptics are incapable of making their wills. In individual cases it is a matter of proof, if a contestant asserts that the testator was not competent.[45½] The legal presumption here, too, would be in favor of capacity, although there are exceptions to this rule in some jurisdictions.[46] The proof necessary to overcome this presumption would have to do with such unsoundness of mind as might result from the epileptic attacks; but it goes almost without saying that such unsoundness of mind would have to be shown to have been present at the time of the making of the will. The mere fact that a testator had

[43] For an exceptional case, see *Com.* v. *Lynch,* 25 Pittsb. L. J. 193 (1878).

[44] Nicolson, "Criminal Lunacy in England," in Allbutt's Syst. of Med. Vol. IX. p. 438.

[44½] Caligula, the Roman Emperor, was an epileptic imbecile, and one of the most atrocious of the various degenerates who sat upon the throne of the Cæsars. "He was crazy both in body and mind," says Suetonius (Lives of the Twelve Cæsars, Bohn's Library, p. 285), "being subject, when a boy, to the falling sickness." The graphic account of this imperial monster by Suetonius is a contribution to the literature of moral imbecility.

[45] Drähms (The Criminal, p. 118) states that among 23,333 male criminals in Turin prison 0.66 per cent were epileptics, and of 3.358 female criminals 0.22 per cent were so afflicted. In Germany, in 1881, 22 per cent of epileptics were discovered among 65 male lunatics. These figures are quoted here for what they are worth. The former seem very low, and the latter extraordinarily high. Clark found crime to prevail among 11 per cent of epileptics.

[45½] *Re Lewis,* 51 Wis. 101. 7 N. W. 829; *Brown* v. *Torrey,* 24 Barb. 583; *Foot* v. *Stanton,* 1 Deane & S. Eccl. Rep. 19.

[46] *Delafield* v. *Parish,* 25 N. Y. 9. This was a leading will case, in which the principle was laid down that the *onus probandi* as to mental capacity is on the proponent of the will

had an occasional epileptic attack would not avail in any court to overthrow a testament, nor should it do so.[47] A will has even been sustained in a case in which the lucid interval was short, between two attacks of epileptic mania, the latter of which ended in death.[48]

881½. The marriage of epileptics.—By the common law[48a] lunatics were not capable of contracting marriage, and this law would evidently apply to an epileptic, if it were clear that he was *non compos* at the time of the contract. But in one instance, at least, modern statute law has gone much farther, for, by the law of New Jersey,[48b] it is unlawful for any person who has been confined in any public asylum or institution as an epileptic or insane or feeble-minded patient to marry without a certificate from two regularly licensed physicians of the state that such person has been completely cured of such insanity, epilepsy, or feeble mind, and that there is no probability that such person will transmit any such defects or disabilities to the issue of such marriage. Any person of sound mind who shall marry with any such epileptic, insane, or feeble-minded person, with knowledge of his or her disability, or who shall advise, aid, or assist in procuring any marriage contrary to the provision of this act, shall be guilty of a misdemeanor.

It is to be noted that this law applies only to epileptics who have been legally declared to be such by being confined in an asylum, and is an instance of the extreme solicitude of the New Jersey law for the welfare of posterity.[48c]

882. The responsibility of epileptics in civil matters.—Cases have been reported of patients who had signed legal papers, other than wills, while in a state of epileptic confusion or automatism. As explained already, this state of automatism may closely simulate a state of perfect consciousness, but the patient may, nevertheless, be entirely oblivious of himself and his surroundings, and have no recollection afterwards of what occurred. It might be difficult to prove such a case, but, on the other hand, it would not do for courts to ignore the possibility of such an imposition on a person in a state of irresponsibility.[49]

[47] Some courts, however, take very extreme ground in this matter of "legal presumption" in cases of mental disease,—ground which cannot be defended by science. See an opinion by Sir J. Nicholl (*Brogden* v. *Brown*, 2 Addams, Eccl. Rep. 441), in which "lucid intervals" are "presumed" to occur in febrile delirium long enough to let a man make his will!

[48] *Re Ross*, 12 N. Y. Week. Dig. 34.

[48a] 1 Blackstone, Com. 438.

[48b] Laws of 1904, chap. 137.

[48c] It has been seriously recommended that those epileptics and other imbeciles who are incorrigible evil doers should be castrated. See Barr, Mental Defectives, p. 189.

[49] "We have recorded in Brain the case of a patient in Bethlem, who, while in

The subject of epileptic insanity is one of peculiar difficulty for the medical jurist, and this difficulty is not diminished by the fact that this defense has been unjustly urged in not a few cases. This fact, however, does not absolve either courts or experts from the duty of recognizing, on the one hand, that epilepsy in a criminal may indicate a high degree of irresponsibility, and on the other, that the defense must be based on something more than mere presumption. It is to be hoped that the case of Bowler will never be duplicated,—a case of which Baron Alderson,[50] years afterwards, said in open court: "Bowler was executed, and very barbarous it was."[51]

our presence, had a slight fit of unconsciousness, followed by a period of automatism, during which he performed complicated movements, adapting himself properly to his surroundings, and yet, at the end of some time, on his recovery, was completely without knowledge of any of the acts which he had so carefully performed. In this case it was said that his relations had been able to get him to sign cheques, and do other things with his property, while he was unconscious."—Savage, in Tuke's Dictionary, Vol. I. p. 454.

[50]*Reg.* v. *Oxford,* 9 Car & P. 533.

[51]Reference may be made to the following works: Clymer, The Legitimate Influence of Epilepsy on Criminal Responsibility, 1874; Echeverria, on Epilepsy, 1870; Legrand du Saulle, Étude Médico-légale sur les Épileptiques, 1877; Delasiauve, Traité de l'Épilepsie; Féré, Les Épilepsies et les Épileptiques. Paris, 1890; Discussion sur la Responsabilité des Actes commis par les Épileptiques, Bull. de la Soc. Méd. Lég. 1875–76; Hammond, "Case of Montgomery," Journ. Psych. Med. 1872, Vol. VI. p. 62; Echeverria, "Case of Montgomery," Am. Journ. Insan. 1872–73, Vol. XXIX. p. 341; Kiernan, "Medico-legal Relations of Epilepsy," Chicago Med. Rev. 1882, Vol. LXI.; Ordronaux, "Case of Jenisch," Am. Journ. Insan. Vol. XXXI, p. 430; Spratling, Epilepsy, p. 477; Wise, "Case of R. B." Am. Journ. Insan. Vol. XLV. p. 360; Smith, "Report of a Case," Journ. Ment. Sci. July, 1901. See also the Index-Catalogue, "Jurisprudence of Epilepsy," Vol. IV. p. 290, for a very full bibliography.

CHAPTER XLII.

GENERAL PARESIS.

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I. The medical aspects of general paresis.

883. Many synonyms.—This disease has many names, and does much harm under all of them. The name we have chosen is the

shortest and most familiar; but general paresis is also known as "general paralysis of the insane," or "progressive paralysis of the insane," or "paralytic dementia," or "dementia paralytica."

884. Importance of the affection.—General paresis has been called one of the "white man's burdens." It has also been called the scourge of civilized man; but such terms are extravagances, for the disease is not confined to the white races, nor is it widespread enough to merit such high-sounding names. Equally extravagant is it to say that it is the product of "civilization and syphilization," as Krafft-Ebing is credited with having done. No one is able to demonstrate that it did not exist before the present era, or that it is invariably caused by syphilis. Nevertheless, general paresis has an interesting history, for this history shows the disease emerging, as it were, from the obscurity of the past, and gaining a place in pathology, all within one hundred years. This history also shows that the science of psychiatry had advanced so far that it could make of this novel affection an example of the brilliant work it can do in demonstrating the morbid anatomy of a mental disease. General paresis, indeed, is one of the few insanities which, so far, have a distinct morbid anatomy. Moreover, general paresis often has a rather dramatic course, in persons in whom it was least expected, and amid circumstances which are of great interest to a wide circle of friends and acquaintances. In other words, it is sometimes not a little sensational, and has wide civic and medico-legal relations. Therefore, in view of all these facts, general paresis is a disease which usually excites great interest in the laity; and well it may.

885. The history of general paresis.—There can be no doubt that we owe to the French alienists of the first half of the 19th century the earliest recognition and description of general paresis,[1] although the English physician, Haslam,[2] gave, in brief space, a lifelike picture of it in one patient a little before their time; but the pupils of the distinguished Esquirol, particularly Georget, Bayle, Delaye, and Calmeil, gave the disease a distinct place in psychiatry.[3] Calmeil, indeed, has been called the "discoverer" of general paresis; he regarded the disease as a special form of paralysis, superimposed upon a form of insanity.

It is a curious fact, indeed, that the early observers seemed to feel impelled to dissociate the paralysis from the insanity; they had not

[1] Chase, General Paresis, Phila. 1902, p. 18.

[2] On Madness, London, 1809.

[3] Régis, Mental Medicine, translated by Bannister, p. 414.

then come to the point where they could recognize that the same morbid process in the brain could cause both paralysis and insanity; but Bayle was one of the first to see this truth, and after his time the disease came slowly to be recognized as a conjoint paralytic and mental disorder. This fact, indeed, is one of the most interesting things about general paresis, and one of the most instructive to a layman, for it shows how the insanity is just as much a material affection as is the paralysis.

886. It is an extensive subject.—General paresis is far too extensive a subject to be treated in detail in these pages, nor is it needful here to go into a minute description of its anatomy. As the disease has some important medico-legal relations, its chief symptoms and course will briefly be described with special reference to that fact.

887. The underlying process.—The disease is really a widespread destructive process in the tissues of the brain. This process follows a rather definite course, and leaves organic changes which can be recognized post mortem even by the naked eye.[3½] The cause, or causes, of this destruction, is still a matter of debate; but the best opinion inclines to see in it the action of syphilis and alcohol, combined with over-strain in the complex struggle for existence.

888. Syphilis and general paresis.—Statistics differ as to the part played by syphilis. Savage[3⅔] believes that in at least 70 per cent of the cases syphilis may be recognized. Berkley[4] could not find more than 50 per cent of his cases with a history of syphilis, but some German observers do not hesitate to claim that the disease is invariably syphilitic. This claim does not hold good in America, at least.[4½] In France there has been a tendency to hold alcohol even more responsible than syphilis. Over-exertion is a factor in some cases, especially when combined with dissipation; while heredity, traumatism, and sunstroke have been observed. The discussion does not further concern us here.[4⅔]

[3½] "From the anatomical point of view this disease has been regarded as a chronic meningitis (Meyer), a cerebral atrophy (Erlenmeyer), a general inflammation of the brain cortex (Parchappe), or a chronic diffuse inflammation of the brain and membranes (Calmeil)."—Krafft-Ebing, Traité Clinique de Psychiatrie, Traduit par Laurent, p. 663.

[3⅔] "General Paralysis of the Insane," in Allbutt's Syst. of Med. Vol. VIII. p. 692.

[4] Mental Diseases, p. 175. See also Jonathan Hutchinson, Syphilis, p. 204; Houghberg, Neurolog. Centralblat, 1894. p. 279; Dercum, Nervous Diseases by American Authors, 1895. p. 670; and Mott. Arch. of Neurology, Vol. I.

[4½] Lalanne (Journ. de Méd. de Bordeaux. 20 Déc. 1903) reports a case of juvenile general paresis, in which the post-mortem findings were typical. It occurred in a child who had hereditary syphilis.

[4⅔] Tomes (Brit. Med. Journ. Sept. 22, 1900) has dealt with the subject of insanity in lead-workers. Of 3,500 insane

889. The course of the disease.—However caused, this destructive process follows, as a rule, a definite course, which permits us to note certain stages in the disease, and the symptoms are both mental and physical. We may thus define general paresis as a progressive and destructive disease of the brain, extending to the spinal cord and the nerve-trunks; it is marked by dementia, on the one hand, and by paresis, on the other; on the mental side there is weakening of all the faculties, with the formation of expansive delusions, and episodes of mania and melancholia, progressive and irreparable; on the physical side there is widespread impairment, shown in a weakened or ataxic gait, stammering or involved speech, tremor, changes in the optic nerves and pupils, trophic changes, as in the joints,[5] and epileptic and apoplectic seizures.

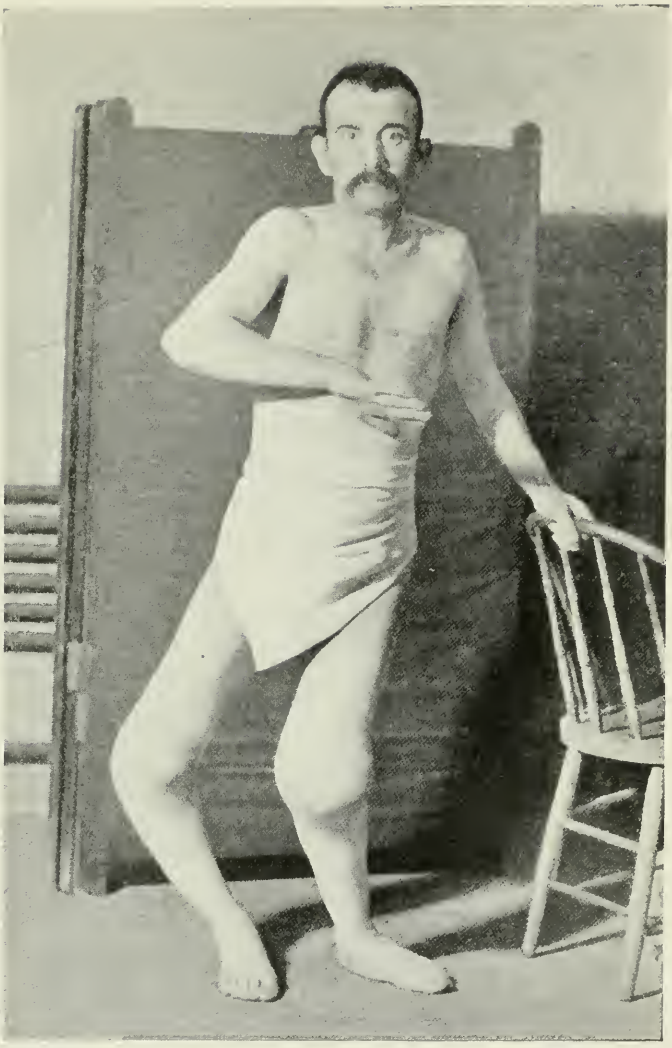
890. The four stages of general paresis.—It is customary to divide general paresis into stages, for convenience of description; but cases vary, and all of them do not conform to one classical type. The stages commonly observed are four: First, a prodromal stage; second, an acute stage; third, a chronic stage; fourth, a terminal stage.

891. The prodromal stage.—For the medical jurist the prodromal stage of general paresis is far the most important. This is the period before the disease has become well recognized, and during which the patient is peculiarly apt to break the law. It might well be called the medico-legal stage. General paresis often begins insidiously, and among its earliest symptoms are perversions of the moral faculties. These lead to all sorts of lapses, some trivial, but some quite otherwise.

At first there is change of character and disposition. The patient may have spells of despondency, then elation. He does odd and unusual things. He becomes inattentive to business, and unreliable. He is forgetful, extravagant with money, ordering and buying things which he does not need and cannot pay for. His morals suffer; he may indulge in drink and in sexual excesses, and men of good character sometimes compromise themselves. He may be restless and irregular in his habits; insomnious, but occasionally an abnormal som-

in Claybury asylum 133 had been exposed to lead poisoning. Of these 133 patients 31 had symptoms like those of general paresis. Oliver ("Lead Poisoning," in Allbutt's Syst. of Med. Vol. II.) says there is a pseudo-general paresis caused by lead, in which the prognosis is not always unfavorable. See also Dangerous Trades, edited by Oliver, 1902, pp. 308, 309. This is somewhat like the pseudo-paresis caused by alcohol and morphin. See § 930. Also Baillarger, Ann. Med.-Psych. 1896, and Journ. Ment. Sci. 1896, pp. 303, 646.

[5] Lloyd, "Arthropathy in General Paresis," in the Journ. Nerv. and Ment. Dis. Vol. XVIII. p. 83; also in the Philadelphia Hospital Reports, Vol. II. 1893, p. 164.



General paresis, with deformities (arthropathies) of the knee joints

nolence is seen. A patient whom I once saw, a prominent railroad official, would drop off asleep in his office at all hours of the day; this was the first symptom noted in him. In some cases the patients start off aimlessly on a journey, without enough money. I once saw a patient with this tendency, and warned his friends not to let him out of their sight; but that very day he disappeared, and was heard from ten days later in Liverpool. It required the services of the American consul and two trained attendants to have him brought back to his home, at great expense.

The mental faculties are variously impaired: the judgment is weakened, the common sense lost, the logical processes curiously at fault. The patient has queer and absurd impulses and propensities: he becomes boastful, indifferent to appearances; frequents low resorts; follows after strange women; and is easily influenced by sharpers and designing people. If he is in official life, he may do things which are technically illegal; in business affairs he may make grave mistakes; in his personal affairs he may squander much money, engaging in wild speculations or involving himself in contracts and obligations which imperil his estate. He may even default, embezzle, or steal outright.

The emotions, or affections, are impaired, and the patient loses his normal fondness and care for his wife and children. A close observer may sometimes detect the beginning of delusions, such as mark especially the second stage. Inattention and loss of initiative are seen: the patient takes up with new projects, and then soon abandons and forgets them. Occasionally, in the very early stage, he is conscious of feeling ill; he recognizes that something is going wrong with him. An incident is told of a physician who, in this stage, made a correct diagnosis of his own case; but this degree of self-consciousness is soon lost, and gives place to a sense of indifference, or to a feeling of abnormal well-being or mild exaltation. Things are usually all right with the general paretic, he is optimistic, and a good fellow all round. In a word, the prodromal stage is one of beginning perversion of the mental and moral faculties. This is often associated with slight physical changes, as a tendency to tire easily.

892. The second stage.—In the second stage the disease is unmistakable. On the mental side there is exaltation and a tendency to form expansive delusions, and with these there is a very evident increasing weakness of the mental faculties. The patient, in fact, is in a maniacal state; but this differs from ordinary mania in the fact

that the mental state is one of weakness, and in the peculiar character of the delusions. These delusions of the general paretic have a character of their own; they are called delusions of grandeur, and they well deserve this term. They are puerile and extravagant, utterly unreal and improbable, without limit, and easily suggested and adopted. They show clearly that the logical processes and the sense of reality are profoundly disturbed.

893. The delusions of grandeur.—These grandiose delusions are often described in detail by medical writers, and sometimes with an exuberance which leads the reader to suspect that the imagination of the writer as well as of the patient has gone a little beyond bounds. To describe them, in fact, is to engage in puerilities. The one general term by which they can be described is extravagance. The paretic patient has vast sums of money, great physical prowess, wide influence, broad domains, and lucrative patents; and the use he will make of these things is generally silly. He will charter an ocean steamer for his friends; he will have a four-in-hand for his doctor; he will have diamond buttons on the coats of his servants; he will, as a rule, have more than one wife, and his sexual capacity will be equal to the occasion; he will bestow untold benefits upon mankind; he will even regenerate the world in a senseless sort of way. In all these deliria it is hard to find any idea of a sense of proportion; any notion of a rational, practical, or useful scheme. Moreover, this nonsense is very changeable; the dreams of El Dorado are veritable castles in the clouds: they change with every breeze. This is characteristic of these expansive delusions; they can even be suggested to the patient, and he will adopt them for his own. In other words, they are neither well-systematized nor firmly fixed.[5a]

[5a] The histories of some of these cases are written all over with dollar marks. A patient of Hammond's (Insanity, p. 601) issued a prospectus for a company that was to monopolize the manufacture of india-rubber rattles; he was himself to take all the stock, valued at $1,000,000,000. A patient of Dercum's (Nervous Diseases by American Authors, p. 677) estimated his wealth at $150,000,000, $50,000,000 of which he had made in as many minutes. Clouston (Mental Diseases, p. 379) had a patient who boasted that he could lift 1,000 pounds, that he was the best rider, swimmer, and jumper in the world; he wanted to buy every horse he saw, offering £100, and then a second £100, if the first was refused. He wrote to the Queen and other notables, offering to make their fortunes, and inviting them to dinner; he offered to buy the asylum for £100,000; later he offered £1,000,000 for it; moreover, he would have Dr. Clouston made a baronet, and would dress him in a uniform of cloth of gold. A patient of Sankey's (Mental Diseases, p. 315) had a scheme to cut a canal from the west of England to the mouth of the Severn; also to build towns and a cathedral. (See Chase, op. cit. for many other examples.)

A patient of the writer's had extraordinary delusions about the size of his virile member; in fact, it is not uncommon for pareties to boast about their sexual prowess.—a subject which has some medico-legal significance.

894. The sense of well-being.—With this delusional state there is a sense of well-being. But not all paretics are quite so extravagant in their delusions. There is sometimes little more than a tendency to boast, and to take up for a while with childish fancies. Moreover, in this stage some patients may have spells of acute delirium, or even of acute melancholia;[5b] but the expansive ideation is almost sure to come again to the surface, with its attendant mental weakness. These patients may do impulsive things; they are occasionally violent; they are often indecent, their minds running on sexual subjects; they are much given to purloining odds and ends of things that strike their fancy. It is almost needless to say that by this stage the patient has become quite forgetful, inattentive to affairs, unconventional, indifferent, and partly imbecile.

895. The physical changes.—On the physical side the advance of the disease is very marked. The patient has tremor of many of his muscles, in the face, lips, tongue, hands, and elsewhere. His speech begins to be affected; it is drawling, stammering, or staccato, as the case may be; he drops words, or runs them together. His handwriting reveals both the mental and physical changes,—the want of co-ordination, the tremor, the tendency to drop words or letters. The gait is involved: it may be weakened and slightly inco-ordinate, with increase in the knee-jerks. The pupils may fail to react to light, or they may be unusually contracted, or one may be larger than the other. Sometimes they are irregular in shape; and these various conditions may change from day to day. Occasionally there is found inflammation or atrophy of the optic nerves. In a word, the general paretic, in the second stage, is in the acute period of a destructive disease of his brain, the prevailing tone being exaltation with weakness.

896. The third stage.—In the third stage the disease assumes a more chronic aspect, and it is in this stage, especially, that certain grave crises assert themselves. These are epileptic and apoplectic attacks. The line of demarcation between the second and third stages is not marked; the transition is usually gradual; but in some cases

[5b] Spitzka, Insanity, 1883, pp. 199–200. Savage (op. cit. p. 703) says that he has met with melancholic general paretics "who thought that millions of devils were torturing them . . . and more than one patient who supposed his bowels to be obstructed by millions of tons of feces." Whether depressed or elated, these patients think in terms of millions. It is a true "megalomania," but when it is depressive in type the French call it "micromania."

I know more than Apollo;
For oft when he lies sleeping
I behold the stars
At mortal wars,
And the rounded welkin weeping.
—Tom o'Bedlam's Song.

a violent epileptic seizure may occur, and this may serve to mark the transition. After such a fit the patient is perceptibly worse; his mental state is still further lowered, and so it is after each fit. These epileptic attacks are sometimes of long duration. I have known a patient to continue in an epileptic condition for several days, the convulsive movements being slight, and consciousness not entirely abolished.[5c]

So also of the apoplectic attacks: the patient may lie for a long time in a comatose state, apparently in great danger of death; but he rallies and partially recovers from it, although it leaves its permanent effects upon him. The mental state thus deteriorates more and more; the expansive delusions are not so marked; and dementia is progressive. The physical symptoms also increase: the patient is more paralytic; his speech becomes more difficult and defective, and his sentences are short and incoherent. It must be recalled, however, that in some cases the epileptic and apoplectic crises occur earlier in the disease. Violent maniacal episodes also occur. After an apoplectic attack the patient may be left for a time partially hemiplegic, or paralyzed on one side.

897. The fourth stage.—This is the condition of advanced dementia with paresis. This stage is terminal: the morbid process in the brain has done its work. Almost all signs of mentality are extinguished, and the patient merely vegetates—bedridden, paralyzed, helpless—until death ends the scene. The end may come in an epileptic or apoplectic attack, or more gradually, by exhaustion.

898. Sex and race.—It may be noted briefly that general paresis is not nearly so common in women as in men, nor in the negro as in the white races;[6] but the rate is increasing among negroes. A few instances have been noted of the curious coincidence of the disease appearing in both husband and wife,—the so-called "conjugal" paresis. It, of course, suggests a syphilitic infection.[7]

899. Varieties and complications.—The above passages are not meant for a description so much as for a mere statement of general paresis. The disease is too complex, and its symptoms too multiform, to admit of brief description. Moreover, various combinations of symptoms

[5c] "I have seen a patient convulsed while at the same time he was conscious, and was swearing at his disorderly limbs."—Savage, op. cit. p. 707.

[6] Chase, op. cit. p. 210.

[7] Phelps, Am. Journ. Ins. Vol. LIII. p. 59. See also Keraval and Raviart (Arch. de Neurolog. June, 1902) for a report of five instances of conjugal general paresis. Syphilis was not made out in all these cases. Alcohol figured in some. In the case of one of the men, a twin brother also had died of general paresis. Tuke also refers to a case of general paralysis in twins. See § 1130.

occur, constituting different types of the disease; but these are of interest to the pathologist rather than to the medical jurist. In these pages it is only possible to give a sketch, upon which, however, may be outlined the medico-legal features of these unfortunate cases.

900. Locomotor ataxia and general paresis.—It is well known to pathologists that these two diseases have a relationship to each other. Thus, in some cases, a patient with locomotor ataxia will, later in his disease, begin to present the symptoms of general paresis. Obscure mental symptoms in such a patient should always raise a suspicion. On the other hand, in general paresis the symptoms of locomotor ataxia may coexist, or may arise later in the disease as a complication. Syphilis is the most common cause in these cases.[8]

901. The pathology and morbid anatomy.—It is essential, however, in order to have an intelligent idea of this disease, to bear constantly in mind that it is due to a destructive process in the tissues of the brain. This process is inflammatory in character; it begins in the small blood vessels of the membranes of the brain, leading to congestion, obstruction to the circulation of the blood, and to the outflowing stream of lymph; morbid increase of the growth of the supporting tissues, causing a hardening rather than a softening of the brain; thickening of the membranes; minute hemorrhages; extravasation of fluids, and impaired nutrition of the nerve cells in the brain cortex.[9]

All this seems to be the result of some invading poison or infection of the central nervous system. In the first stage of invasion the nutrition of the brain suffers slightly, and we see the prodromal effects as described in a preceding page. As the congestion and irritation increase, we see the second stage, characterized by exaltation with expansive delusions. When the morbid process advances to the destruction of brain tissue, we see the third stage, with its advanced dementia and its epileptic and apoplectic attacks; and, finally, in the fourth stage, we see, in the failing and dying man, the evidence of such a widespread destruction of brain tissue as is incompatible with life.

902. Remissions in this disease.—Remarkable remissions occur in some cases of general paresis; the patient may even seem entirely to recover; but the appearance is only too likely to be deceptive. This affection is one of the most obstinately fatal of diseases. The impor-

[8] An instructive discussion on this subject took place before the London Pathological Society, in 1899. British Medical Journal, Nov. 25 and Dec. 9, 1899.

[9] Bevan Lewis, Mental Diseases, 2d ed. p. 548 *et infra*.

tance of these remissions is somewhat exaggerated. In most cases, if they even occur at all, they are short and imperfect.[10]

II. The medico-legal aspects of general paresis.

903. In conflict with the law.—From the foregoing description it is evident that the general paretic is liable, in some stages of his career, to come in conflict with the law. The stages of moral perversion are conspicuously the early stages. In these periods the patient shows a weakening of his moral perceptions, and, in the prodromal period especially, before his disease is recognized or even suspected, he may undergo arrest, trial, and imprisonment. In some cases, in fact, a criminal offense is the first indication of general paresis. It is a symptom of his disease, but it may not be recognized as such until some time after the unfortunate patient has been incarcerated. The moral lapse sometimes seems to be due to a fault of memory,[11]—an absent-mindedness,—a mere disregard for the proprieties, and an inability to perceive the moral quality of an act. It thus happens that very few general paretics figure among the confirmed criminal lunatics. Their condition is recognized sooner or later, and they do not tarry in jail. In Broadmoor Asylum for Criminal Insane, in England, there do not appear to have been many of this class, according to Nicholson,[12] who, in a recent paper on the subject of criminal lunacy in that prison, does not even mention general paresis.[13]

[10] Krafft-Ebing (Traité Clinique de Psychiatrie, traduit par Laurent, p. 675) says that remissions may be long extended, in the early stages of the disease especially, and can be mistaken for intermissions and for cures; but he warns the reader that, nevertheless, in the most promising remissions, there remains a trace of mental weakness, with all sorts of anomalies of character. See, also, Mickle's article in Tuke's Dictionary of Psychological Medicine, Vol. I. pp. 531, 532; and Percy Smith, British Medical Journal, Jan. 4, 1890 (for long and marked remissions). For cases of alleged cure, see Krafft-Ebing, op. cit. pp. 685, 686.

[11] Chase, op. cit. p. 110.

[12] Criminal Lunacy in England, in Allbutt's Syst. of Med. Vol. IX. p. 438.

[13] A more recent and a more careful paper by Baker ("General Paresis and Crime," in Journ. Ment. Sci., July, 1904, p. 437) tells a somewhat different story. This paper is based on an analysis of the cases in Broadmoor Criminal Lunatic Asylum. Since the opening of that asylum, forty-one years ago, 62 cases of general paresis have been admitted,—54 men and 8 women,—being 3 per cent of men and one half of one per cent of women in the total number of admissions. The report of the lunacy commissioners of Great Britain for 1899 and 1900 shows that the proportion among the noncriminal insane is 10.7 per cent of men and 2.2 per cent of women. The crimes committed by these general paretics were as follows: Against the person, 16 (including 9 murders); sexual, 4; against property (including both thefts and arson), 42. The diagnosis in some of these cases, however, is open to question, as some of them seem to have been cases of paranoia and of alcoholic insanity. Sullivan, of Pentonville Prison, has also recently written a paper on this subject.

904. Crimes inspired by delusions of grandeur.—The delinquencies of the general paretic are not so much from design as from mere impulse. They may be inspired, however, in some rare cases by the grandiose delusions; and when this happens in the first stage, before the mental changes are well marked, the deed may have a very bad look. Thus, a railroad official, well known for business rectitude and ability, went to a small town in western Virginia, where he was known, and bought up property, announcing that the railroad was to be extended through the place, and the property would be in demand for a depot and offices. A syndicate of citizens was at once formed, who entered into the speculation, bought back the land, and allowed the man to reap a large profit, which he squandered in a few days. The story was a myth,—the project of an insane brain,—and the projector was soon landed in an asylum.[14] Chase relates the case of a reputable plumber, in the early stages of paresis, who was arrested for fraudulently tapping a city gas-main, without a permit.

905. Thefts by general paretics.—The commonest offenses of these patients are thefts, often of trivial objects, taken without much design, and without attempt at concealment. They can hardly be called thefts in fact. One case is told of a gentleman who filled his pockets with silver spoons at a table where he was an invited guest; he had also appropriated the silver sugar-bowl. These patients exhibit no mortification when detected; in some cases, indeed, the emotion is one of indignation. Brierre de Boismont told the story, often quoted, of an old government officer who stole articles at public sales which he attended in an official capacity. He denounced the agents of his arrest as "imbeciles," who did not know that he was but following a time-honored custom, and he exhibited articles of value which he still had in his pockets. He was discovered to be in paresis, and died of the disease a few months later.

This tendency to pilfer is sometimes shown openly, as in the case of a man who broke into a shop window, took a handful of cigars, and then sat on the curbstone to smoke them, although he had plenty of money with which to buy what he wanted.[15] Sometimes this pilfering is a mere impulse or instinct, shown in the most absurd ways. These patients will pick up almost anything, and forget that they have taken it. Clouston tells of a paretic whom he found trying to stuff the coal-scuttle into the backside of his trousers.

906. Extravagance.—This tendency to steal, or to acquire things anyhow, is perhaps not unassociated with the morbid impulse to buy

[14] Berkley, op. cit. p. 173. [15] Stearns, Mental Diseases, p. 478.

what he does not need and often cannot pay for, so common in paretics. These impulses arise from the same confused instinct to acquire. Thus, one patient went from store to store ordering pianos, and sent home so many that the vans almost filled the street in front of his house. Another sent home a wagon-load of snow-shovels. Such stories could be greatly multiplied.[15½]

907. Stealing as a morbid act.—The instinct of the general paretic to steal is a purely morbid phenomenon. It is an instance of a genuine kleptomania, using that term in its only legitimate sense, as indicating an insane propensity. This impulse is not uncommon in several forms of insanity, especially in those forms which are caused by gross lesions of the brain, as in senile dementia, idiocy, and imbecility, and injuries to the brain. It is not a criminal impulse, and is to be distinguished even from that tendency to steal which is seen in some moral perverts. The general paretic, like the senile dement, simply appropriates; he does not truly steal. His instinct is more like the hoarding instinct in some animals,[16] and it is usually without a rational motive, as is shown by the fact that these patients often take articles of no value. This tendency to steal was shown by a man after a sunstroke, the patient eventually dying in an apoplectic seizure.[17] In another patient a severe blow on the head was followed by insanity with delusions and a tendency to secrete trifling objects about the house, and to fill the pockets with coke.[18] A sailor, six years before he became a general paretic, developed a tendency to hoard things, although he had no delusions of grandeur.[19] Hollander has collected a long list of such cases from the literature, and they include cases of brain-injury, epilepsy, mania, senile decay, and other forms of insanity.

908. Cases in which a doubt arises.—The only doubt that can arise in these cases of general paresis is when the stealing is done very early in the disease. It is necessary, also, to guard against simulated cases; that is, where a defense is set up in some desperate case, based on the

[15½] In *Lincoln* v. *Buckmaster*, 32 Vt. 652, an insane man, who was probably a general paretic, purchased a large number of horses at exorbitant rates, and without previous experience as a horse-dealer. The court decided in his favor, and held that a lunatic may sometimes be incapable of contracting even if his infirmity is not known to the other party. This was contrary to the view taken by many courts with reference to the contracts of the insane, and was a most important decision as bearing on the liability of general paretics. See also *Niell* v. *Morley*, 9 Ves. Jr. 478, in which a contrary opinion was given. The subject has been discussed in the chapter on "Contracts and Torts of the Insane," in the present work.

[16] Hollander, Mental Functions of the Brain, p. 198.

[17] Meyer, Arch. f. Psych., 1872, Vol. III.

[18] Mickle, Journ. Ment. Sci. Oct. 1885.

[19] McLeod, Journ. Ment. Sci. Vol. VII.

allegation of beginning paresis. As a rule, these cases are easily unmasked. General paresis is not an easy disease to simulate, and it is steadily progressive, so that by the time the case comes to trial there ought to be but little difficulty in determining whether it is a real case.

909. The case of Cochran.—In the case of Cochran, an old employee of the United States Mint in Philadelphia, a question was raised of a possible beginning general paresis, or else of senile dementia. The prisoner was an old man, and had been employed at the mint for forty-three years. He had been custodian of the vaults, and during his long term of service it was estimated that he had been responsible for the safe keeping of one thousand million dollars. He was so well-informed that he was considered the encyclopedia of the mint, and his integrity had never been suspected. He had once assisted in detecting a fellow-official, who had been robbing the institution, and he always seemed afterwards to have a grievance against the government for not rewarding him and increasing his salary. He would say that the government owed him money for saving so much money for it. This was the only approach to anything like a delusion, and it was not an expansive one. After his long and faithful service Cochran was detected in having abstracted gold bars, worth many thousands of dollars, from the vaults, and in having secreted these bars in his house, a suburban place, where he had fitted up a little furnace for melting his booty. The thefts had been going on for only about three years. The cry was raised at once that the man would be found to be insane, and this cry was re-echoed by physicians in several parts of the country, who had never seen him. But the expert examination, conducted for the government by Dr. Chapin and the writer, proved quite negative. The prisoner's memory was good, his ideas coherent, he had no delusions of any kind, there was no tremor, no speech defects, no fault in gait, no pupillary changes, nor any history of a mental crisis, such as mania or melancholia, nor of any epileptic or apoplectic attacks. It was found, moreover, that he had had a clear motive for taking the gold, as he was being pressed for debt, and he had shown the greatest cunning and design in disposing of it. The only conclusion possible was that he was not insane, and on this report and the evidence he was tried and convicted.[19½]

910. Other crimes committed by general paretics.—General paretics have been arrested for other faults than stealing. Baker[20] reported

[19½] In the United States District Court at Philadelphia, Nov. 22, 1893.

[20] Journ. Ment. Sci. Vol. XXXV. p. 50

the case of a laborer, aged forty years, who was tried for arson, in setting fire to a stack of straw. A woman, of previously excellent character, turned her house into a scene of drinking and immorality, neglected her children, and ordered large quantities of furniture. She was arrested for pulling up plants in a nursery.[21] But among the commonest delinquencies of these patients are such as are connected with the sexual impulse. I knew of a man, prominent in his locality, who, in the early period of his disease, stood in front of his house in the middle of the day, and solicited school-girls on their way to and from school. Chase, in his excellent book, refers to a sedate married man who was arrested, some time before he was adjudged insane, for an indecent assault on a colored woman, and was emulged of a large sum of money; also a professional man, who was arrested for indecent exposure, and fined by the court, then left the court-room and repeated the offense.[22]

911. Imprudent marriages.—Among the most serious consequences of these sexual aberrations are imprudent marriages. A physician, whose case is referred to by Stearns, married a mulatto woman two or three years before his friends had him placed under restraint. I was once consulted in the case of a wealthy manufacturer who, when in an advanced stage of general paresis, fell into the toils of an adventuress, a woman of more than doubtful character, and was misled into marriage with her. This man was so far advanced in his disease that he could scarcely walk or talk; he was far gone in dementia, and was totally irresponsible for his acts. Yet the clergyman who performed the ceremony said he had observed nothing wrong in the bridegroom—which might readily have been so, for clergymen are but poor observers at such times. Such cases have grave medico-legal aspects. The greatest injustice can thus be done not only to the patient, but to his family, and especially to children by a former wife. From the medical standpoint there can be no question that such a marriage, when accomplished by design on the part of a person who had good reason to know the patient's infirmity, should not be sustained by the courts.

912. The question of testamentary capacity.—The same may be said of wills and contracts. The question of testamentary capacity is involved in the case of any paretic who makes a will. Such a patient, when his disease is once declared, has not a sound and disposing mind, if by that expression is meant the ability "to understand substantially the state of his family and his affairs; the disposition of his

[21] Sankey, Mental Diseases, p. 316. [22] Stearns, Mental Diseases, p. 478.

property as made by the will; and to intend to make such disposition." These patients are peculiarly liable to yield to undue influence.[23] Nothing can exceed their pliability; and they have an impaired memory, a confused understanding, and practically no foresight. It is difficult to see how any form of lunacy can more disqualify a person for such a purpose than can general paresis. The great difficulty, as in all these cases, occurs in the early stages, when the patient's real condition is not yet fully apparent to his friends.

The law will presume every man to have testamentary capacity until the contrary be proven. Even the fact that a man has died of insanity a short time after making his will does not necessarily prove, in the eyes of the law, that he did not have capacity at the moment of signing the testament. This has been held in various forms of insanity,[24] and would doubtless be held by most courts in a case of paresis. The very elastic theory of the law about lucid intervals would be quite capable of embracing these cases. It must therefore be a question of direct proof in every individual case, and this proof doubtless must be submitted to a jury. It will not do to rely upon the fact that the testator died of paresis some months, or perhaps even years, after signing his will. It must be proved that at the moment of his signing he was so affected with the disease that he was not capable. In the *Kiedaisch Case*[25] the patient was in an asylum in 1886; was taken out in 1887; married in 1888, and made a will shortly afterwards; was in the asylum again in 1889, and died in 1890. The will was sustained. But the remission of a general paretic is by no means always a "lucid interval." A degree of mental enfeeblement persists in such remissions. (See § 902, and footnote.)

913. Acts of violence.—General paretics are capable of acts of great violence. These acts may be done impulsively and without adequate motive. Chase refers to a case reported by Campbell Clark of a man who passed a prostitute in a public park and, with a weapon in his hand, killed her on a sudden impulse. When questioned about the act some weeks later, he replied, with a self-complacent smile, "Yes, I killed three hundred of them." This tendency to boast of cruel deeds is quite characteristic of some paretics, although in most cases the deeds are, of course, quite imaginary. The imagination seems to revel in blood, but the semi-imbecile patient's visage and manner are not always ferocious in accord with the words. By reason of

[23] Chase, op. cit. p. 44.

[24] *Re Ross*, 12 N. Y. Week. Dig. 34; *Burrows* v. *Burrows*, 1 Hagg. Eccl. Rep. 109; *Chambers* v. *The Queen's Proctor*, 2 Curt. Eccl. Rep. 415.

[25] 2 Connoly, 438, 13 N. Y. Supp. 255.

their compliant disposition these patients can be led into crime, as in the case of the Austrian nobleman, Chorinski, who was instigated by his mistress to kill his wife, and died some time later of paresis.[26] Criminal negligence, or malpractice, has been charged against physicians suffering with paresis, as in the case, quoted in some books, of a Russian doctor who was sent to Siberia for giving a fatal dose of tartar emetic. Instead of giving one sixteenth of a grain, he gave sixteen grains,—a mistake easy to understand in a paretic.

914. The case of Sheriff Rowan, and the question of civic capacity.—Cases of general paresis may involve grave questions of civic capacity. One of the most noteworthy of such cases was that of Sheriff Rowan, of Philadelphia, in 1886 and 1887.

Ellwood Rowan had been elected sheriff of Philadelphia after a close and exciting canvass, during which he had been under great mental strain. After his election and induction into office he began to present the symptoms of general paresis. His condition soon became such that the gravest questions arose about his capacity to discharge the duties of his highly responsible office. When it became no longer possible to ignore his mental state, Mr. Rowan was removed to an asylum. As he was still sheriff of the county, although legally declared insane under certification, his case was referred to the legislature of the state, and a commission was appointed by that body to take testimony. The certificate of insanity had been signed by Dr. Richardson and the writer. Sheriff Rowan at that time was in the acute stage of his disease. He had expansive delusions of an extreme type. He believed that he owned a city of 4,000,000 inhabitants in South Jersey, as well as all the railroads in Pennsylvania and New York. He acted accordingly. When his family physician, in order to test him, asked him for a check, he immediately wrote one, in a scrawling hand, for ten thousand dollars. His speech and facial muscles were beginning to be affected; he could scarcely write his full name legibly, and could not read aloud intelligibly. His mental faculties were weakening, and he was incapable of attending to the smallest details of business. The case gave rise to some discussion as to the legal mode of procedure in such an emergency. The sheriff of Philadelphia, in his official capacity, gives title every year to many thousands of dollars worth of real estate; he is responsible for drawing the juries, upon whose proper selection the trial of all cases in the courts depends; and he has other important functions. The

[26] Spitzka. Insanity, p. 188.

commission took much testimony, and finally reported to the legislature that Mr. Rowan was insane and incapacitated; and he was accordingly removed from office by due process of law. The disease advanced steadily, and the patient died after a comparatively short course. In this case some attempt was made by counsel to show that a remission might occur, and allow the sheriff to resume his office, but the attempt failed.[27]

This case of Sheriff Rowan is probably the only such case on record, and forms a valuable precedent for any similar cases that may occur in the future.[27½] It is noteworthy that the legislature moved promptly to protect the public, and that no hair-splitting about "lucid intervals" and "remissions" was allowed to influence the result.[28]

[27] Legislative Record, Session of 1887, No. 41, p. 314.

[27½] It is a far cry from a sheriff to a king, but it may be proper to recall here the case of George III., who, however, did not have general paresis. He was practically deposed by Parliament on account of insanity. During his mental illness in 1788 the King's case was reported to Parliament, and a committee from each house was appointed to examine the attending physicians. Committees were also appointed to examine the law and precedents. But the King recovered, and the matter was dropped. In 1810 he had another attack, and, the facts being reported by a joint committee, the Prince of Wales was appointed Regent. Pope (Law of Lunacy, 2d ed. p. 372) gives an account of the case, and says it was somewhat parallel to the case of an infant monarch, for which precedents of procedure were more numerous. He also says that the only other case of insanity in an English king was in Henry VI.

According to Pope (p. 372) it seems that ministerial acts done by a judge who was in a state of lunacy have been held good. Pope refers to several old authorities.

[28] The following references are of special value to the medical jurist: Brierre de Boismont, Études Médico-légales sur la Perversion des Facultes Morales et Affectives dans la Period Prodromique de la Paralysie Générale, Paris, 1860; Mickle, General Paralysis of the Insane, 2d ed. London, 1886; Hammond, Remarks on Paralytic Insanity . . . with Special Reference to the Case of Abraham Gosling, 7 Med. Gaz. 289; the *Perrin Case*, quoted by Spitzka, Insanity, 1883, p. 202, footnote; Mendel, Die Progressive Paralyse der Irren, Berlin, 1880; Chase, General Paresis, 1902; Voisin, Traité de la Paralysie Générale des Aliénés, Paris, 1879; Tuke, Dictionary of Psychological Medicine, article on "General Paralysis of the Insane," by Mickle; Savage and Goodall, "General Paralysis of the Insane," in Allbutt's Syst. of Med. Vol. VIII. p. 690 (with many references to recent literature); Mickle, "Critical Digest on General Paralysis," in Brain, Spring No. 1894.

CHAPTER XLIII.

SYPHILITIC INSANITY.

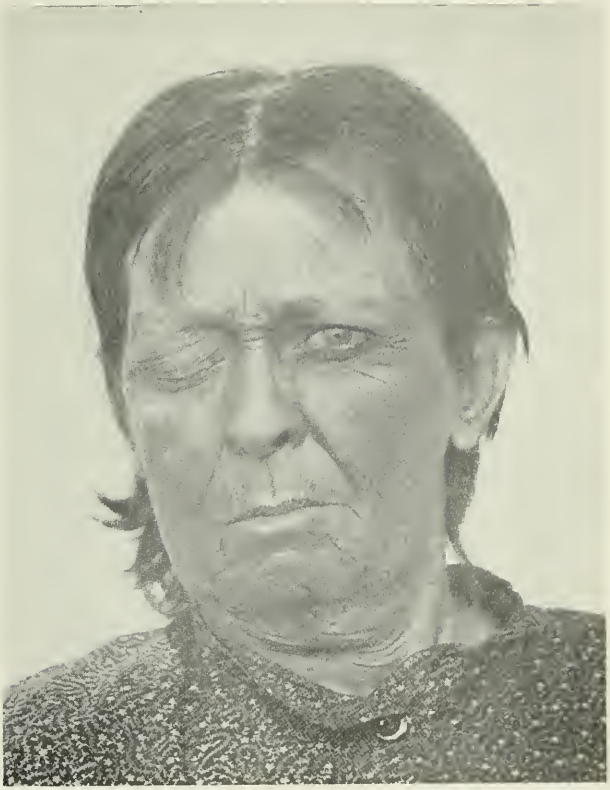
I. The medical aspects of syphilitic insanity.
915. The destructive action of syphilis.
916. Its wide extent in the nervous system.
917. The mental symptoms.
918. Syphilitic dementia.
919. The resemblance between syphilitic insanity and general paresis.
II. The medico-legal aspects of syphilitic insanity.
920. These are such as arise from dementia under all circumstances.

I. The medical aspects of syphilitic insanity.

915. The destructive action of syphilis.— The poison of syphilis sometimes acts with destructive energy upon the brain tissue. It causes an inflammation, beginning in the coats of the small blood vessels, and extending to the contiguous structures; as, for instance, the membranes, the connective tissue, the supporting tissue, or neuroglia, and finally to the essential nervous tissue, or the nerve cells themselves and their prolongations. It produces in time an exudation or deposit of a gummatous material, and this, by its injurious pressure, and interference with the functions and nutrition of the brain elements, still further causes morbid phenomena.[1]

916. Its wide extent in the nervous system.—This destructive action of the syphilitic poison may occur in all parts of the nervous system, both in the brain and spinal cord, and it thus causes many and various symptoms. These symptoms, therefore, are by no means always mental. They may, for instance, consist of various kinds of paralyses, neuralgias, and interference with sensation, according to the location and extent of the lesions. There may thus be tumors of the brain, affections of various nerves, as the optic nerves, meningitis, and widespread diseases of the spinal cord; and these may be associated in various ways. In fact, it is uncommon for purely mental symptoms alone to result; such mental symptoms are generally asso-

[1] Dercum, Text-Book of Nervous Diseases, by American Authors, Phila. 1895, p. 597; Berkley, Ment. Diseases, 1900, p. 699; Oppenheim, Diseases of the Nervous System, translated by Mayer, p. 87.



A case of syphilitic insanity, with paralysis of the muscles of the right eye.

ciated with the symptoms of organic changes in the brain. In other words, syphilis of the brain is an organic disease not limited to the purely mental sphere.[2]

917. The mental symptoms.—As we are concerned in these pages with mental diseases only, we shall merely point out briefly the results of syphilitic infection of the brain.[2½]

Headache is an almost constant symptom. It may be so acute and constant as to interfere with the patient's sleep; in fact, nocturnal headache of a peculiarly intense kind is often observed in brain syphilis.

Insomnia, or its opposite, somnolence, is also observed. The insomnia, as just stated, may be an accompaniment, or result, of the headache. A morbid somnolence is, if anything, more common:[3] the patient sleeps all night, and dozes all day, and seems almost like a person under the influence of some drug. In some of these cases there is naturally more or less confusion and stupor. The patient is not himself, and cannot always be roused, or kept roused, to attend to his ordinary avocations. He acts mechanically or almost automatically.[3½]

Inflammation of the optic nerves is common in these cases, and in some of them the small muscles moving the eye-balls are paralyzed,—a condition known as "ophthalmoplegia."[4] The pupil is variously affected.

918. Syphilitic dementia.—When the syphilitic inflammation is diffused over a large surface of the brain cortex, a condition known as syphilitic dementia results.[5] The patient is changed in character, apathetic, dull, morose, inattentive, and irritable. In some cases

[2] Heubner, in Zeimssen's Cyclopedia, Vol. XII.

[2½] Shakespeare has described the physical rather than the mental symptoms of syphilis; but he should never be quoted on the subject without apologies to the legal and clerical professions:

> Consumptions sow
> In hollow bones of man; strike their sharp shins,
> And mar men's spurring. Crack the lawyer's voice,
> That he may never more false title plead,
> Nor sound his quillets shrilly: hoar the flamen,
> That scolds against the quality of flesh,
> And not believes himself; down with the nose,
> Down with it flat; take the bridge quite away
> Of him that, his particular to foresee,
> Smells from the general weal: make curl'd-pate ruffians bald;
> And let the unscarred braggarts of the war
> Derive some pain from you. Plague all;
> That your activity may defeat and quell
> The source of all erection.
> —Timon of Athens, Act iv. Sc. iii.

[3] Krafft-Ebing, Traité Clinique de Psychiatrie, traduit par Laurent, p. 702.

[3½] The patient behaves like "a restless nocturnal automaton rather than a man."—H. C. Wood, quoted by Osler, Practice of Medicine, 1892, p. 173.

[4] See papers by the author in Annals of Ophthalmology, Jan. 1898; Philadelphia Medical Journal, June 3, 1899; and University Medical Magazine, October, 1899; also Jonathan Hutchinson, Syphilis, p. 197, *et infra*.

[5] Drysdale, Syphilitic Insanity, Brit. Med. Journ. abstracted in 7 Med. Gaz. p. 548.

there may be melancholic depression;[5½] but, as a rule, there is not much emotional disturbance; the tendency is simply to a weakening of the mental faculties. Memory is impaired, and the intelligence affected. The patient is no longer able to attend to business. He is a sick man, with a meningitis and inflammation of his brain tissues. In some cases there are delusions, either of a depressive and persecutory kind, or of the expansive type, as seen in general paresis.

919. The resemblance between syphilitic insanity and general paresis.—Syphilitic insanity, in fact, has very close analogies with general paresis, and some authorities regard the former as merely a variety of the latter; but while there are close resemblances, there are also some possible distinctions. For instance, in syphilitic insanity there is not the same tendency to the formation of expansive delusions. But the radical distinctions are two in number. In the first place, syphilitic dementia does not have the same characteristic evolution and course that are seen in general paresis; and, in the second place, the prognosis is more favorable in the former than in the latter disease. Under active antisyphilitic treatment the dementia may entirely disappear,[6]—a result which is practically unknown in a pure case of general paresis. I once had under my care a business man in whom a very threatening syphilitic dementia had occurred. He was incapacitated for business, his mental faculties being much weakened and clouded; yet he entirely recovered under treatment, and has now for some years been actively and successfully engaged in his work. Still, it would not do to say that such a favorable result is attainable in all cases. Not a few cases are fatal; especially if there are gross lesions of the brain.

In brain syphilis, or syphilitic dementia, we are more apt to see localized palsies, as of some of the eye muscles, and the intense headache, than in general paresis.[7] Nevertheless, the diagnosis between the two conditions is often difficult, or even impossible. The two conditions are allied, and doubtless often identical, or the one shades into the other, as should be expected if general paresis is so often a syphilitic disease as statistics tend to show.[8]

[5½] Fournier (International Clinics, Vol. III. 14th Ser. 1904) refers to eighteen cases of suicide due to syphilis in his own practice. Self-destruction may be due to a feeling of despair of recovery, or to the melancholic depression.

[6] Dana, Text-Book of Nervous Diseases, 4th ed. New York, 1897, p. 462.

[7] Savage, Insanity, p. 341.

[8] It is a remarkable fact that Bevan Lewis (Text-Book of Mental Diseases, 2d ed.), who has written the most exhaustive account of mental pathology and morbid anatomy in the English language, does not give a separate description of brain syphilis. He apparently includes all syphilitic lesions in his account of general paralysis of the insane. The word "syphilis" does not even find a place in his index. As a contrast, see

II. The medico-legal aspects of syphilitic insanity.

920. These are such as arise from dementia under all circumstances. —In well marked cases the patients are clearly incapacitated by reason of their stuporous and confused condition, their enfeebled mental faculties, their inability to concentrate the attention, and their physical suffering. The question of responsibility is one to be decided in each case by the individual symptoms. Criminal complications are not so likely to occur as are questions of capacity in civil matters.[9]

Berkley's work, Mental Diseases, p. 210; also, Tuke's Dictionary of Psychological Medicine, Vol. II. p. 1252.

[9] As an instance of the virulence of the syphilitic poison, one of the author's cases is in evidence. A young man had acquired syphilis before his marriage, and after that event he developed syphilitic dementia. He continued in this state for some years, spending a part of the time in an asylum. He had fortunately had no children, but after his discharge from the asylum, somewhat improved, his wife conceived and bore a well-developed infant. This child, soon after birth, developed hereditary syphilis, and the wife, who had not before been infected, soon had an unmistakable syphilitic skin disease. She had apparently contracted this disease through her own infant.

CHAPTER XLIV.

ALCOHOLIC INSANITY.

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952½. The commitment of chronic inebriates.

I. The medical aspects of alcoholic insanity.

921. **The poisonous effects of alcohol.**—Alcohol is an active poison to the nervous system, and when used habitually and in excess it is

almost sure, soon or late, to lay its victim low. In modern life the ravages of alcohol are greater than was the case among the ancients, for the reason that strong alcoholic drinks are now distilled and marketed at a low price. Magnus Huss[1] was one of the first to treat this subject in detail. He described the Swedish dram-drinkers, some of whom consumed as much as twenty glasses of raw brandy every day.[2] Since Huss wrote his book there has grown up an immense literature on this subject, for alcohol is fully recognized to-day, both by pathologists and by jurists, as supplying one of the great problems of civilization.[3] As a factor in crime it is not less important than as a factor in disease.[4]

922. These effects are acute and chronic.—The effects of alcohol on the nervous system may be described as "acute" and "chronic,"—a distinction which has special importance from a medico-legal standpoint.

923. Simple acute poisoning.—First among the acute effects is the simple acute poisoning, or the ordinary intoxication. This is too well known to require minute description. In the first stage there is exaltation, not unlike a mild mania; the ideas are accelerated and slightly incoherent; the sense of well-being is increased; the emotions stimulated; and there is motor excitement and a tendency to talk. In the second stage these symptoms are increased to the extent that the victim loses self-control and self-consciousness; the ideas are much confused, memory impaired, and violent and impulsive acts are more common. In the third stage a condition of stupor, or profound sleep, passing even into a temporary coma, supervenes; and the attack ends after some hours, when the person awakes, with a sense of *malaise,* nausea, headache, and a dry mouth and throat. A period of depression results, lasting for some hours or days.

924. Delirium tremens.—A much graver affection is acute delirium, —the so-called delirium tremens. This occurs in persons who have been drinking to excess for a period of some days or weeks: it is the climax, as it were, of a protracted acute poisoning. It is seldom seen after a single short debauch, although exceptions to this rule occur in persons who are highly susceptible. In delirium tremens the immediate effects of the alcoholic poisoning may pass away, but there is left such a profound disorder of the nutrition of the brain that a delirious state continues and is kept up for days and even weeks without

[1] Alcoholismus Chronicus, Stockholm, 1851.

[2] Bevan Lewis, Mental Diseases, 2d ed. p. 345.

[3] The Index Catalogue contains eleven large, closely-printed pages, of two columns each, of references.

[4] Drähms, The Criminal, 1900.

the ingestion of more alcohol. Therefore, delirium tremens and some allied states stand for more than mere continued alcoholic poisoning. They represent a state of malnutrition of the brain, which is a veritable disease, and one which, although started by alcohol, does not depend on the continued use of alcohol for its further duration.

This is shown in the form called *delirium potu suspenso,*[5] in which the delirium breaks out only after the alcohol has been withdrawn. Some days may elapse after the last drink, and the patient may seem to have almost recovered from his debauch, when the delirium supervenes. This is sometimes seen in surgical cases, in which the patient, having received an injury, such as a broken bone, is denied his alcohol, does well for a few days, and then suddenly develops delirium tremens. The same is sometimes seen in pneumonia and other acute diseases.

In delirium tremens the mental functions are in entire disorder: the ideas are wandering and incoherent; the attention cannot be fixed, except, perhaps, for a moment; disturbing and terrifying delusions occur; there is loss of the sense of personal identity, and of the identity of persons, time, and place; memory is effaced; hallucinations are common, especially hallucinations of sight, such as of repulsive objects, snakes, bats, etc.; there is great motor unrest, the patient needing to be restrained; insomnia is present, and refusal of food. In these cases there is marked physical prostration, and a very common symptom is a tremor of the muscles, from which the disease derives its name. In the worst cases a typhoid state, with fever and a dry, brown tongue, sets in. Delirium tremens is always a severe, and sometimes a fatal, affection. Complete recovery, however, is possible, but repeated attacks tend to cause permanent injury to the brain.

925. The sub-acute insanity of some habitual drinkers.—This is a sort of semi-delirium; it stops a little short of an acute delirium tremens, and is kept going for days and even weeks by the continued abuse of the poison. The victim is able to be about; indeed, his frequent visits to the dram-shop are what keep adding fuel to the fire. Lasègue[6] has well described this psychosis. The patient is in a kind of dream-like state; his days and his nights are alike a nightmare; he passes from sleep to waking and from waking to sleep in a state that is not very different whether he sleeps or wakes. He is the prey of hallucinations and delusions, confused in understanding and mem-

[5] Régis, Mental Medicine, translated by Bannister, p. 488.

[6] De l'Alcoolisme Subaigu, Arch. Gén. de Méd. 1869, p. 1513.

ory, unfit to apply his mind, sometimes irritable and impulsive, eating little, and always on the verge of collapsing in a veritable delirium. This is a condition in which many chronic sots pass days at a time. It may present episodes of maniacal excitement, in which the patient is furious and dangerous; and, what is not uncommon, it may merge into a state of profound melancholia, in which the patient commits suicide.

926. Alcoholic melancholia.—A pronounced melancholia is indeed not uncommon in inebriates, and may occur in various stages of alcoholism. It follows especially after the excesses of the periodical drinker. A stuporous or atonic kind is seen also in chronic drunkards. It may begin brusquely, follow an acute course, and be characterized by hallucinations, apathy, attempts at suicide, and sometimes a prompt recovery, leaving on the patient's mind the impression of a bad dream.[7]

927. Mania a potu.—Attacks of mania, or fury, are seen in many inebriates. In some highly neurotic persons a little alcohol will cause undue excitement; what would be in most persons hilarity and mere tipsiness, becomes in them a raving fury. They smash, break, fight, and even commit murder. But in steady drinkers, also, a maniacal outburst may occur, and this differs clinically from a delirium. The patients are excited, combative, noisy, impulsive, and violent. They are not merely intoxicated in the ordinary sense, for the maniacal attack may continue for days after the alcohol is withheld. This is the disease which many writers call *mania a potu* as distinct from delirium tremens.[8] The distinction is a valid one, for the two conditions are not exactly alike, and they may have different medico-legal relations.

928. The chronic effects.—The chronic effects of alcohol on the nervous system are multiform, but they all indicate a downward course. There is, in the first place, the chronic deterioration of character so common in the inebriate. The moral as well as the mental qualities of the man suffer: the finer edge is taken off. Alcohol has been called the father of lies; it is also the father of deceit, of cruelty, of indifference, of dishonesty, and of countless moral perversions. The mental faculties become slowly and surely impaired. The man is unfitted for work or for business; he is inattentive, unreliable, with his memory impaired, his judgment weakened, and his intellect clouded. He becomes irritable and brutish,—a mere vagabond or

[7] Krafft-Ebing, Traité Clinique de Psychiatrie, traduit par Laurent, p. 627.

[8] Kerr, Inebriety or Narcomania, New York, p. 66.

loafer. Upon this state of moral and mental deterioration there are engrafted, in time, genuine forms of alienation.

929. Chronic alcoholic insanity.—The most common of these is chronic alcoholic insanity. In this disease hallucinations and delusions occur. The former are seen especially in every renewed debauch. The patient sees disgusting and revolting objects, or hears threatening or insulting voices. The delusions of the chronic inebriate are usually of the persecutory or depressive type. He becomes suspicious; he believes that people are in league against him, or that he is being poisoned. A very common form is the delusion of marital infidelity: he suspects and accuses his wife.[8½] He may also have hypochondriacal ideas, as that he is diseased, or that his organs are changed, or that he harbors insects or vermin or strange animals within him. There are progressive loss of self-control and progressive weakening of the mental faculties. This is often shown in a strange lack of what we may call initiative, or resolution. The patient talks constantly of his wrongs and oppressions, but takes no step to correct them. Clouston had for a patient of this kind an able lawyer, who declaimed daily against the outrage of his being kept in an asylum, threatened to write to the lunacy commissioners, and was invited regularly to do so, but never wrote them a line. The inebriate who accuses his wife of being faithless to him may continue to live and sleep with her as though all were well. This lack of harmony between the ideas and the acts, between the delusions and the conduct, shows the breaking up of the normal associations in the mind. In other cases, however, the condition is the reverse of this: under the influence of persecutory delusions the patient may become dangerous. He may also develop, in time, expansive delusions,—the so-called alcoholic paranoia,[9]—and come to believe himself some great and injured personage. Such patients may become most irascible, and commit acts of extraordinary brutality.

930. Alcoholic general paresis.—A form of chronic insanity in inebriates is the pseudo-paresis, described by Nasse, Moreau, and others, and observed by many.[10] This form resembles very closely general paresis, or dementia paralytica, but differs from it in the important

[8½] "Whatever may be the explanation of this, and not a few explanations have been attempted, as, for instance, that which would refer the frequency of this delusion to the failing sexual power of the individual, it is true that in both the chronic and in the acute or subacute cases this false belief holds first place." —Mills. (Unpublished paper.)

For an extraordinary case of this delusion, in quaint old English, see Hale, P. C. Am. ed. p. 709.

[9] Krafft-Ebing, op. cit. p. 637.

[10] Régis, op. cit. p. 497.

particular that the patient may entirely recover. There is the same tendency to the formation of grandiose delusions, with defects in speech and gait, muscular unsteadiness, mental weakness, inequality of the pupils, and, possibly, even some epileptic seizures. I saw such a case in a physician, the victim of both alcohol and morphin, in whom the prospect seemed very dubious, and yet recovery took place after a few weeks of wise treatment in a hospital for the insane.

931. Epilepsy in alcoholism.—Epileptic fits are sometimes observed after a debauch, even in inebriates who have not shown any mental changes as yet during their sober intervals. In a man nearly seventy years of age, now under my care, a series of epileptic fits is almost sure to occur after a period of steady but not very excessive drinking. This patient has no failure of mental power, except such slight changes as may be ascribed merely to his years. As a rule, however, the onset of epilepsy in a chronic drinker is a sign of mental failure.

932. Dipsomania.—This is the term used for the periodical craving for drink which assails some persons with the force of an overpowering impulse.[10½] It is a much-abused term, but it has a legitimate meaning. This morbid craving is seen especially in neurotic persons,—in those who are predisposed by heredity to nervous disorders. Spitzka[11] says with truth that it is sometimes allied with periodical insanity, especially mania. In its periodical and explosive character, and its complete subversion of the will, dipsomania has some resemblance to the obsessions described elsewhere, but it differs from them in being not a mere mental disorder, but rather a physical craving, or appetite. It leads sometimes to prolonged drinking spells, during which the victim may suffer with some of the acute and chronic effects of alcoholism. The real dipsomaniac comes, as a rule, of neurotic stock, in which parents or near relatives have shown insanity, epilepsy, inebriety, or other nervous disorders. His tendency to drink to excess usually begins early in life, and is periodical. The paroxysm is of sudden onset, and when it is once started nothing serves to stop it until it has exhausted itself and its victim. It is peculiarly unrestrained by any consideration of family or friends or self. After it ends there may be a period of melancholia.[12]

[10½] Magnan, "Leçons sur la Dipsomanie," in Progres Médicale, 1884.

[11] Insanity, pp. 269–271.

[12] Morel, Traité des Dégénérescences, Paris, 1857; Mercier, "Vice, Crime, and Insanity," in Allbutt's Syst. of Med. Vol. IX; Magnan, Alcoholism, translated by Greenfield, 1876; Kerr, "Narcomania, the Disease of Inebriety," Twentieth Century Practice, Vol. III. p. 115; Wilson, "Dipsomania," in Pepper's System of Medicine, Vol. V. p. 635; Kiernan, with an account of the *O'Brien Case*, in the Journ. of Inebriety, Oct. 1896.

933. Alcoholic dementia.—Finally dementia sets in after chronic alcoholic insanity. The patient is permanently impaired in memory, in understanding, in the emotions and affections, and shows also evidences of physical disease. The liver and kidneys especially suffer, the arteries are hardened, the heart muscle degenerated, and death often ensues from an epileptiform or apoplectiform attack. This last scene is the triumph of the degeneration of tissue.

934. The pathology and morbid anatomy of chronic alcoholism.—These have been studied with care. Changes are found in many tissues of the body, especially in the coats of the blood vessels, causing thickening and hardening, in the brain membranes, in the supporting tissue of the brain, or neuroglia, and in the kidneys, liver, and heart. Berkley[13] has found microscopic changes in the nerve cells in the brain, indicating a destructive process. Bevan Lewis[14] has also found widespread changes in the blood vessels, membranes, and nerve cells of the brain and other parts of the nervous system, and has described these with great accuracy and minuteness in his textbook. The evidence is abundant and clear that alcohol acts as a destructive agent on the cerebral tissues, and therefore that chronic alcoholism becomes a distinct organic disease. Alcohol can also cause an active inflammation of the nerves of the extremities, as seen in the disease known as multiple neuritis, which is sometimes associated with a wandering delirium.[14½]

II. The medico-legal aspects of alcoholic insanity.

935. Drunkenness.—It has been said that drunkenness is regarded by the church as a sin, by the world as a vice, by the law as a crime, and by science as a disease. This imposing statement is not altogether true, for drunkenness in itself, according to some authorities, is not a crime in law,[15] nor is it necessarily a disease in fact. Nevertheless, as productive both of crime and disease, it is of unsurpassed importance in the medical jurisprudence of insanity.

936. Is drunkenness a crime?—As to drunkenness being or not being a crime in law, this is not the place for an extended discussion. Certainly many legal authorities refer to it as such. Blackstone[16]

[13] A Treatise on Mental Diseases, 1900, p. 263.

[14] A Text-Book on Mental Diseases, 2d ed. p. 581.

[14½] A recent important work is "Bibliographie der Gesammten Wissenschafftlichten Litteratur über den Alcohol und den Alcoholismus," 1904. This is a collection of references to the whole literature of alcoholism; a complete bibliography to date.

[15] Clark, Analysis of Criminal Liability, p. 29.

[16] 4 Com. 26.

is an example; and Lord Mansfield[17] distinctly said that drunkenness is itself a crime.[18] But this is not a medico-legal question.

937. The proper medico-legal question is whether drunkenness is an excuse for crime.—It has usually not been so held. By the law of Pittacus,[19] intended to restrain the drunkenness of the ancient Lesbians, this vice was held to aggravate the crime, and a double penalty was inflicted,—a difficult thing to do in the case of capital punishment. But the Roman law, as Blackstone tells us, was more lenient: *per vinum delapsis capitalis pœna remittitur.* This law seems to have applied especially to soldiers, in whose cases there may have been special reasons for indulgence.[20] Still, these two ancient codes, one of the Greeks, the other of the Romans, represent the opposing views of this subject, and may serve as a text. It will be the object of the following pages to show that in Anglo-American law the tendency has distinctly been to recede from the former position, if not to assume the latter. If this has not been so in theory, it has at least been so in practice, and especially in America. The theories of the law change slowly; the courts adhere tenaciously to ancient maxims; but, even in theory, there is perceptible a modification of the old common law that drunkenness is no excuse for crime.

938. Under the common law.—There can be no doubt that, according to the common law, drunkenness does not act to mitigate the offense. The authorities are well-known and often quoted. Coke[21] says: "As for a drunkard, who is *voluntarius dæmon,* he hath . . . no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." This statement is almost as extreme as that of Pittacus: drunkenness not only does not excuse, but it even aggravates. It is doubtful whether English practice has often taken this extreme course. The courts have been content to deny the excuse, but they have not added to the penalty; although that may have been because many of these offenses have been capital; for it is impossible to hang a man more than once. Hale,[22] in a long definition, says that the drunkard has "no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." Here, it will be observed, Hale does not follow Coke, for according to him the vice does not aggravate the crime; the penalty

[17] *Chamberlain* v. *Evans,* H. of L. 1767.

[18] By the statutes 4 Jac. I. chap. 5, and 21 Jac. I. chap. 7, §§ 1, 3, the drunkard was put in the stocks for a few hours,—presumably to give him time to get sober.

[19] Anthon, Classical Dictionary, art. "Pittacus."

[20] McIlraith, Law Relating to Drunkenness, etc., p. 11.

[21] 1 Litt. 247.

[22] 1 P. C. p. 32.

is the same as though the man were sober. Hawkins[23] follows Hale in this as in other things, and says that "he who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober." Blackstone[24] merely follows Coke, and says that drunkenness aggravates the crime.[25] These are the standard authorities on this subject in the common law, and they are not strictly in accord, for two of them, Coke and Blackstone, follow the ancient rule of Pittacus, and tell us that drunkenness aggravates the crime, while Hale and Hawkins say that it is merely no excuse. This distinction is not unimportant in a medico-legal sense. It shows an advance from an extreme to a more moderate view.

939. How the law has been modified.—The *dictum* that drunkenness is no excuse for crime has been modified in two ways. In the first place, it has been allowed that, although the primary drunkenness is no excuse, yet the secondary, or chronic, effects of drunkenness may constitute the grounds for a valid defense. In the second place, it has been held that primary drunkenness can affect the intent to commit crime. These two postulates cover slightly different grounds, and will be considered here apart and in turn.

940. The difference in law between acute and chronic alcoholism.—As to the first of these, Sir Matthew Hale himself saw that there was a difference between acute intoxication and chronic alcoholism, for he said that, although frenzy occasioned immediately by drunkenness excuse not in criminals, "yet, if by one or more such practices an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes as if the same were contracted involuntarily at first."[26] Although not expressed in such nervous language as Coke's, the meaning of this passage is plain. In chronic cases the alcoholism becomes practically a disease, and is regarded as such by the law; and the legal principle that drunkenness is no excuse has given way to the idea that mental disease caused by drunkenness is in the same list as all other mental diseases whatever, and exempts from punishment. This is a thoroughly scientific conception, and reflects great credit on Lord Chief Justice Hale. It is the first indication in English law, so far as appears, that alcoholism was to be regarded in time in its true light, as a condition of disease.

[23] P. C. Chap. 1. § 6.
[24] 4 Com. 25, 26.
[25] *Nam omne crimen ebrietas et incendit et detegit.*
[26] 1 P. C. loc. cit. p. 32.

941. The courts recognize chronic alcoholism as a disease.—Moreover, this opinion of Hale's has been widely followed in the courts. It would be easier to multiply cases than to find space for them in these pages. In 1825 Justice Holroyd[27] charged that drunkenness is not insanity, "unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong." This recognizes habitual drunkenness as a cause of insanity, and thereby an excuse for crime. In the Scotch case of Alexander Milne, the Lord Justice-Clerk told the jury: "If the mind is diseased, the man is insane; and if the mind is diseased, it is no matter what has caused it, so that the insanity is actually produced and present at the time."[28] In America it has been held in case after case that when inebriety develops into a fixed and well-defined mental disease, this relieves from responsibility in criminal cases, and such cases will be regarded and treated as cases of insanity.[29] Justice Story,[30] of the United States Supreme Court, told the jury that, if the crime had been committed while the prisoner was intoxicated, he would be liable for murder; but the accused was acquitted on the ground that he had delirium tremens. Sir Fitzjames Stephen[31] told a jury that "drunkenness is one thing, and the diseases to which drunkenness leads are different things;" and he defined at length the condition known as delirium tremens, and pointed out how it would absolve from crime. In a recent American case Judge Hirzel[32] charged the jury that it was immaterial what caused mental derangement, whether the same was brought on by hereditary disease, or was the result of the excessive use of alcohol, or of any disease or other cause, or combination of causes. It is needless to multiply examples.[33]

942. The full significance of the principle.—So well established is this principle in the law that it would probably be difficult to find many cases in which a contrary opinion had been given by the courts.

[27] *Rennie's Case*, 1 Lewin, C. C. 76.

[28] Edin. Med. Journ. 1865, Vol. XI. p. 18.

[29] Clark Bell, Proceedings of the Society for the Study of Inebriety, No. 16, April, 1888 (with references).

[30] *United States* v. *Drew*, 5 Mason, 28, Fed. Cas. No. 14,993.

[31] *Reg.* v. *Davis*, quoted by McIlraith, Law Relating to Drunkenness, p. 12.

[32] *State* v. *Duestrow*, 137 Mo. 69, 38 S. W. 554, 39 S. W. 266.

[33] The following cases are quoted: *Real* v. *People*, 55 Barb. 551; *Maconnehey* v. *State*, 5 Ohio St. 77; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *Lanergan* v. *People*, 6 Park. Crim. Rep. 209; *O'Brien* v. *People*, 48 Barb. 274; *People* v. *Williams*, 43 Cal. 344. See §§ 222–226, *ante*, for a full discussion of the effect upon responsibility for crime of insanity produced by intoxication.

Let us examine briefly, therefore, into the full significance of the principle. Justice Stephen, as we have seen, tells us that there is a difference between drunkenness and the disease to which drunkenness leads. So there may be, but it is merely a difference of degree, not of kind. The man who drinks for a day and gets drunk is not separable by any hard and fast line from the man who drinks for a week and gets delirium tremens. There is a practical difference which no one will deny, but it is still only a difference in degree. In delirium tremens the action of the poison has been longer continued, and it has set going certain morbid changes in the brain cells which require a longer time for repair than after an ordinary spree; but this fact only shows that in the one case there is, if anything, a greater moral fault than in the other; for it would seem that the man who drinks ten times as much as another man ought not to be held more innocent than the latter, if the legal maxim is true that drunkenness is no excuse for crime. He who is ten times more drunk cannot, in reason, according to that rule of law, be ten times more innocent.

This is probably the only instance in law in which the more a man breaks the law the more innocent he becomes. It is an example of a legal maxim being proved false by the very condition which ought to prove it true. If drunkenness is no excuse for crime, it contains no element whatever of mitigation that can be developed by the increase of the drunkenness which contains it not.

943. Drunkenness and irresponsibility.—The truth is that drunkenness contains all the elements that go to make irresponsibility. This is the scientific view, and the common-sense view, and, in some circumstances, as will be shown, it is the legal view also. The capacity to form a criminal intent requires two things, at least: First, the knowledge that an act is wrong; and, second, the power to choose.[34] Now these two elements of responsibility are impaired, or even destroyed, in drunkenness, although, as drunkenness is a variable state, they are not impaired always to the same degree. This subject is placed in a clear light if we take the case of intoxication from some other poison than alcohol. In the delirium of fever there is a condition analogous to alcoholic intoxication, and yet no one would question for a moment that even in mild forms of febrile delirium the moral accountability is lost. Moreover, the law fully recognizes this fact in alcoholic intoxication itself; for it provides that when the

[34] Clark, An Analysis of Criminal Liability, 1880. Any reader who attempts to follow the learned and subtle analysis in this work must be convinced that it is not in the capacity of a drunken man to have a criminal intent.

intoxication is involuntary, the person is exempt. All the old authorities—Coke, Hale, Hawkins, Blackstone—are careful to state that the drunkenness must be voluntary in order to be no excuse for crime. If a person be made drunk against his will, he suffers no penalty for breaking the law while in this state.[35] What is this but a clear acknowledgment that a drunken person is not accountable?

Hale[36] says: "If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth a temporary or permanent phrenzy, as aconitum or nux vomica, this puts him into the same condition in reference to crimes as any other phrenzy, and equally excuseth him." From this it is clear that the law recognizes that acute poisoning takes away a person's liability for crime. Now, as alcohol causes an acute poisoning, it must also take away such liability; and to this proposition the law assents, provided the alcohol is administered against the person's will; but alcohol acts in the same way, whether it is given with or against the consent.

944. Drunkenness destroys responsibility in fact if not in law.—The proof that acute drunkenness destroys the two elements necessary to form a criminal intent is not hard to see. The incoherence of ideas, the confusion of mind, the disordered emotions, the moral obliquity, the loss of identity of person, time, and place, the obliteration of memory, the loss of self-control, the delusions, the involvement of the senses, the excitement, or at times the stupor,—all these are the symptoms of acute poisoning by alcohol; and they are destructive of the legal elements of responsibility.[36½]

945. The motive of the law in holding the drunkard accountable.—It must be apparent, therefore, that the motive of the law in declaring that drunkenness is no excuse for crime is not based upon the exact state of facts, but upon some legal exigency. As this principle is so widely accepted in various codes, there must be some universal reason for it, and it will not do hastily to criticize what has been inspired by the wisdom and justice of the ages. In the final analysis this principle seems to be based on the opinion that an inebriate is not merely to be held accountable for his primary offense, which is the drunkenness, but also for the results that flow from it. It is thus a purely ethical principle, and one which is assumed to cover

[35] Balfour Brown, Med. Jurisp. Ins. p. 312.

[36] Op. cit. p. 32. Sir Matthew Hale is not to be criticized for calling nux vomica a brain intoxicant, nor does it impair his argument; but this drug does not act in this way. It is a poison to the spinal cord largely.

[36½] Winslow (Plea of Insanity) has some good illustrative cases, pp. 68 *et seq.*

a wider ground than is occupied by the mere material facts of intoxication. Whether this is always wise or justifiable is another question. Paley, the moral philosopher, thought not, and the rulings of many courts could be cited to show that there is often a doubt about it, even in the judicial mind.[37]

946. A modification of the old common-law doctrine.—This brings us to the second postulate; which is, that there has been a tendency in the courts to recognize that drunkenness does affect a person's responsibility. It is remarkable, however, that the courts almost universally profess to adhere to the old principle, even while, in the same breath, some of them point out in what ways it fails to hold good. In the first place, it has been widely held that drunkenness can be urged to show a want of criminal intent. Justice Wightman[38] said that "the mere fact of drunkenness . . . is a material fact in order to arrive at a conclusion whether or no the prisoner really intended to destroy his life." As affecting malice, drunkenness can be taken into account.[39] As affecting premeditation, the fact of intoxication was held to be a circumstance proper to be considered,[40] but this has been denied in another English case.[41] In one case it was even held that the prisoner could be found guilty of the offense, but not of the intent, if he were so drunk as not to have control over his faculties.[42] As affecting apprehension, if a drunken man thinks he is attacked and in danger, even though he be in error, his intoxication is a factor to be considered;[43] but it was held by Baron Alderson[44] that the kind of weapon he uses is an indication of whether or no a drunken man has malice, for, if he merely uses a stick, he is not so guilty as if he uses a more dangerous implement. This is making a fine distinction in the case of a man who is too drunk to know fully what he is doing.

947. The rulings in American courts.—It has been decided in not a few American courts that in cases in which a specific intent is essential to constitute a crime, intoxication is a matter for consideration, and is competent evidence on the question whether the defendant was capable of forming such an intent or purpose at the time the

[37] Archbold (Crim. Pr. & Pl. 19th ed. Lond. p. 19): "It has been said that upon an indictment for murder, the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated." *Rex* v. *Grindley*, 1 Russell. Crimes, 8; *Rex* v. *Thomas*, 7 Car. & P. 817; *Rex* v. *Meakin*, 7 Car. & P. 297. But see *Rex* v. *Carroll*, 7 Car. & P. 145.

[38] *Reg.* v. *Doody*, 6 Cox, C. C. 463.

[39] *Rex* v. *Thomas*, 7 Car. & P. 817, also *Pearson's Case*, 2 Lewin, C. C. 144.

[40] *Rex* v. *Grindley*, cited in 1 Russell, Crimes, 6th ed. p. 144.

[41] *Rex* v. *Carroll*, 7 Car. & P. 145.

[42] *Reg.* v. *Cruse*, 8 Car. & P. 541, 2 Moody, C. C. 53.

[43] *Rennie's Case*, 1 Lewin, C. C. 76.

[44] *Rex* v. *Meakin*, 7 Car. & P. 297.

act was done.[45] Drunkenness as a matter of fact is a proper subject for the consideration of the jury when it affects intent. Still more remarkable is the *dictum* that if deliberation and premeditation are necessary to constitute crime, and drunkenness excludes them, then the crime charged is not excused by the drunkenness, but is regarded by the law as not in fact committed. This is an attempt to save an old principle, but looks too much like a quibble. It says, in effect; not that the drunkard is excused, but that if he were so drunk as not to be able to form a criminal intent, he could not have committed a crime at all. The act would thus be nothing more than in the nature of an accident.[45½]

948. Drunkenness may reduce the grade of crime.—Again, evidence of intoxication may operate to reduce the grade of the crime, and has thus operated in numerous cases. Thus, the jury, in many of our American states, may consider the evidence of intoxication as a circumstance to show that the act was not premeditated, and to rebut the idea that it was done in the cool and deliberate state of mind necessary to constitute murder in the first degree. If the evidence shows that at the time of committing the act the accused was so intoxicated that his faculties were prostrated and he was rendered incapable of

[45] For a full discussion of this question see §§ 227–243, *ante*. See also McIlraith, Law Relating to Drunkenness, for a full discussion of the English cases; Kerr, Inebriety, or Narcomania, also, for much learning and compilation on this subject; and Bishop, Crim. Law, chap. xxvii.

[45½] Some of these rulings have been embodied in statute; as, for instance, in New York: "Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." N. Y. Penal Code, § 22, edited by Parker.

In a case of burglary it is not error to instruct the jury that they may take into consideration the intoxication of the defendant, in determining the intent with which he entered the building. *People* v. *Burns*, 2 N. Y. Crim. Rep. 415.

Parker, the editor of the N. Y. Penal Code, gives the following references to cases in which intoxication was considered by the jury in determining intent: *O'Brien* v. *People*, 48 Barb. 274; *People* v. *Conroy*, 33 Hun, 119; *People* v. *Burns*, 2 N. Y. Crim. Rep. 415; *People* v. *Fish*, 125 N. Y. 136, 26 N. E. 319; *People* v. *Leonardi*, 143 N. Y. 360, 38 N. E. 372; *People* v. *Corey*, 148 N. Y. 476, 42 N. E. 1066; *People* v. *Martin*, 33 App. Div. 282, 53 N. Y. Supp. 745.

But, as showing how contradictory the law is on this subject, this same New York code, in the same section, prescribes that, "no act committed by a person while in a state of intoxication shall be deemed less criminal by reason of his having been in such condition;" and the following references are given: *People* v. *Pearce*, 2 Edm. Sel. Cas. 76; *People* v. *Jones*, 2 Edm. Sel. Cas. 86; *People* v. *Batting*, 49 How. Pr. 392; *People* v. *Eastwood*, 14 N. Y. 562; *People* v. *Rogers*, 18 N. Y. 9; *Kenny* v. *People*, 31 N. Y. 330; *Friery* v. *People*, 54 Barb. 319; *Lanergan* v. *People*, 6 Park. Crim. Rep. 209; *People* v. *Porter*, 2 Park. Crim. Rep. 14.

It is difficult, from a scientific standpoint, to conceive how two statements can be more contradictory. It amounts to saying that, although drunkenness is no excuse for crime, nevertheless it may affect the intent to commit crime, and therefore excuse!

forming a specific intent to take life, his offense may be lessened to murder in the second degree; and, in the absence of any intent to kill, to manslaughter in some of its grades.[46]

949. A departure from the old maxim.—A careful study of the cases, both in England and America, as collected by such writers as McIlraith, Kerr, Bishop, and the various encyclopedias, shows conclusively that, although there is not unanimity among the judges, there is a wide departure, on the whole, from the old legal maxim that drunkenness is no excuse for crime. The language of the bench is often guarded, and the old maxim is invariably produced, but the fact that the old principle no longer satisfies the judicial conscience in all cases is as clear as the English language, somewhat veiled and mystified, can make it.

950. Degrees of drunkenness.—There are many degrees of drunkenness, from a mild exhilaration to a profound intoxication; and of course not all of these will affect equally a man's capacity to form a criminal intent.[46½] This is a question for the jury in individual cases. So, also, of the various forms of alcoholic insanity: the courts will judge these cases according to the rules applicable to other forms of mental disease.

951. Drunkenness as affecting civil capacity.—In civil cases the English law takes a much more indulgent view of drunkenness than in criminal cases. This is exactly in accord with its position in reference to insanity in general. A state of mind which will not excuse a man for crime will absolve him from some of his contracts. This attitude of the English law is another conclusive proof that, under some circumstances, it does fully recognize that drunkenness destroys a person's responsibility. A drunkard who might be hanged as a responsible being for homicide will yet be released from the contracts into which he has entered while drunk. "It is the state and condition of the mind itself that the law will notice, and not the causes that produced it."[47] This was said in a civil, not a criminal, case. Drunkenness as an element of incapacity to do a legal act is part of English law.[48] The principle is the same in all civil cases; namely, that the party was, at the time of entering into the legal act, incapable of giving that free and voluntary assent which the law requires.

But these cases have often turned on the question of fraud instead

[46] *Ante*, §§ 232, 234.
[46½] See *ante*, §§ 233, 235.
[47] *Bliss* v. *Connecticut & P. Rivers R. Co.* 24 Vt. 426.
[48] McIlraith, op. cit.

of incapacity, and this because the English law formerly denied a man's right to stultify himself by alleging his own disability.[49] This, however, no longer holds, for, as Baron Pollock[50] has said: "The rule, as above laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defense to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it." According to Pothier,[51] the essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract. Baron Alderson[52] said of a drunkard signing a contract: "It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism." Lord Ellenborough[53] said of an intoxicated person, "He had not an agreeing mind." [54]

It is needless here to multiply cases; the authorities are readily accessible,[54½] and we are only interested in the principle involved; but it must strike the medical reader, at least, as inconsistent to hold the drunkard responsible for his acts, and yet to release him from his contracts.

952. Testamentary capacity during drunkenness.—What has been said of capacity in civil cases in general applies equally in the case of testamentary capacity. If a man is so drunk as not to know what he is doing, he is not competent to make a will; but here nice questions arise as to the degree of drunkenness necessary to incapacitate. Whether intoxication did or did not exist in the requisite degree to vitiate the act must depend in each case upon a due consideration of all the circumstances of that case in particular.[55] In view of the unwillingness of courts to set aside wills, it might be expected that even a considerable degree of drunkenness would not be allowed to incapacitate. It seems to be held that a man may be moderately drunk, yet capable. Opinions on this subject may differ.[56]

[49] Co. Litt. Lib. III. Chap. VI. § 405.

[50] *Molton* v. *Camroux*, 2 Exch. 501, 18 L. J. Exch. N. S. 68. 12 Jur. 800.

[51] On Obligations, quoted by McIlraith.

[52] *Gore* v. *Gibson*, 13 Mees. & W. 624, 14 L. J. Exch. N. S. 151, 9 Jur. 140.

[53] *Pitt* v. *Smith*, 3 Campb. 33, 13 Revised Rep. 741.

[54] See also the American case of *Barrett* v. *Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691.

[54½] See *ante*, §§ 20–24.

[55] See *ante*, §§ 91–94.

[56] "He that is overcome by drink, during his drunkenness is compared to a madman, and therefore if he make his testament at that time, it is void in law; which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of his reason and understanding; otherwise, albeit his understanding is obscured and his memory troubled, yet he may make his testament being in that state." Swinburne, p. 2, § 6; quoted by Kerr, op. cit. p. 386.

952½. The commitment of chronic inebriates.—The fact that the law has been gradually adopting the scientific view of alcoholism as a disease is shown in the provision made in some states for the commitment of inebriates to asylums or hospitals. These persons are practically placed on the same ground as the insane, and are deprived of their liberty for their own good and the good of society. Until this view is universally adopted, and such measures are enforced in every civilized country, it will be a hopeless task to combat the ravages of alcohol. The chronic inebriate is no more entitled to his liberty, which he abuses, than is an insane man; for in fact, he often is insane, or is always in jeopardy of becoming so. In Pennsylvania a comprehensive act has been passed by the legislature, providing for the commitment of the chronic drunkard and the narcomaniac.[57]

[57] Act of Assembly, approved April 16, 1903, P. L. 153.

An Act to Authorize and Provide for the Commitment of Persons Habitually Addicted to the Use of Alcoholic Drink or Intoxicating Drugs to a Proper Hospital or Asylum for Restraint, Care, and Treatment.

Sec. 1. Be it enacted, etc., That from and after the passage of this act, it shall be lawful for any person so habitually addicted to the use of alcoholic drink, absinthe, opium, morphin, chloral, or other intoxicating liquor or drug as to be a proper subject for restraint, care, and treatment in a hospital or asylum, or for at least two persons, being the wife, husband, parent, child, children, or next friends of such person, to apply by petition to the court of quarter sessions, or to any magistrate or justice of the peace of the proper county, setting forth the facts, upon oath, and requesting the commitment of such person to a proper hospital or asylum for restraint, care, and treatment; and such petition shall be accompanied by the affidavits of at least two physicians, based on examination by them of the alleged drunkard, setting forth the condition of such person, and stating that, in their opinion, restraint, care, and treatment in a hospital or asylum will be a benefit to such person. Whereupon the said court, magistrate, or justice shall issue a warrant to bring before them, on a day certain, the petitioner, both physicians, and the alleged drunkard; and a hearing shall then be had, and if the facts set forth in the petition and affidavits are proved to the satisfaction of the judge, magistrate, or justice, it shall be the duty of the court to commit such alleged drunkard to a proper hospital or asylum, for restraint, care, and treatment, until, upon further hearing, the said court, magistrate, or justice shall be satisfied that such restraint, care, and treatment are no longer beneficial to the person committed as aforesaid. Provided, that such restraint shall not be continued in any case for a longer period than one year. And provided, that no person shall be committed under the provisions of this act, or be admitted into any hospital or asylum, until payment has been made or security has been given to the managers of the hospital or asylum, satisfactory to them, to pay the proper charges for the board, care, and treatment of the alleged drunkard, and also to indemnify the said managers from all cost and expense. And provided, that all commitments under this act shall be reviewable by proceedings under writ of habeas corpus, which may be sued out, at any time, by any person restrained hereby, or by any one acting for or on behalf of such person.

CHAPTER XLV.

ACUTE DELIRIUM.

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I. The medical aspects of acute delirium.

953. A statement of the disease.—There is seen occasionally a form of mental disease which resembles closely the delirium of fever; such delirium, for instance, as occurs in typhoid fever, pneumonia, and other acute infectious diseases. In this form, however, there is no such definite disease to which the delirium can be traced. In other words, the delirium exists, as it were, of and by itself; it constitutes the whole of the clinical picture; although exceptions occur, of which due notice must be taken. As, however, an active delirium is a common symptom in a great variety of diseases, and can therefore be due to a great variety of causes, so the mental disease here described as "acute delirium" is presumably not always due to one and the same cause. The evidence accumulates, indeed, that acute delirium is always a symptom of some profound disorder of the system; and probably, in most cases, of some form of infection,—an infection, however, which need not always be the same.

954. Its history.—Acute delirium was first described as a distinct disease by Dr. Luther Bell,[1] an American physician; and from him it is often called "Bell's mania." Because of its resemblance to the active delirium seen in typhus fever, it was soon afterwards named "typhomania;" but this name must not be taken to indicate that there is a necessary connection between this disease and typhus or other fever. The affection is also called "delirium grave," and sometimes "acute delirious mania."

955. A severe affection.—Under this multiplicity of terms a form of serious brain affection, characterized especially by delirium and rapid exhaustion, tending to death, has been described by various authors. Some writers, with their passion for clinical differentiation, have probably included kindred cases of a mild type under such titles as "stuporous insanity" and "confusional insanity." The type of the disease is well exhibited in the delirium which attends typhoid fever and other infectious diseases, and the morbid process is probably not dissimilar. This disease, or, properly, class of diseases, has also been described under special names, according to its causation. Thus, puerperal mania, post-febrile insanity, post-operative insanity, septicemia, exhaustion from over-work, and poisoning from sewer-gas and other agents, have all included cases of this acute delirious condition. Cases of delirium tremens have sometimes been confused with it.[2]

956. A rapidly fatal disease in some cases.—Some authors include in "delirium grave" only rapidly fatal cases, while they include less severe, long-continued, and curable cases under the term "acute delirious mania." These mere clinical distinctions are too often arbitrary, and are entirely uninstructive as to the exact causation. I have seen one case which proved fatal in less than three days, while another, differing only in severity, extended over several weeks, and the patient recovered. In both these cases the condition was a typical delirium, with impaired secretions, brown tongue, rapid pulse, variable temperature, and exhaustion, with emaciation. There is no sufficient reason to place these cases in separate classes, with distinctive names, simply because one patient died and the other lived. So, again, the type of the delirium may vary as well as its severity. One case may be of a low, muttering form, tending to stupor, coma, and death, as has been reported after some of the exanthematous diseases, such as scarlatina and small-pox; another may be of an extremely vio-

[1] At the meeting of the Association of Superintendents of American Asylums, in 1849.

[2] See the author's paper on "Acute Delirium.—Probably an Infectious Process," in the Medical News, Vol. LVIII.

lent type, with great motor disturbance; another may exhibit a confusion of intellect, with active hallucinations, and persist for weeks, with final recovery, as is seen frequently after childbirth. These latter cases fall properly under the term "confusional insanity," described elsewhere in these pages. In fact, these various grades merge into each other, and there does not seem to be sufficient ground yet for a classification which shall be final, especially as the active cause is still practically unknown.

957. The cases vary.—The symptomatology of these cases varies, but presents a sufficient number of resemblances to constitute a simple, broad class. The mental symptom is usually a wandering delirium; or, in grave cases, an active, combative, or furious maniacal excitement. In milder cases the attention may be momentarily arrested, and a question or two answered; but the mind soon lapses into more or less complete object-unconsciousness. Subject-consciousness is much confused, and is apt to be dominated by visual and aural hallucinations. From this stage all grades of delirium up to complete stupor and coma are observed. The physical state accompanying the delirium is usually that which is spoken of as "typhoid," and grows more marked the longer the acute stage lasts. The tongue becomes dry and brown, and sordes form. The pulse is rapid and compressible. There are muscular unsteadiness, tremor, and inco-ordination. The temperature occasionally rises, but not in all cases, and in my experience pursues no regular course. The gastrointestinal tract is not always involved, except that there is aversion to food. In puerperal cases of this type there may be foul lochia and tenderness on pressure over the uterus, but these symptoms are not constant. In two well-marked cases of delirium following childbirth I could discover no focus of septic infection, although I searched for it. In one puerperal case, seen in the Pennsylvania Hospital for the Insane, the patient's active delirium was accompanied with anemia, emaciation, and a brown, dry tongue. She had at first fleeting delusional ideas, and rapidly became immodest, restless, and hard to control. She talked incoherently, but later had a fixed, staring gaze, with dilated pupils, and would not respond to questions. There was no abnormal soreness, and no fever. The blood count showed that the red corpuscles were reduced 20 per cent. It is usual to call such cases merely examples of "puerperal insanity;" yet their likeness to

p. 122, from which a part of this chapter is abstracted.

acute delirium, especially when they are severe, is too great to be ignored. Such cases sometimes run a rapid "typhoid" course, and the patients die; but in the main the prognosis in puerperal cases is good.

958. Post-febrile cases.—In some cases happening after acute fevers, such as typhoid fever or smallpox, the post-febrile insanity, as explained elsewhere, is practically continuous with the delirium so commonly seen in these diseases. As the primary disease subsides, it is found that the brain cells have not recovered from the toxemia, and a psychosis results which may pursue a variable course, usually as a confusional insanity, but sometimes as a more pronounced delirious mania. These cases are of special interest, because it is not to be doubted that they are due to infection; hence in them the action of a blood poison on the brain may be observed, and important hints and analogies supplied for the understanding of similar cases in which infection can only be surmised, not demonstrated.

959. A fatal case.—The rapidly fatal case which I once saw was as follows: A. B., a man aged thirty-nine years, of fine physique and in robust health, was seized with acute delirium on a Saturday, at midnight, and died on the following Tuesday morning, having lived less than sixty hours after the onset. He was at first acutely maniacal, with what seemed like hysteroidal symptoms, but his attention was held with difficulty, and but for a moment. There was great motor disorder, so that the patient had literally to be held in bed. He struggled, resisted, spoke not a word, had staring eyes, refused food, and seemed at times rather emotional and histrionic. His pulse at first was strong and good. His temperature varied, without regularity, and once rose to 103°; it was sometimes normal. His urine was not albuminous, nor did it contain other evidence of disease of the kidneys. He sank rapidly, as though under the influence of some baleful intoxicant; became comatose, and died. In this case there was no history of alcoholism, syphilis, lead poisoning, malaria, or any infectious disease. The delirium struck the man down in the midst of perfect health, and killed him rapidly. The autopsy revealed to the naked eye nothing but congestion of the membranes of the brain, and white streaks along the course of the small blood vessels (in what are called the perivascular sheaths), which probably indicated the action of some infectious organism.

This was a typical case of acute delirium, or "delirium grave." It came without warning and without apparent cause; its onset was abrupt, or explosive; its symptoms were violent; its tendency from the first was towards death; and it proved rapidly fatal.

960. A second fatal case.—In a second case the progress was not quite so rapid, but the result was likewise fatal. C. D., a man aged forty-three years, lay for more than two weeks in a stuporous delirium. He was aroused with difficulty. His tongue was dry, brown, and hard, and his pulse feeble; but there were no other symptoms to guide in forming a diagnosis. The patient's temperature seldom, if ever, rose above normal. His urine was frequently examined with all tests, and with negative results. Alcohol and lead were not factors in the case. Syphilis was excluded as well as it usually can be, and the post-mortem lesions did not indicate this infection. The general appearance of the patient was somewhat like that of a man profoundly ill with typhoid fever; but the afebrile temperature, the absence of abdominal symptoms and eruption, negatived such a diagnosis. There was no history or appearance of injury to the head. The man gradually failed and died. At the autopsy a thrombus, or coagulum, was found in the longitudinal sinus of the brain, but there was nothing to indicate a primary cause for the death.

961. A post-maniacal case.—In another case, in the Philadelphia Hospital, an active delirium came on in a patient who had been for a year in a simple maniacal exaltation. Such a complication is noted by various authors,[3] especially in general paresis. It may be called a delirium grafted on a mania; or an episode in the course of a morbid process, like general paralysis of the insane.

962. Meningitis present.—The symptoms of meningitis, or meningeal irritation, are seen in some of these acutely delirious cases. They belong to the class described by the old Greek physicians as an inflammation of the brain, or a phrensy.

E. F., a woman aged twenty-one years, was admitted into the Pennsylvania Hospital for the Insane. She was reported to have had a mild febrile attack of some obscure kind two months before, and this attack had left her in an impaired mental state, marked by agitation, confusion, insomnia, and emotional disturbance. She grew worse, and was admitted to the hospital with a diagnosis of acute delirious mania. When I saw her she was in a typical delirious state. She was incoherent, inattentive, muttering, and expressing what seemed to be fragmentary delusional ideas. She evidently had hallucinations. The prevailing tone was apprehension and distress. She was restless, and was kept in bed with difficulty. Her tongue was coated, bowels constipated, pulse 105, and temperature 99⅖°. The pupils

[3] Krafft-Ebing, Traité Clinique de Psychiatrie, traduit par Laurent, p. 652.

were dilated. A marked symptom was the muscular spasticity, with convulsive movements of the hands and arms, and much exaggerated patellar reflexes. The urine was normal. During the last week of the patient's life the temperature rose steadily day by day, until just before her death, when it was 104¾°. The loss of object-consciousness in this case was almost complete. An autopsy was refused.

963. No one theory for the disease.—In such a group of cases as here presented no one theory will cover all. No one special *materies morbi* can explain cases so widely separated as a delirium happening after a mild fever, another occurring in a robust man, without apparent cause, and still another developing in a woman after childbirth. When we add still others, occurring after surgical operations, or sunstroke, or acute alcoholism, and still other causes, and cases, even, in which no cause is apparent, it becomes evident that we are then confronted with a complex problem in mental pathology. Many of the causes put down in the text-books are quite inadequate to account for the delirium in the vast majority of cases. Such causes are anemia, exhaustion, and mental and moral shock or strain; such as grief, fright, worry, etc. These may be contributing causes, and in the case of blood impoverishment we have probably an important predisposing cause; but we want something more definite than worry to explain the death of a strong man in less than three days,—something more tangible than mere emotional disturbance to explain an acute delirious mania, with symptoms of meningitis, in a vigorous young woman.

964. Infection is probably a cause.—In the post-febrile and puerperal cases an infectious poison—a microbe—is probably the cause. Clark[4] gives details of forty patients with puerperal insanity, of whom nearly 50 per cent had septicemia or some inflammation about the uterus. Clouston's puerperal cases showed a much higher range of temperature than any other class of cases; an "alarming result," as he thinks, of septic disorder.[5] Since the time of Hippocrates this septic delirium following childbirth has been noted. The father of medicine himself reported a fatal case following a delivery of twins, in which case there were suppressed lochia, chills, insomnia, incoherence, convulsions, suppression of urine, coma, and death. Guislain[6] distinguished what he called puerperal meningitis, characterized by sweats, fever, abdominal pain, and coma,—evidently a septic de-

[4] Journ. Ment. Sci. July, 1887.
[5] Mental Diseases, p. 357.
[6] Leçons Orales, Vol. I. p. 356

lirium. With an increasing knowledge of septic disorders in childbed we shall probably hear more, in time to come, of sepsis as a cause of insanity in the puerperium.

965. The action of microbes.—The drift of modern pathology is undoubtedly towards the opinion that acute delirium, arising from so many and such varied causes, is due to microbian infection. From this point of view the affection is a symptom rather than a distinct disease. It is not one, but many; and may be caused by a variety of infecting organisms, just as the symptom "fever" may be. Kraepelin, a leading German authority, does not recognize it as a disease properly so-called; but, in the present state of our knowledge, such an opinion is ultra scientific. We must, for the present, keep our lists open for an affection which is capable of arising in a night, and destroying life in a few days. Even though we do not detect the active cause in every case, we see before us a clearly defined picture of disease. It is only a clinical, or bedside, picture, to be sure; but it is too individualistic for us to dismiss it as a mere "symptom-complex."

966. Uniform results not obtained.—Bacteriological studies have not led to uniform results in the matter of acute delirium. The Italians have been especially active in these studies, and have reported finding various forms of bacteria and micrococci in the blood of these patients. Berkley[7] has indicated the truth when he says that in a malady which may be caused by so many agents, a sole cause is not to be expected. To show how difficult the problem is, we may recall that a deep-seated pneumonia, undetected, has caused a delirium like the form here described; so has the sepsis of childbed; and so have the poisons of typhoid fever, typhus fever, tuberculosis, dysentery, measles, and acute rheumatism. Syphilis and alcohol may cause explosive types of delirium, and lead poisoning and uremia may do the same. To distinguish and eliminate all these possibilities is the problem set before the diagnostician; but, after all is done, there undoubtedly will remain a small proportion of cases in which none of these, or any other, causes can be found, and these rare cases will still merit and receive the name of "acute delirium," or "Bell's mania." [8]

[7] Treatise on Mental Diseases, p. 330. This work contains a review of the recent literature of acute delirium.

[8] Shakespeare described mental disease with great accuracy; and the words he put into the mouth of Prince Henry are marvelously realistic, for they even contain a reference to blood poisoning:

"It is too late; the life of all his blood
Is touched corruptibly; and his pure brain,
Which some suppose the soul's frail dwelling house,
Doth, by the idle comments that it makes,
Foretell the ending of mortality."
—King John, Act V. Sc. VII.

II. The medico-legal aspects of acute delirium.

967. The question of capacity not likely to arise.—In such an acute condition, overwhelming the mental faculties, and rendering the patient absolutely helpless and irresponsible, medico-legal complications are not likely to occur. No question of capacity can arise. The fact, however, may be noted, in closing, that in some cases, very acute in type, remissions occur, and these may present the appearance of lucid intervals. The patient may seem about to recover; the mind temporarily clears; questions may be asked and answered; but too often these appearances are deceptive, and the patient relapses into another delirious paroxysm. Such remissions are too transient and imperfect to admit of a doubt that the patient is not even temporarily restored.

968. Many grades of the affection.—These cases of acute delirium present many grades, as already said, and they merge gradually into milder types which are described under the head of "confusional insanity." Reference may be made to that chapter for a further discussion of the medico-legal aspects.

CHAPTER XLVI.

SENILE INSANITY.

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I. Medical aspects of senile insanity.

969. The law of old age.—It is a universal physiological law that men and women decay with old age.[1] This law needs no argument

[1] "For there is a character of mind which belongs to old age."—Maudsley, Responsibility in Mental Disease, p. 259. "Exact statistics might show that senile dementia exists to such an extent as to show a large proportion for the

to prove it. It is patent to all, and recognized everywhere. But the reasons for this law are not so clear: the fact is accepted, but few persons stop to consider why it should be so. The pathologist, however, is never satisfied with the mere statement of a fact: he must seek for the causes of it.

970. The causes of senile insanity.—Now the causes of mental decay in old age are not far to seek. Among them are the degenerative changes which occur in the brain tissues in advancing life. The commonest of these changes are found in the blood vessels. The coats of the blood vessels tend to become thickened and hardened in old age, and these impaired vessels are no longer competent to supply a normal blood current to the nerve cells. It is rare, indeed, after sixty years of age, for the brain not to reveal some of these changes. The degeneration is called "atheroma;" and few persons escape it. There is a wise saying that "a man's life is only as long as the life of his blood vessels;" and the pathology of old age is a constant proof of the truth of this maxim. This is the period in which, especially, we see apoplexy, hemiplegia, second childhood, and accidents to the heart and tissues generally. These accidents are, as a rule, the evidence of weakened blood vessels.

971. Weakness is the characteristic of old age.—It follows that the mental decay in old age is characterized by weakness. There is failure of memory, loss of interest, inability to apply the mind, a tendency to tire, lack of energy, of aggressiveness and of progressiveness, and changes in the tastes and affections. It is needless to say that these are variable factors: not all persons grow old with equal rapidity, and not all the symptoms of senility appear in just the same way in any two persons.

972. Old age as a cause of insanity.—That old age is an important factor in the causation of insanity cannot be gainsaid. Statistics as well as common observation prove it. Clouston,[2] in his large experience at the Royal Edinburgh Asylum, found that in nine years (1874–1882), of the 3,145 patients observed, 304, or almost 10 per cent, were over sixty years of age; but of these only 203 patients were classed as true senile cases. Still, this is a large proportion.

In any given case, old age may not be the only factor. There may be contributing causes, such as heredity, alcoholism, syphilis, and emotional disturbances, such as grief, loss, and anxiety. Some persons

last years of life."—Griesinger, Mental Pathology and Therapeutics, Eng. Trans. p. 102.

[2] Mental Diseases, p. 396.

are born to grow old quickly: they have a bad heredity. They do not exemplify the rule of Dr. Oliver Wendell Holmes, who said that "it is better to be fifty years young than fifty years old." [3] Again, the chronic tippler anticipates the flight of years: he hardens his blood vessels with alcohol even before their allotted time; so, too, with syphilis; and a profound moral or emotional shock also may prove disastrous even in well-preserved old age.[4]

973. Senile melancholia.—A type of melancholia is not uncommon in the aged. It is apt to be periodical or remittent, and is not quite so acute and painful as in earlier life. The painful depression is often the result of the sense of loss of power, loss of interest, and of joy in living, that is not uncommon in elderly persons. This is so especially in those persons who live a sedentary life; who have fallen out of the race, and have lost their grip on life. There comes a sense of *ennui,* of *tædium vitæ,* very painful to see and very hard to bear.[4½]

This is not altogether a delusional condition; there is often, indeed, a substratum of fact for this unhappiness. It is not pleasant to some persons to grow old,—to feel the sense of personal decay, of loss of those things which have made life worth living.[5] The mild melan-

[3] Autocrat of the Breakfast Table. Dr. Holmes said that there was one mark of age which struck him more than any of the physical ones,—the formation of habits. In other words, the mental signs of old age may be as well marked, if not better marked, than the bodily signs. It is always a good sign when an old man retains some mental elasticity; when he is able, for instance, to take up with new ideas and even with new occupations. This truth was well known to the ancients, for Cicero, in his De Senectute, refers to it, and tells us of Cato, who learned Greek when he was old; and it is said that he even wished to learn the fiddle, after the example of Socrates. Solon learned something new every day in his old age, and Cyrus pointed with pride to the trees he had planted with his own hand.

[4] Savage (Insanity, p. 202) relates a typical case in an old man past eighty, who lost his wife just after their golden wedding.

[4½] I've seen sae monie changefu' years,
On earth I am a stranger grown:
I wander in the ways of men,
Alike unknowing and unknown;
Unheard, unpitied, unrelieved,
I bear alane my lade of care;
For silent, low, on beds of dust,
Lie a' that would my sorrows share.
—Burns, Lament for Glencairn.

[5] The pleasures of growing old are sung by some of the poets. Browning says:

"Grow old along with me, the best is yet to be;
The last, for which the first hath been."

But Browning is reported to have said of one of his own poems. "The poem had a meaning when I wrote it, but what it was I cannot now say." (London Truth.)

George Eliot, in several of her writings, expatiates on the advantages of increasing years: but the general verdict is against her. Such philosophical reflections are only a way of making the best of a bad situation. Montaigne, in his essay "Of Age," tells us with cynical frankness: "'Tis possible that, with those who make the best use of their time, knowledge and experience may increase with their years; but vivacity, promptitude, steadiness, and other pieces of us, of much greater importance, and much more essentially our own, languish and decay." This is the universal experience, and it is also the teaching of pathology.

cholia of old age is one of the most logical of the insanities. With advancing years, however, and with repeated attacks, the failure of the mental faculties becomes more evident, until these patients pass into a hopeless terminal stage of dementia. Melancholia in old age is not an uncommon cause of suicide; in fact, many of the suicides in elderly people are due to this mental state.[6] Such patients very often are not radically insane, and do not find their way into the asylums.

974. Mania in old age.—This is not so common as melancholia, unless it is induced by bad habits, as a too free use of alcohol. It may occur, also, as an episode in the progressive dementia of the aged, and is then usually marked, not by a gay exaltation, but by anxiety and distress. Insomnia may be a troublesome symptom, as well as refusal of food. The condition is often associated with delusional ideas, to be referred to later.

975. Senile dementia.—The characteristic insanity of old age is the "senile dementia," so often witnessed, and usually called "childishness." This begins, as a rule, so gradually that its boundary line cannot be fixed. It is marked by progressive decay of the mental faculties, of which memory is one of the first to fail; and the loss of memory is at first more marked for recent than for remote events.[7] The instincts and affections change, the tastes alter, and the sense of delicacy often suffers. In the purely intellectual sphere, we observe an impaired judgment and a weakened power of attention. There is apathy, indifference to current events, and a disposition to be interested in trifles. The emotions become unstable. Some of these patients are irritable, easily excited, prone to weep easily and without much apparent cause. On the other hand, a common type is seen in a mildly apathetic and placid temper,—one which is not often ruffled, because interest in life is narrowed down to a small circle of immediate wants and childish ideas.

976. Delusions in the aged.—A not unusual form of senile dementia is a type of delusional insanity.[8] In advanced cases, especially, in which all the mental and moral faculties are more or less clouded, delusions are observed. These delusions are usually of a depressive or persecutory kind; a common one is the idea of loss of property, or of being robbed; also dread of poverty, of going to the alms-house, etc. These delusions may be associated with secretiveness, and a tendency to hoard trifles. Just as in general paresis, so in senile de-

[6] Bevan Lewis (Mental Diseases, p. 439) says that a strongly marked suicidal tendency appears in 79 per cent of such cases.

[7] Mercier, Psychology, p. 420.

[8] Ritti, Les Psychoses de la Vieillesse, 1897.

mentia, we see patients taking any and everything, without the slightest appreciation of *meum* and *tuum*, and hiding things away, only to forget them. The *penchant* for hiding, indeed, is rather more common in the latter patients, and the objects are often quite valueless.

Confusion of identity of persons and places is often present; the patient may even lose the sense of personal identity, and very often the nearest relatives, such as sons and daughters, are confused with each other or with strangers. Delusions of a fragmentary kind are often the source of great annoyance to the patients; they fret and worry over trifling and imaginary evils, as in the case of an old lady, eighty-four years old, who, day after day, gave her family and herself no peace for worrying about an imaginary pair of old shoes that had been sent to some imaginary cobbler. This was a type of many senile delusions,—trifling and annoying. Delusions of poisoning also may occur; and of relatives being murdered, although the murdered person may be seen daily. Thus is shown the widespread breaking down of the logical processes and of the normal association of ideas. With it all is observed the weakness of all the mental faculties,—the genuine dementia.

977. Accidents and episodes.—In some senile dements, in whom the disease of the blood vessels is extreme, various accidents and episodes occur. Paralytic strokes are the commonest. These are usually one-sided,—the so-called "hemiplegia,"—involving the tongue, face, arm, and leg. They are caused by hemorrhage in the brain, or by the stoppage of a blood vessel. A not unusual accident, and one of great medico-legal importance, is aphasia, or the loss of the faculty of speech. Because of its special importance, this affection will be considered in a chapter apart. In some cases epileptic seizures occur, and these are caused, doubtless, by the destructive changes in the brain;[9] and, as already said, attacks of maniacal excitement are sometimes seen.

978. Alcoholism and drug habits in old age.—Senile insanity may be complicated with alcoholism, or with the effects of some drug addiction. In some old persons, in both the sexes, the insidious habit of drinking to excess, or of taking some opiate, may be formed. It is quite remarkable how, in persons of previously temperate lives, such evil habits may creep on in the weakness of old age. I knew of one old gentleman who had acquired the habit of drinking nearly four

[9] Spratling (Epilepsy, p. 32) classes as senile epileptics those whose epilepsy is due to changes, mostly in the arterial system, which may become prominent after the fortieth, but are not common until after the sixtieth, year. He refers to a case in which the first fit occurred in the eighty-ninth year; successive fits occurred until the patient's death, when he was nearly ninety-three.

quarts of whisky a week before his family awoke to a realization of the facts; by that time the patient was in a sad state of chronic alcoholism. In the case of an old lady, who was an earnest advocate of temperance, the habit of using opium to excess by suppositories was gradually formed without the slightest idea of any inconsistency. As Bevan Lewis has well said, the excessive use of alcohol lends a frightful impetus to the retrograde changes which naturally occur in the brains of old people.[10] Chronic inebriety is said to be not so common in old as in younger persons, and this claim seems to be supported by statistics; but the compilers of such tables are sometimes strangely oblivious of the fact that there are fewer people living after the age of sixty than before it. We should therefore not expect as many old men to figure in our inebriate asylums as we should expect younger men. The chronic inebriate generally drinks himself off before the age of sixty: he does not wait to grow old.[11]

979. The completeness of the destruction.—In advanced senile dementia the brain is well nigh stripped of its functions. Nothing can exceed the completeness with which this reduction is sometimes effected in old age, unless it be in general paresis; and, in fact, the terminal stages in the two conditions are not unlike. The patient's mind is indeed "sans everything."

980. Stages and varieties.—The mental changes in old age are marked especially by weakness,—by failure of the mental faculties; but varieties occur, just as in all forms of insanity: there is no one constant type. Shakespeare, in King Lear, has given us a graphic picture of senile insanity of a maniacal and delusional form, but he has not exhausted the subject of dotage.[11½] All grades of men-

[10] According to Bevan Lewis (op. cit. p. 444) of 261 male senile cases of insanity, as many as 75 (about 28.7 per cent) were proved to have been of intemperate habits for some years prior to their attack of insanity, and he thinks even this percentage is far below the actual truth. Alcohol gives a special direction to the morbid tendency, being especially productive of attacks of mania and melancholia, as well as of the degeneration of the arterial system.

[11] Thus Kerr (Inebriety, p. 124) publishes a table, based on American cases, which shows that of 600 inebriates under treatment, only 22 were above sixty years old. This is not surprising, neither does it disprove the fact that chronic alcoholism is a graver complication in old age than in earlier life.

[11½] It is curiously significant of Shakespeare's genius that his insane characters have been analyzed by scientific alienists with as much care as though they presented the clinical pictures of genuine cases of insanity. Prominent among such writers have been Bucknill (Mad Folk of Shakespeare, London, 1867) and Brigham ("Shakespeare's Illustrations of Insanity," in Am. Journ. of Insanity, July, 1844).

Bucknill's diagnosis of Lear's case is "intellectual mania which resulted from the combined influence of physical and moral shock;" and again, "the result of passion exaggerated by long habitude and by the malign influence of extreme age."

Brigham says: "Lear's is a genuine case of insanity from the beginning to

tal decay are observed, and to this fact is largely due the difficulties that surround this subject in its medico-legal aspects. There are few old people, indeed, who, soon or late, do not show some mental deterioration, but not all old people are senile dements.[11 2/3]

After death, gross changes are usually found in the brains of these patients; such as arterial disease and areas of softening. Robertson,[12] pathologist to the Royal Edinburgh Asylum, found such changes in the majority of his cases.

II. The medico-legal aspects of senile insanity.

981. Senile dementia and the law.—Senile dementia has had a remarkable history in the English law. A long time elapsed before this affection was judicially recognized as a real insanity, and the prejudice against this view of it still survives.[13] It was in favor of senile dementia, in fact, that the distinction was originally made between a *non compos mentis* and a lunatic.

This history has already been discussed in these pages under the definition of "Non Compos Mentis." (Page 482.) It is there shown that the ancient writ de lunatico inquirendo was judged not to include persons who were merely of weak minds, and therefore it could not include a person who was merely failing from old age, unless his weak-mindedness was called by another name. Lord Hardwicke,[14] in 1744, quashed an inquisition in the case of a senile dement, because in the finding it was not stated in express words that the party was *non compos mentis.* The Lord Chancellor evidently did not like the word "lunatic" in this connection, for he said it was "a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but discovered by philosophy,

the end; such as we often see in aged persons."

Nothing more true to nature was ever written by the great bard than the words he put into the mouth of the aged king, when he feels the onset of impending alienation:

"O let me not be mad, not mad, sweet Heaven!"

And when all was over, no more pathetic lines were ever spoken over the dead body of a worn-out old man than Shakespeare put into the mouth of Kent:

"O let him pass! He hates him
That would upon the rack of this tough world
Stretch him out longer."

See Rolfe's Edition of King Lear for numerous notes on the old king's madness.

[11 2/3] Pickett, "Senile Dementia: A Clinical Study of Two Hundred Cases, with Particular Reference to Types of the Disease," in the Journ. Nerv. and Ment. Dis., Feb. 1904.

[12] Edinburgh Medical Journal, January, 1896.

[13] In *Thompson* v. *Kyner*, 65 Pa. 368, Judge Rowe told the jury: "We are not concerned, in this investigation, with questions of insanity properly so-called." The case was one of senile dementia.

[14] *Ex parte Barnsley*, 3 Atk. 168.

and ingenious men, that it is certainly owing to a defect of the organs of the body."

982. A senile dement not a lunatic.—This opinion of Lord Hardwicke's was illuminating, although it did not clear up the whole subject. What it did, however, was to emphasize the fact that "lunatic" was a bad term with which to describe a weak-minded person, and that *non compos mentis* was a good one. It seemed to draw a distinction between the two conditions, and to include weak-minded persons under the term *non compos mentis* as implying that they had merely a defect of the organs of the body.[15] This evidently included cases of senility, and was so construed later in the courts.

But Lord Hardwick said it would require an act of Parliament to change the law before the old writ de lunatico could include persons of merely "weak mind." From all this it is evident that the court of chancery was struggling in a confusion caused by the terms "lunatic," "*non compos mentis,*" and persons of "weak mind;"and that that court only got far enough to recognize that weak-minded persons, such an senile dements, like Barnsley, could be included under the term *non compos mentis,* but not under the term "lunatic." This was at least some progress, for it indirectly recognized that senile dementia is an organic disease of the brain; therefore, a form of insanity.

983. A senile dement is "non compos mentis."—Lord Eldon[16] said it was necessary that the jury should find in express words that the party was *non compos mentis* when said party was represented as not being idiot or lunatic, but merely of unsound mind. Here again the distinction was made in favor of a person who was merely of "weak mind," and not a "lunatic." The convenient and venerable term, *non compos mentis,* derived from Justinian,[17] and of an ancient and legal flavor, was to be used for such a person, and was evidently understood not to work to his prejudice as would the term "lunatic." From these two opinions, by Lord Hardwicke and Lord Eldon, this subject seems to have taken a shape which it long retained in English, and also in American, law; and the effects of which are still apparent.

Lord Chancellor Erskine[18] also recognized the prejudice against calling all persons of unsound mind "lunatics." "A man may have passed a great and illustrious life," said he, "and by the course of

[15] Barnsley was merely broken down with old age, and did not seem a proper person to be described as a "lunatic." See page 488, *ante.*

[16] *Re Portsmouth.*

[17] Institutes, Lib. II., Title XII., § 1.

[18] *Ex parte Cranmer,* 12 Ves. Jr. 445.

nature his faculties may decay, so that he may not be fit either to govern himself or his affairs. It is unseemly that he should be put upon the footing of a lunatic."[19] All of which goes to prove clearly that the stumbling-block in the way of a scientific conception of senile dementia was the artificial term "lunatic," and that a way out of the difficulty was to call the patient *non compos mentis*.[20]

984. The scientific conception of senile insanity.—But the scientific conception of insanity was destined in time to break through the artificial distinctions of the courts. Insanity, which is etymologically the same as "unsound mind," means, in science, all forms of mental derangement which are caused by disease or disorder of the brain; and in this sense it includes senile dementia as well as mania, melancholia, or any other mental disease whatever. This fact, now so thoroughly established, was finally accepted in English law, and by the statute 25 & 26 Vict. chap. 54 (1862) it was declared that the old legal term "lunatic" "shall mean and include every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind." In other words, all distinctions between these various terms were swept away. This comprehensive definition is now practically adopted in most of our American states,[21] the only distinction being in respect to idiocy, which, in some of them, is considered a condition apart. Therefore, senile dementia is now legally recognized as one of the insanities; and so it ought to be.

985. The law now takes the scientific view.—By the law as it now stands it is proper to certify a senile dement as an insane person, and this is constantly done in England and in our American states.

This being so, it follows, of course, that patients with any form of senile insanity, such as those described above, are to be judged by the same rules of evidence that apply to insanity in general in the trial of medico-legal questions.

986. Criminal acts by senile patients.—Senile patients are not often guilty of criminal acts. In some cases, however, there may be suicidal and homicidal impulses. In fact, in senile melancholia, suicide, as already said, is not uncommon; but homicide is rare. These

[19] American courts have followed the English chancery closely in this matter. See the *Case of Beaumont*, 1 Whart. 52, 29 Am. Dec. 33, in which also the inquisition was quashed because the finding did not expressly declare that Beaumont, a senile dement, was *non compos mentis*.

[20] Chitty, for instance, says: "The malicious, untrue, written assertion that the King or any person is affected with insanity, is considered a criminal and indictable act, since it imputes to the party a malady generally inducing mankind to shun his society, though, as no one is of perfectly sound mind but the Deity, it is not libellous to say that a man is not of sound mind."

[21] See chapter on *Non Compos Mentis*, page 482, *ante*.

patients are too weak, both mentally and physically, as a rule, to attempt to kill. Yet a blind homicidal impulse is sometimes shown in excited cases, the patient evidently having little conscious design, and soon forgetting all about it.[22] It is well, however, to be on guard against the violent impulses of some of these dotards. I recently saw an old gentleman, eighty-two years old, much excited and quite aphasic, who was striking right and left at all persons who approached him. Little injury is likely to be done, however, by such a patient.

987. Senile insanity in civil cases.—It is in civil cases that senile dementia figures most frequently in the courts. Probably the great majority of contests over wills have turned upon the capacity of these patients.[23] This is doubtless a hard question in most cases, whether it be viewed from a legal or a medical standpoint; and the two points of view should be practically the same, for there cannot be one kind of insanity in law and another kind in science. "That cannot be a fact in law," said Justice Doe,[24] "which is not a fact in science; that cannot be health in law, which is disease in fact."

988. How differences of opinion arise.—Differences of opinion in these cases often arise from the fact that the courts do not recognize the medical idea of a disease, and the physicians do not subscribe to the legal idea of capacity. It has been held in many cases that some degree of mental impairment does not necessarily entail incapacity to make a will. There has been much diversity of opinion on this point, however, and the subject is confusing to a medical expert who attempts to follow the conflicting opinions of the courts.[25]

[22] Clouston, op. cit. p. 398.

[23] It is noteworthy that, under the English law, the subscribing witnesses may afterwards be admitted to prove the testator was insane when he executed his will (2 Bl. Com. 378, footnote by Christian). This would seem to add to the facility with which such instruments could be contested.

[24] *Boardman* v. *Woodman*, 47 N. H. 120.

[25] The language of many judges in defining testamentary capacity in aged persons is hopelessly involved and contradictory, if analyzed by a scientific rule. A study of the recorded cases, *ante*, §§ 123–127, must convince any impartial scientist of this fact.

In *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329, the doctrine was stated that "a mere glimmering of reason" is sufficient to sustain a will. Judge Lumpkin (*Terry* v. *Buffington*, 11 Ga. 345, 56 Am. Dec. 423), commenting on that doctrine, seems to uphold it, and yet he says that, by law, persons of "unsound mind" are not permitted to make wills, and then proceeds to show, by florid figures and rhetorical illustrations, how the very thing can be done.

Chief Justice Thompson (*Thompson* v. *Kyner*, 65 Pa. 368) said: "What constitutes the want of a sound disposing mind and memory is incapable of a definition suited to all cases. Every case is, to a great extent, to be tested by its own facts, circumstances, and surroundings. We can do little more than generalize in regard to the subject." This is practically a condemnation of all tests and definitions.

Justice Redfield (*Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58) said: "Every man will have his own mode of expressing the thing;" and he undoubtedly stated the truth

Sir Fitzjames Stephen,[26] a recent writer, says: "It undoubtedly is . . . the law, that the mere existence of an insane delusion which does not in fact influence particular parts of the conduct . . . has no effect upon their legal character. The cases[27] referred to . . . establish this proposition as regards contracts and wills." And yet, according to Shelford,[28] the law recognizes partial insanity, and in civil cases this partial insanity (as "delusion"), if existing at the time the act was done, invalidates the act, though not directly connected with the act itself.[29] This is in direct contradiction to what Stephen claims is now the English law; but as this subject is discussed more at length in the chapter on "Wills" in the present work (p. 908), it will not be pursued further here.

989. The presumption of sanity in senile cases.—The presumption of the law is in favor of the capacity of a testator. All persons of the age of discretion are presumed to be sane. The only exception to this rule, according to one authority,[30] is in a few jurisdictions where the statutes have cast upon the proponent of a will the burden of showing testamentary capacity. But this presumption of sanity is often carried to a great extreme in law, as, for instance, where a man signs a will in what is presumed to be a lucid interval of exceedingly short duration,—say only a few hours.[31] Here there is the presumption (or assumption) that a man was sane long enough to make a will, although insane immediately before and after. This is not more logical than the defense of transitory homicidal mania in criminal cases, in which a man is claimed to have been insane only long enough to pull a trigger, although perfectly sane just before and just after.[32] The two kinds of cases are not dissimilar, and the psychology of the one is about as bad as the psychology of the other. These abrupt transitions from health to disease, from sanity to insanity, and *vice versa,* are rare indeed in fact, and do not warrant a presumption in their favor one way or the other.[33]

[26] 2 History Crim. Law, p. 162. See his Digest also.

[27] He refers to *Banks* v. *Goodfellow,* L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813, and *Smee* v. *Smee,* L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220.

[28] Lunatics, p. 66.

[29] See Erskine's statement of the distinction between civil and criminal cases, in his speech for Hadfield, 27 Howell, State Trials, 1281.

[30] 16 Am. & Eng. Enc. Law, 2d ed. p. 604. The subject is discussed in *Delafield* v. *Parish,* 25 N. Y. 27.

[31] Shelford (op. cit. p. 66) cites a case in which the will was dated and executed on the 15th of November, 1839. The testator was laboring under certain delusions on the three days previous, and destroyed himself on the 16th, while insane. Yet the will was sustained. *Chambers* v. *The Queen's Proctor,* 2 Curt. Eccl. Rep. 415.

[32] *Com.* v. *Wireback,* 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

[33] In *Weaver* v. *Weaver,* 28 Pittsb. L.

990. Lucid intervals in senile insanity.—The doctrine of "lucid intervals," as bearing on testamentary capacity, seems to have been derived from the Roman, or civil, law, for therein it was laid down, in the Institutes of Justinian,[34] that "madmen, if they make a will in that period in which their madness intermits, seem to be legal testators." But this subject is discussed more in detail in §§ 131–133, and in the chapter on "Lucid Intervals," in the present work (page 496). Extreme old age, with its attendant physical and intellectual weakness, does not of itself incapacitate the testator, and therefore it raises no presumption of his not having a disposing mind.[35]

It follows that in this kind of insanity, as in all others, the exact subject of inquiry is the state of mind at the time of signing and executing the will. The fact that the testator was old, and had shown mental weakness at other times, before and after, is not enough, although in some courts such evidence might be admitted as supplementary.[36]

991. The definition of a "sound and disposing mind."—A sound and disposing mind is defined to consist in a man's ability "to understand substantially the state of his family and his affairs; the disposition of his property, as made by his will; and to intend to make such disposition."[37] It is important that medical experts should try to understand clearly what the law means by testamentary capacity. Evidently the law requires very little, especially as at present administered. The amount of intelligence requisite for a man to know what he wants to do with his property, or to understand satisfactorily the state of his family and his affairs, is not great. Such an amount of knowledge is presumably not inconsistent with the existence of great feebleness of mind, considerable loss of memory, and even with some insane delusions. In old age all these conditions may exist, and yet a man may know enough, in the eyes of the law, to be able to make a will. The expert may indeed recognize that this position of the law is largely one of presumption,—largely theoretical,—and yet he must also see that such a presumption is deemed to be necessary in

J. 367, N. S. it was claimed that a man who gave a note was sane on "every other day." The court held that the note was given on one of the sane days. This was mere presumption.

[34] Lib. II. Title XII. § 1. "Furiosi autem, si per id tempus fecerint testamentum, quo furor eorum intermissum est, jure testati esse videntur."

[35] 25 Am. & Eng. Enc. Law, p. 970, on "Testamentary Capacity," with many references. Old age raises no presumption of incapacity. *Browne* v. *Molliston*, 3 Whart. 129. Also Underhill on Wills, § 117.

[36] *Thompson* v. *Kyner*, 65 Pa. 368, p. 377: "An abnormal condition of mind is never presumed when a testator makes his will, unless a previous aberration be shown of such a nature as may admit of a presumption of recurring unsoundness at any time."

[37] Chase, General Paresis, p. 44.

order to guard the right of citizens to make their wills,—a right which, if not a natural one,[38] is yet most jealously claimed by all men.[39]

992. In respect to testamentary capacity, the mind of a senile dement may be impaired in several ways.—The memory of the senile dement may be so affected as to disable him from understanding the state of his family and his affairs. This may be shown, among other ways, in his confusing the identity of persons and places.[40] His knowledge of events and circumstances may be so clouded as also to impair his capacity. He may be confused, or excited, or stuporous. He may have delusions which influence his feelings against his family. His judgment may be involved so as to impair his business sagacity in disposing of property. And finally, he may be under undue influence.[41]

993. Undue influence.—Senile patients, particularly men, are sometimes subject to curious erotic impulses, and these expose them to the risk of making bad marriages. They are easily led, also, in other ways, and this is more easily appreciated when seen in the daily life than described in court after the patient's death.[42] The vacillation, loss of will power, and erotic propensities, says one authority,[43] render these patients an easy prey to designing persons. Thus, marriages are brought about, papers signed which lead to vexatious litigation, or wills and codicils are written. To protect innocent persons, heirs,

[38] One of the state senators who voted to sustain the will of the idiot Lispenard (*Stewart* v. *Lispenard*, 26 Wend. 256) claimed that the right to make a will is a "natural" right. This distinction is, perhaps, merely an academic one, but in that case it helped to disclose the mental bias as well as the critical acumen of the senatorial court.

[39] Troplong (Traité des Donations, preface) says: "Un peuple n'est pas libre, s'il n'a pas le droit de tester, et la liberté du testament est la plus grande preuve de la liberté civile."

[40] Stearns (Mental Diseases, p. 311) tells of a patient who received a visit from his son, a resident of Washington. The father asked the son where he was from: "From Washington, father." "Washington," repeated the father, "I have a son there. I wonder whether you know him."

[41] The definition of testamentary capacity, as given in 25 Am. & Eng. Enc. Law, p. 970, is as follows: "A person who, at the time of making his will, has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim upon his bounty, and the manner in which it is to be distributed, has sufficient mental capacity to execute a will."

It does not seem to have occurred to the writer who framed that test (and the same is true of all tests) that it is a problem of the greatest difficulty in most cases to determine those nice questions. It is practically equivalent to asking, "Is the testator sane, or is he not?" And so, after all, in every case the query comes back to the simple formula, "Is the person of sound and disposing mind?"

[42] "Undue influence, which is . . . a concession of capacity, although weak." *Thompson* v. *Kyner*, 65 Pa. 368.

[43] Chapin, Compendium of Insanity, p. 155.

etc., is as important in these cases as to protect the presumptive right of a senile demented to make a will. (See § 1190, *post.*)

994. There can be no uniform test for senile insanity.—These are all questions of fact for a jury in each individual case. There can obviously be no uniform rule by which to test these patients. The question whether a testator has a mental disease that affects his or her capacity has been held to be a question of fact for the jury, and not a question of law for the court.[44] According to this view, even in respect to a legal definition of testamentary capacity, such as is quoted above, it becomes, after all, a question for the jury whether the testator had such a degree of mental impairment as incapacitated him.[44½]

995. Contracts and legal papers other than wills.—What is said elsewhere about contracts and legal papers other than wills applies to cases of senile insanity as well as to all other forms of mental impairment. "A person not under the guidance of reason (whether from insanity, idiocy, or extreme inebriety) appears to be absolutely incapable, while that condition lasts, of entering into a valid contract."[45] It will be a question of fact in any given case whether the impairment of mind by reason of old age is sufficient to fall within this definition.

996. Different kinds of capacity.—But it has generally been held that a man may not have a sufficient capacity to execute a valid contract (as signing a deed), and yet be capable of making a will. This rule, though generally accepted, is denied by some authorities, which hold that the degree of capacity requisite is the same in both cases.[47] Chief Justice Thompson[48] said that, as a general proposition, less capacity is required to make a valid will than to transact ordinary business. So far as aged persons are concerned this is an important distinction, and seems based on the idea that a contract implies the action of opposing minds, which fact might put a feeble-minded old

[44] *Boardman* v. *Woodman*, 47 N. H. 120. In this case Justice Doe, in a justly celebrated opinion, held that "the tests and symptoms of this disease [insanity] are no more matters of law than are the tests or symptoms of any other disease." See page 568, footnote, in the present work.

[44½] The following cases are of some special interest because of the extreme age of the testator: *Pooler* v. *Christman*, 145 Ill. 405, 34 N. E. 57 (testator eighty-six years old); *Minor* v. *Thomas*, 12 B. Mon. 106 (ninety years old); *Collins* v. *Townley*, 21 N. J. Eq. 353 (ninety-eight years old); *Re Gray*, 1 Silv. Sup. Ct. Rep. 338, 5 N. Y. Supp. 464 (ninety years old); *Re Totten*, 21 N. Y. S. R. 950, 3 N. Y. Supp. 153 (eighty-nine years old); *Re Soule*, 1 Connoly, 18, 3 N. Y. Supp. 259 (ninety-two years old).

[45] 2 Stephen, Com. on Laws of Eng. p. 70, 11th ed.

[47] As to contractual capacity as a test for testamentary capacity, see *ante*, § 64.

[48] *Thompson* v. *Kyner*, 65 Pa. 368

person at a disadvantage, whereas in making a will there is more freedom of mind, and not so much distraction. But there is no unanimity among jurists on this subject. In Maryland, for instance, the statute provides that the inquiry as to capacity of a testator must always be whether he was capable of executing a valid deed or contract.[49] This difference shows how unsettled legal opinion is on the subject of testamentary capacity in old age, as well as in other conditions.[50]

997. A favorite rule.—The courts, in fact, give themselves the widest latitude in deciding on testamentary capacity; and this, indeed, is better than adhering to any formal definition. A rule which seems to have great sway is based on the reasonableness of the will itself. This is no doubt often, but not necessarily always, a safe rule; at any rate, it is a favorite one.[51]

[49] Code of Maryland, art. 93, § 300.

[50] *Tyson* v. *Tyson*, 37 Md. 567.

"The written law of this state furnishes the rule by which the capacity of a testator is to be measured; and the inquiry must always be whether, at the time of executing or acknowledging the will and testament, he was capable of executing a valid deed or contract."

See, also, *Davis* v. *Calvert*, 5 Gill & J. 300, 25 Am. Dec. 282: "He who is not competent to execute a valid deed or contract is, under the testamentary system of this state, incompetent to make a valid will or testament." This was an act of 1798.

Judge Redfield said, in *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58: "I have myself usually told a jury . . . that less mind is ordinarily requisite to make a will than a contract of sale understandingly, for the reason that in contracts of sale there are usually two parties, and some degree of antagonism between their interests and efforts, so that here mind is opposed to mind, and consequently it is somewhat more difficult to see clearly the just bearing of all the relations presented than under the common circumstances of making a will, where one is left free to act upon his own perceptions merely. But this is not always the case in making a will. One may be beset by an army of harpies, in the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale."

[51] In deciding the question of capacity, in case of doubt, "the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question."—Ga. Code, 1873, § 2408.

CHAPTER XLVII.

APHASIA.

I. The medical aspects of aphasia.
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I. The medical aspects of aphasia.

998. Definition of the term.—Aphasia is a general term for disorders of speech depending on lesions of the brain. It is to be distinguished from paralysis or other disorders of the muscles of speech, such as of the tongue, lips, and pharynx. Such localized paralyses in these muscles may and do interfere with the utterance of speech, but they do not constitute aphasia proper. Aphasia, in short, is a pure brain disorder. It is located in those portions of the cerebrum

which have to do with the mental evolution and control of speech; not with its mere muscular expression.[1]

999. The function of speech analyzed.—This fact can best be understood if the function of speech be analyzed. For instance, in order to frame a sentence there must be a mental concept: the person must have in the mind the idea which he wishes to express in words. This is entirely antecedent to, and independent of, the muscular act of talking. This mental concept is next transformed, as it were, into speech. This is a complex act, involving the idea which is to be expressed, the words which are to express it, and the proper action of the muscles of speech, which are to be the medium of expression. These muscular actions, as everyone can readily see, are not simple, but highly complex; and are the results of long education of certain centers in the brain, which preside over them. Finally, the muscles of speech must be fully under the patient's control. Hence, speech consists of three elements: First, the purely mental concept; second, the co-ordinate action of certain educated centers necessary to express ideas in words; third, the action of the muscles themselves. It is mainly in the second of these elements that disease causes aphasia.

This is shown in the simplest form of aphasia by the following facts: First, the purely mental concept is not involved, for the patient knows what he wants to say, but cannot say it. Second, the coordinating center is involved, for the patient cannot frame his ideas in words. Third, the muscles themselves are not paralyzed, for they react freely to the patient's will.[2]

[1] Speech is a product of evolution, interwoven with every activity of human thought. It cannot be controlled by act of legislature or the decree of court. If it is impaired, the whole mental fabric must suffer. When the Emperor Tiberius had made a grammatical error, and was reproved for it by Marcellus, another grammarian, of the name of Capito, remarked that what the Emperor said was good Latin, or, if it were not, it soon would be. Marcellus, more of a grammarian than a courtier, replied: "Capito is a liar; for, Cæsar, thou canst give the Roman citizenship to men, but not to words."—Max Muller, Science of Language, 1st ser. p. 47.

[2] Aphasia is a complicated and technical subject, and can only be discussed in bare outline in these pages. For the medical jurist the main question is the ability of the patient to make himself understood. This point is constantly borne in mind in the above discussion, and accordingly the chapter is narrowed down to little more than a statement of the legal capacity of aphasic patients. Great treatises are written now-a-days on aphasia; some of them of the highest scientific merit. No subject in neuropathology has been more elaborated within the past forty years. See Mills, The Nervous System and its Diseases, chapter on "Aphasia," p. 628.

"The faculty of speech," says Collins (The Faculty of Speech, p. 1), "distinguishes the human being from even those animals which stand next to him in biological relationship. Man is, in consequence, inclined to reflect upon its possession, and to speculate concerning its nature and origin." And he has never speculated concerning its nature and origin so much as he is now speculating concerning its diseases.

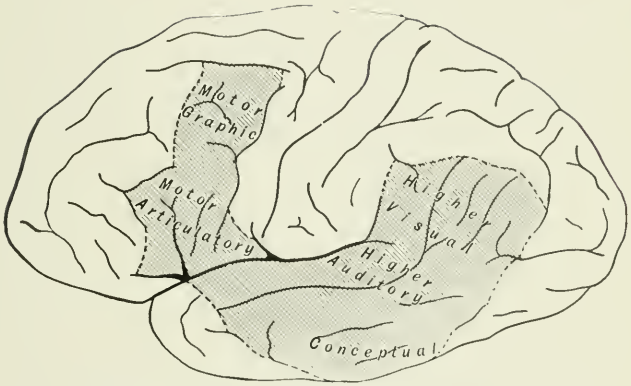
1000. Historical data.—The history of aphasia will forever be associated with the name of Broca,[3] a French physician, who, in 1861, reported two cases which demonstrated that this defect was caused by a local lesion in the posterior part of the third frontal convolution in the left hemisphere of the brain. The importance of this claim was twofold: it pointed to a strictly local disease as the cause of aphasia, and it placed this disease in the left half of the brain. The accuracy of Broca's view has never been disproved, although these elementary facts have been greatly supplemented, and the subject greatly enlarged since his time. A host of writers have illuminated this subject, among whose names shine conspicuously those of Trousseau, Charcot, and Dejerine, in France; Wernicke, Kussmaul, and Simon, in Germany; Hughlings Jackson, Broadbent, Gowers, and Bastian, in England; and Mills, Bigelow, and others in America. But the two cardinal facts of aphasia are still those which were pointed out by Broca; namely, aphasia depends upon a local lesion, and this is situated (in the vast majority of cases) in the left half of the brain.

1001. Various forms of aphasia.—But in time it was found that there are varieties of aphasia, and that these depend on the elements of speech affected; *i. e.*, whether the sensory or motor elements are involved. Let us analyze a little farther. Speech is not simple, but fourfold. Therefore it requires more than a simple mechanism in the brain to serve as its instrument.

1002. The function of hearing in the acquisition of language.—When a child learns language at its mother's knee, it learns it by ear; hence, the hearing for speech is the first faculty trained, and the primary speech center in the brain is the auditory center. This is a matter of common observation; and further, that a person never, or, at least, very seldom, gains such control of any language as of his mother-tongue. A genuine command of language is only gained by the sense of hearing. If a language is acquired by eye (as the dead languages, or even living foreign languages, such as French and German), the mind has not the same hold upon it as though it were acquired by ear. It cannot be spoken, and it is sooner forgotten. Let any good Latin scholar attempt to converse in Latin, and he will appreciate this fact.[4]

[3] Bulletin de la Soc. Anatomique, August, 1861, p. 330; and *ibid.* November, 1861, p. 398.

[4] Professor Blakie, a distinguished Greek scholar, was so annoyed by his Greek slipping from him at critical moments, that he determined to train his ear; and, shutting himself in his room, he used to declaim Greek to himself. His method was a scientific one, although he might not have been able to explain the reasons for it.



The speech centers in the human brain. (After Mills).

1003. The function of speaking.—When the child learns its mother-tongue by hearing, its next step is to attempt to speak it. It puts in operation its motor apparatus. This is quite distinct from the auditory apparatus, and is dependent on a different set of nerve cells in the brain, called a motor center. To attain this power, and to use it correctly, is a matter of prolonged practice, or education: a fact which is evident to all. Here, then, is a second element of speech; and this is as far as many uneducated persons go in their acquisition even of their mother-tongue.

1004. The function of seeing in the acquisition of language.—But when the child is further educated, its next step is to learn written or printed language; and here still another faculty is called into play. This is the visual apparatus. This, too, is quite distinct from the hearing and the speaking organs, and differently located in the brain. This acquisition is also a matter of prolonged education. It may lie entirely dormant, and yet the person have a good speaking command of language. This, also, is a matter of common observation. In past ages many leading personages, even kings and queens, could not read.[5] In this age of public schools it is more rare to see this deficiency in any one; still, it can be seen even yet.

1005. The function of writing.—Finally, the child is taught to write. This brings into action still another and distinct apparatus, —the graphic center. This may be entirely neglected, even although the three other functions are well cultivated. With some persons it is always poorly developed: they remain inexpert all their lives.[6]

1006. The fourfold faculty of language.—From the foregoing analysis it appears that the faculty of language is fourfold. There are

[5] Language, it is needless to say, was acquired by primitive man through the ear. Writing and reading were entirely secondary, and much later. Hearing and talking are therefore the earliest, or primary, modes of language. See Max Muller, Science of Language, 1st ser. p. 38.

It was the theory of Locke that man was originarily mute, like the brutes, and that he gradually evolved language by a process of artificially invented sounds, adopted by mutual agreement. Adam Smith, in his essay on the Origin of Language, held a somewhat similar view, as did Dugald Stewart. Whatever the exact process was, it must have been gradual and by a series of sounds, probably assisted by gestures.

For observations on the gesture-language of childhood and of deaf-mutes and savages, see Wylie, Disorders of Speech, pp. 96, 155.

It was a theory of the Scotch judge, Lord Monboddo, in his "Origin and Progress of Language," that wild tribes still existed in whom there was no trace of language. Lord Monboddo's *homo tetrapus, mutus, hirsutus* has still to be discovered, for it seems to be generally conceded that no savage tribe has yet been found in which there is not some capacity for language. Bateman, on Aphasia, p. 160.

[6] Napoleon, towards the end of his life, could scarcely write legibly; his handwriting proceeded from bad to worse. Yet he had a fine command of spoken language. Gourgaud's Journal.

four centers, each distinct. Two of these are sensory,—hearing and seeing; two of them are motor,—talking and writing. Observations, now very numerous, have proved that these centers are differently located in the brain, and that they may be separately injured or diseased. Consequently we may have different kinds of aphasia. The chief disagreement among scientists is as to the separate existence of a graphic center: some maintain, others deny it; but how such a center can be lacking is difficult to understand. It is doubtless intimately associated with the portion of the brain that presides over the general movements of the arm and hand. The various speech centers are evidently connected with each other by tracts of nerve fibers which allow them to act in harmony. To the breaking up of these tracts by disease are due some of the most curious disorders of speech. All these centers, in the vast majority of persons, are located in the left half of the brain.[7] The speech apparatus in the human brain may be likened to a great keyboard, with in-going and out-going wires, and with connecting strands between the various keys.

1007. The principal varieties of aphasia.—The principal varieties[8] of aphasia are as follows:

1007a. Motor aphasia.—This is the form originally described by Broca, and the lesion is located in the posterior part of the third frontal convolution. It affects the power of evolving speech. The patient cannot frame and express his ideas in words. He not only cannot talk spontaneously, but he cannot repeat on dictation, nor read aloud. In fact, all power of emitting language is gone. But the patient can understand what is said to him, and in some instances he can read to himself, because his centers for hearing and seeing are intact. In many cases he cannot write, because the motor center for writing seems to be intimately connected with the center for speech. This is one of the commonest forms of aphasia. The patient can, as a rule, communicate by signs.[8½]

[7] The exceptions are seen especially in left-handed persons. A recent case is reported in which there was word-deafness caused by a lesion in the right hemisphere of the brain. Surdité Verbale par Lesion Temporale Droite (Lyon Med. May 17, 1903).

[8] The subject has undergone excessive subdivision. Langdon (The Aphasias and Their Medico-Legal Relations, 1898) describes twenty-eight varieties. All this confuses rather than clarifies the subject for nonmedical readers.

[8½] Some patients with motor aphasia retain the power to utter a few words or even set phrases. Thus, one patient of the writer's repeated the name of his dead son, and used it for every and all occasions. Curious instances are given in which patients have suddenly become aphasic for one language and not for another; as in the case of a gentleman who, after a blow on the head, lost his knowledge of Greek, but did not appear to have lost anything else. Some of these reported cases are probably greatly exaggerated. See Bateman, on Aphasia, 2d ed. pp. 187, 188.

1007b. Auditory aphasia, or word-deafness.—In this disorder[9] the lesion affects the hearing center, in the temporal convolutions, and it is one of the most serious forms of aphasia. The term "deafness" is, however, inappropriate, for the patient is not physically deaf. He can hear sounds perfectly, but he does not recognize spoken words. It is a mental defect. The words of his mother-tongue fall upon his ear as though they were the words of an unknown language. They are meaningless sounds to him. It is therefore impossible to communicate with him by talking, but he may be able to recognize signs, and, in some cases, to read. But the effect upon his own speech is often disastrous. He can still utter words, but, not being guided by his hearing sense, he uses them in a wrong way, and his utterances may be meaningless.[10] This form of aphasia gives a patient a peculiarly demented appearance, which may be misleading. It also illustrates how ruinous is the destruction of the primary center for language,—the hearing center, through which, as already said, language is primarily acquired. The ability to write is also usually impaired secondarily in these patients.[10½]

1007c. Visual aphasia, or word-blindness.—This depends upon a lesion in the visual center, in the region of the brain known as the angular gyrus. Here, too, there is not a physical blindness, for the patient can see objects, such as printed words, but he does not recognize words, either printed or written. They are meaningless lines to him. Not being able to read, he is, of course, not able to write, for he does not recognize the strokes of his own pen any better than the writing of another person; but he is able to understand spoken language and to talk. The intelligence may be well preserved.

1007d. Agraphia.—This affection, pure and simple, is rare. Even its existence has been denied; but Mills has recently recorded such a case.[11] The lesion is located just above that for motor aphasia, in the pre-central convolution. It is usually complicated with paralysis of the arm, so that it is difficult to say how much is mental and how much is due to the physical impairment. As a complication, or sec-

[9] Collins (op. cit. p. 252) reports an interesting and typical case of this affection, in which the inability to understand what was said was accompanied with "babbling," or the repetition of meaningless sounds.

[10] Trousseau related the case of a lady who had a curious perversion of speech. "On receiving a call from a visitor, she rose to receive him with a benevolent smile on her countenance, and, pointing to a chair, said, 'Pig, brute, stupid fool.'" Her intention was to be polite.

[10½] A recent paper is by Dejerine and Thomas, "Contribution à l'étude de l'Aphasie Sensorielle," in Rev. Neurologique, Aug. 15, 1904.

[11] Trans. Col. Phys. Phila. June, 1904. Collins, who opposes the doctrine that there is a separate graphic center, has a long discussion of the subject in his valuable treatise (op. cit. p. 136).

ondary phenomenon, to the other forms of aphasia, agraphia is common. As the name implies, the patient is unable to write.

1008. The facts needful for the medical jurist.—It is possible to subdivide the various forms of aphasia into sub-groups; but these are of scientific rather than medico-legal interest, and it will not be done here. The four main varieties, above given, supply the medical jurist with the chief facts which he requires to know. The following points, however, may be added:

As the various centers, motor and sensory, for language are connected with one another by tracts of nerve fibers, and depend upon these connecting fibers for their harmonious action, it follows that defects in speech must result if any of these cross-tracts are broken up. When these connecting bands only are broken, the speech-defects are not quite so profound as when the centers themselves are destroyed. The reason for this is that the centers are located in the gray, or cortical, matter of the brain, in which the intellectual processes occur, and therefore if this gray matter is destroyed the patient's linguistic concepts are just that much destroyed with it.

1009. The dependence of thought upon language.—The question has been much debated to what extent thought is dependent on language. Doubtless the connection is much closer than unreflecting persons may suppose. As man has developed, and acquired more and more the power of abstract thought, he has also acquired a more elaborate language as a medium for this thought. The two have developed side by side. Deprive man of his linguistic medium, and it is doubtful whether he can think as far and as well as though he had it. Intellectual processes are conducted in terms of language.[12] Let any one attempt to think, to meditate to himself, and he will find that the process in his brain is going on by the silent aid of language. He cannot think well or closely without unconsciously using unspoken words,—words which are the symbols of his thoughts,—the garb in which he has always clothed them,—the mold in which he has always fashioned his ideas.[12½] This is a question of great importance in the

[12] "We gain abstract ideas only with the help of words, which alone give them a sure form."—Kussmaul.

"Where, then, is the difference between brute and man? What is it that man can do, and of which we find no signs, no rudiments, in the whole brute world? I answer, without hesitation: 'The one great barrier between the brute and man is language.' "—Max Muller, op. cit. p. 354.

[12½] Whitney (Language and the Study of Language, 1872, Lect. XI.) has gone to great pains to refute the idea that thought is dependent on language; but he seems too much to ignore the real question, that it is abstract thought that is thus dependent. It is worthy of remark, also, that Whitney, in his argument, takes no notice whatever of aphasia. But the student of linguistic science can no longer afford to ignore

jurisprudence of aphasia. Trousseau and others have held that the mental processes are always of necessity impaired to some extent in these patients, and that the extent is merely a question of the extent and gravity of the lesion.[13]

Now, when merely the connecting fibers between the centers are broken, the damage is not so great to the intellectual processes: the patients have a condition called "paraphasia," which is not so much a destruction or abolition of speech as a misuse of it. The ideas may remain clear, but the language is broken and imperfect. In other words, the internal language is all right, but the external speech is not evolved.

1010. Words as symbols of things.—Again, in acquiring language the young child does more than learn merely to utter words. These words are symbols for things. Consequently, there is an association formed in the mind between the word and the object. A child learns the word "orange," but at the same time he learns to associate the word with a certain fruit which has a characteristic color, shape, fragrance, and taste. These ideas gain access to the mind by different senses,—sight, touch, smell, and taste. Hence, a complex association of ideas is formed with the name of the object. Now, in some forms of aphasia, this association is broken up in very curious ways. There may result what is called "object-blindness" or "object-deafness."

For instance, the writer once had a patient in the Philadelphia Hospital who could not name the simplest objects that were held up before her eyes. She had no motor aphasia, for she could talk; but if a key or a coin were held up before her, she could not name it. If, however, the key or coin were slipped into her hand, she instantly gave the correct name for it. This must indicate that a lesion in her brain had affected her visual center: the path was closed; but the pathway into her brain by way of touch was open, and when the idea gained access by this pathway, the proper name was at once suggested and uttered. This woman unfortunately was illiterate, and had never learned to read; if she had had that accomplishment, she would probably have been found to have "word-blindness," or inability to read.

the pathology of this subject. Disease performs experiments on speech which are not possible in any laboratory.

[13] In the case of Lordat, a distinguished professor of medicine at Montpellier, aphasia lasted for some months, and the professor protested that he had been able to think just as well during that time as when in perfect health. But Trousseau always maintained that Lordat had deceived himself; and it was noted by all his friends that after his attack his mind was impaired, especially his memory for words, and that he could not trust himself to deliver his lectures without adhering closely to his notes.

1011. The diseases which cause aphasia.—Finally, it must be borne in mind that, as a rule, the diseases which cause aphasia do more damage than merely to the centers for language. Paralyses of various kinds are often associated with aphasia. Thus, motor aphasia is commonly seen in persons who have had a stroke of paralysis, and this paralysis is almost always on the right side of the body, for the reason that lesions in the left side of the brain oftenest cause aphasia. A left-sided lesion causes a right-sided paralysis, and *vice versa*.[14] Patients with left-sided paralysis rarely have aphasia, because in their cases the lesion is on the right side of the brain. Extensive damage may be done to the brain by hemorrhage or softening, or the lesion may be a tumor or an area of syphilitic inflammation. Therefore the mere aphasia is not the only injury sustained. In elderly persons there may be great mental impairment apart from such as is shown by the affection of speech. In short, there are few cases (although there are some) in which aphasia is the only disorder. From the medico-legal standpoint these facts are of great importance.[14½]

II. The medico-legal aspects of aphasia.

1012. Testamentary capacity in cases of aphasia.—The testamentary capacity of an aphasic patient must be judged entirely by the intelligibility with which he can make himself understood. As a legal question it matters not whether the patient knows what he wants to do, if he has not the ability to make his wants known. This is his misfortune; it is a part of the calamity which disease has brought upon him, and one which may excite the liveliest sympathy and solicitude in his friends; but so long as he cannot indicate by language, signs, gestures, or any means whatever, what he desires to devise, the law obviously cannot help him. The ability to make a will implies the ability to make one's wishes known; and whatever refinements are evolved on the subject of testamentary capacity, certainly no

[14] This fact, dependent on the anatomical fact, which is constant for the whole vertebrate kingdom, that the one side of the brain presides over the opposite side of the body, seems not to be generally known in court. I knew of an amusing instance in which it was overlooked by a very able lawyer, much to his discomfiture, in cross-examining a medical witness in a suit for damages. He lost his case, after trying to prove that an alleged injury to the right side of the brain in his client was the cause of a right-sided paralysis. He might have been saved this mortification if he had had a medical expert to "coach" him in preparing his case for trial.

[14½] It is motor aphasia especially that is associated with paralysis, such as hemiplegia of the right side. But cases are sometimes seen in which there is motor aphasia without any paralysis. The present writer has seen a case of almost complete motor aphasia without paralysis, lasting for five years before the patient's death. Such cases are probably due to small hemorrhages or spots of softening limited very strictly

court would decide that such capacity could exist apart from the capacity of expression in some form.[14 2/3]

It is therefore incumbent upon us to inquire in what ways the various forms of aphasia affect a person's ability to express himself. The other question, as to what extent the mind itself is impaired, will also be considered briefly.[15]

1013. The impairment in motor aphasia.—In motor aphasia, which is the commonest form, we see various grades of impairment, according as the lesion is more or less extended. In the simplest form the faculty of emitting language by speech is partially or entirely lost. The patient may retain a few words, or a short sentence or two, which he repeats over and over, using them for everything. Thus, one patient, for several years, used the one sentence, "I cannot talk." He spoke these words in every attempt to make himself understood. It was doubtful whether he comprehended their exact meaning. The ability to hear and understand language is retained. The patient will do as he is told. The ability to read is often retained, but, as the patient cannot read aloud, it is not always easy to test this matter. It is significant, however, that not a few motor aphasics evidently do not care to read, the effort soon tiring them; and they soon give the attempt up entirely.[16] This impairment varies in different cases, depending upon the extent to which the fibers joining the two centers are injured.

Finally, these patients, as a rule, cannot write, either spontaneously, by dictation, or by copying; but it must be remembered in this connection that there is often an associated paralysis of the right arm, which, of itself, would prevent writing. The left hand can, in some cases, be educated to write. In some cases the ability to make a mark has been retained, or at least it has been exercised with the help of

to the motor center, called "Broca's Convolution." It is not so uncommon for sensory aphasia to occur without paralysis. See Collins, op. cit. p. 215.

[14 2/3] The ability to make one's meaning known is not usually included in set terms in the legal definition of testamentary capacity, but certainly it is implied. The best exposition of this subject was by Judge Davies in *Delafield* v. *Parish*, 25 N. Y. 9. In the case of deaf-mutes this element of testamentary capacity is fully recognized and insisted on. See §§ 130, 1098 and footnotes. If the wills of deaf-mutes, as is said, are regarded by the courts "with suspicion," the wills of aphasics should be scrutinized with equal care.

[15] "It is doubtful whether it would be correct to say of any patient affected with aphasia that his intellect remains altogether unimpaired. Probably there is more or less mental impairment in every case. Usually it is less distinct in purely motor aphasia than in sensory aphasia."—Wylie, The Disorders of Speech, p. 270. See also Bernard, De l'Aphasia, Chap. X.

[16] In *Delafield* v. *Parish*, 25 N. Y. 9, Justice Davies, in his opinion, dwelt particularly on the fact that the testator, during the seven years of his illness, never read newspaper or book.

others. But, in spite of all these defects, the motor aphasic often retains clear ideas of what he wants to do, and can make himself understood by signs, gestures, nods of assent or dissent, and various kinds of pantomime. These milder cases probably belong to the sub-group in which the gray, or cortical, matter of the brain has not been injured; in other words, "subcortical" cases, in which the intellectual concepts of language are not destroyed, but only the emitting power. But in the more severe cases, in which there has been extensive damage to the brain tissue, and especially to the gray matter, it becomes a grave doubt whether normal intelligence is preserved. In the milder forms of motor aphasia the testamentary capacity is not necessarily impaired so long as the patient can make himself understood by signs and pantomime.[17]

1014. The impairment in auditory aphasia.—In word-deafness, or what is better called "auditory aphasia," the lesion is in the center for hearing language, or for apprehending spoken language, and the affection, from the legal standpoint, is very grave. The patient is unable to understand what is said to him: the words of his mother-tongue fall upon his ears as unmeaning sounds. Consequently, while he may be able to utter words, he does not do so intelligently, because the words which he utters have no more meaning for him than those that are spoken to him. His speech may become an unmeaning string

[17] Lord Chief Justice Denman, of the Queen's bench, had a stroke of paralysis, in his 74th year, which affected his right hand and made him aphasic. "It was on the 2d December, 1852, that this strange and terrible affliction befell him, —strange as well as terrible, for it had this peculiarity about it, that while he retained his intellectual and emotional faculties almost unimpaired, his powers of communication with others by writing as well as by speech, were absolutely and entirely taken from him. He could frame written letters with a pen, he could readily distinguish one wrong letter from another when ranged in lines before him, but to form these into words, or words into sentences, was utterly beyond his powers, unless the words and sentences were written, or put together as a model for him to copy from. When he had received letters, the only way he could acknowledge them was by copying in a sort of formal print hand any passage in them that had particularly pleased him, and causing that to be sent to the writers, in token that he had read and been pleased by the communications." (Memoir of Lord Denman, by Arnould, London, 1873, Vol. II. pp. 338, 339.) We are told further that he soon learned to write very tolerably with his left hand, but "he would originate nothing, and when some deeds were sent from England for his signature, he could only sign his name by seeing it written out and copying it." It is claimed, however, that he could read, and continued to take an interest in law reports, debates in Parliament, etc.

Considering that this case happened almost ten years before Broca wrote his earliest papers on aphasia, it is reported with remarkable attention to details. It reveals, in its simplest form, a case of uncomplicated motor aphasia. Especially noteworthy is the fact that the patient could read, and, in a very imperfect way, copy; but he could not write even his name spontaneously. The education of the left hand is also interesting. In such a case, the right hemisphere of the brain is educated to take the place of the injured left hemisphere.

of words,—a rigmarole or gibberish. Thus, in this form of aphasia the patient presents a particularly unfavorable appearance; neither comprehending nor uttering intelligible speech, he seems to be as one demented. Such a patient cannot comprehend questions, and therefore cannot answer them rationally; neither can he talk coherently, but utters meaningless words, and does not recognize that they are meaningless. Such a patient can have no intelligent communication with the world unless by reading, *i. e.,* using his visual center, or by writing; but these functions are also often seriously involved. Pantomime may persist, but it is often difficult to interpret. Testamentary capacity will depend on the success with which such signs can be interpreted.

1015. The impairment in verbal blindness, or visual aphasia.—In this affection the patient cannot recognize written or printed language, and, of course, cannot reproduce it, or write himself. It is often associated with object-blindness, as in the case narrated above. But the patient may retain the power to understand spoken language, and to speak himself; consequently he is in a condition often to make himself understood. But he is peculiarly liable to be imposed on in the matter of printed or written documents, because, by reason of his impairment, he cannot understand them.

1016. The impairment in agraphia.—Simple, uncomplicated agraphia is rare; in fact, its existence is denied by many observers. It would cause merely an inability to write, and would not impair the patient's ability to understand what was said to him, or what he read, or to speak in turn. In its simple form it would be one of the least disabling of all the aphasias; but it is seen often as a complication of other forms of aphasia, as already shown, and this tends to confuse the case, especially where there arises the question of testamentary capacity.

1017. The frequency of these cases in the courts.—The history and literature of the jurisprudence of aphasia are not very full, although these cases have occurred occasionally in the courts, and are likely to continue to occur. According to Bateman,[18] as far back as 1743 an aphasic patient applied to the Hanoverian government for permission to make a will by means of signs, and the court acknowledged the validity of the act.[19] Another aphasic discharged for five years the duties of mayor by signing his name with his left hand, and he also

[18] On Aphasia, 2d ed. London, 1890. p. 302.

[19] Hoffbauer. Traité de Médecine Légale, Paris, 1827.

wrote in this manner a holographic will.[20] An interesting case occurred in England, in which the will of an aphasic patient was acknowledged to be a good will in itself, but was rejected on a technicality.[21]

1018. The Parish will case, and the onus probandi.—The leading case in America is *Delafield* v. *Parish*.[22] In that case it was decided, among other things, that the *onus probandi* is on the propounder of an alleged will;[22½] in other words, that an executor, when he presents a will for probate, must prove the mental capacity of the testator,—a decision which runs counter to the usual presumption that every man is sane until the contrary is proved. It was also declared that, in law, the only standard by which to prove testamentary capacity in persons who are not "idiots or lunatics" is found in the fact whether the testator was *compos mentis* or *non compos mentis*. If he was *compos mentis*, the testator could make any will, however complicated; if he was *non compos mentis*, he could make no will whatever.

[20] Billod, Ann. Med. Psych. tome XVIII.

[21] *Margary* v. *Robinson*, L. R. 12 Prob. Div. 8, 56 L. J. Prob. N. S. 42, 57 L. T. N. S. 35, 35 Week. Rep. 350, 51 J. P. 407. The testator, aged sixty-three, was seized with paralysis on November 13th. He was unable to write, and speech was affected. What purported to be a memorandum, written on a small card, by another person, indicated an intention to bequeath £30,000 to his fiancée. Two medical men wrote their names as witnesses on the back of the card, and the testator wrote his mark on the middle of the face of the card. He died on November 24th. The court pronounced against the probate, on the technicality that the signature was not at the end of the document. Otherwise, it was a good will.

The case is not adequately reported from a medical standpoint. The symptoms are not given in detail, and it is impossible to say what form of aphasia the testator had. It has practically but little value as a case of aphasia, for it was decided on other grounds.

[22] 25 N. Y. 9. In this case the evidence taken before the surrogate filled three printed volumes of 800 pages each, and the report of the case in the court of appeals takes more than 100 pages. Justice Davies' analysis of the case is extremely valuable from a scientific as well as from a legal viewpoint. It was before the days when aphasia was much discussed; but it is evident that Mr. Parish had had a very grave form of the affection. He was speechless and unable to read and write for years, and entirely under the control of his wife and her family. "He was therefore denied," said Justice Davies, "the usual manner of communicating his thoughts and wishes. What remained were signs and gestures, and the expression of his face to communicate with those around him. Some of the witnesses supposed that they obtained his meaning by the expression of his face. Now, . . . the only agents conveying such expression are the mouth and eyes. Mr. Parish had no use whatever of the former organ for this purpose. . . . After his attacks the muscles of his mouth became firm and rigid. . . . He could therefore neither speak nor use the muscles of his face to give expression to his thoughts, and the gestures made by him with the left hand and its fingers were irregular, unmeaning, and contradictory, and often conceded to be misunderstood."

Vain attempts had been made to teach Mr. Parish to write with his left hand, and there were grave doubts of his ability to read. He never read for seven years. The two codicils, which were the only parts of the will contested, were not allowed. A dissenting opinion by Justice Gould reflects the conflicting ideas of the courts on this delicate question.

[22½] For the legal discussion of this question, see *ante*, §§ 299–302.

The importance of these decisions, as regards aphasics, is very great. If it falls upon the proponent of the will of an aphasic to prove that the testator had testamentary capacity, this question is necessarily opened whenever such a will is presented for probate; and it may be a more difficult thing to prove that such a patient had such capacity than to prove that he had it not. At any rate, this decision opens this question in every case at the very beginning.[22][23]

1019. The issue briefly stated.—The wills of aphasics have been sustained,[24] but call for caution.[25] On the other hand, such wills have, in some cases, not been allowed.[26] Than for the determination of this delicate question no more caution and judgment are required in any form of mental disorder.[27] Each case must be studied on its own merits. Cases of aphasia differ widely, and no one rule will apply to all of them. The most careful expert tests are required in every case, and these tests are to be applied to the determination particularly of the four points already emphasized above: Can the patient talk? Can he understand what is said to him? Can he read? Can he write? Back of all these inquiries still lies the obscure question of his mental capacity, and of his ability to make himself understood by gestures, signs, and pantomime in general. Relatives and friends often claim more for these patients than the facts warrant; medical experts sometimes engage in too many physiological refinements; and the courts are rather too prone to confine the question to the limits of a technical and narrow definition.[28]

[22] Baron Parke (*Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 637, 2 Moore, P. C. C. 480) said: "The *onus probandi* lies, in every case, upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

[24] *Rothrock* v. *Rothrock*, 22 Or. 551, 30 Pac. 453; *Re Miller*, 179 Pa. 645, 39 L. R. A. 220, 36 Atl. 139.

[25] *Re Raynor*, 44 N. Y. S. R. 468, 18 N. Y. Supp. 426.

[26] *Mendenhall* v. *Tungate*, 95 Ky. 208, 24 S. W. 431; *Smith* v. *Henline*, 174 Ill. 184, 51 N. E. 227.

[27] *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329. This case illustrates the lack of care with which such affections are reported. It is usually referred to as an instance of "mutism," even "deaf-mutism," whereas it was the case of a man, aged ninety years, who was a senile dement and probably aphasic.

[28] An important case was one which formed the subject of an historic discussion before the Société de Médecine Légale de Paris (Ann. d'Hyg. tome XXXI. p. 430). It is noteworthy that the tribunal at Avignon gave a decision in conformity with the views of the society. Bateman, op. cit. p. 306.

CHAPTER XLVIII.

PARANOIA.

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I. The medical aspects of paranoia.

1020. Definition.—Paranoia is a form of insanity which is characterized by systematized delusions, or by the tendency to form such delusions. It is often, but not always, established on a basis of heredity, and it is a primary affection in the sense that it does not follow upon a precedent generalized insanity, such as a mania or melancholia.[1]

1021. Systematized and fixed delusions.—As systematized delusions are so characteristic of paranoia, it is imperative to know what is meant by that term. A delusion is systematized when it has a logical construction in all its parts. It is a belief which proceeds from an erroneous premiss, by a process of ratiocination, to insane conclusions. Therefore it has a marked influence on conduct and character, the more so that such delusions are also, as a rule, fixed. When we speak of fixed delusions, however, we do not mean that such delusions can never change, but only that they persist for periods, often long extended, and that they change slowly, and only by a logical sequence. When, for instance, a paranoiac forms the delusion that he is persecuted, and shapes his life and conduct accordingly, we see a systematized and fixed delusion; when he explains his reasons for believing that he is persecuted, and his grounds for his line of conduct, we see in what way his delusion is systematized; and, finally, when his persecutory delusion, after a period perhaps of years, changes into an expansive delusion, as that he is some exalted personage, we see what was a fixed delusion change its type. This is usually the course in paranoia.

1022. The terms "paranoia" and "monomania."—Paranoia, although an old word, derived from the Greek, and meaning merely insanity in general,[2] has only lately come into general use in psychiatry for the special form of insanity here described. It was adopted as a protest against the further use of the word "monomania," a term which

[1] Séglas, "La Paranoia" Arch. de Neurologie, 1887. Mendel, "Die Verrucktheit," Eulenberg's Encyclopädie, 1893.

[2] Liddell & Scott, Lexicon. The word παράνοια was thus used by Eschylus, Thebes, 756.

has been so abused and misunderstood as to have lost many of its rights to exist.[3]

The term "monomania" was introduced by Esquirol,[4] who used it to denote a class of the insane who were supposed to be alienated only on one idea. Esquirol, whose high authority has diminished but little with time, described monomania as a chronic cerebral affection, unattended by fever, and characterized by a partial lesion of the intelligence, affections, or will. The intellectual disorder is confined to a single object, or a limited number of objects. In other words, this is a partial insanity; and, apart from this disorder, these patients think, reason, and act like other men.

1023. Monomania and partial insanity.—It is thus evident that Esquirol's monomania was strikingly in accord with Sir Matthew Hale's "partial insanity." According to Hale,[5] this form of insanity is of those persons who "have a competent use of reason in respect of some subjects," but yet are "under a particular dementia in respect of some particular discourses, subjects, or applications. . . . And this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason." In fact, Hale, the jurist, and Esquirol, the alienist, are so nearly in accord in this matter that their opinions have usually flourished side by side in the courts. And yet the experienced eye will not fail to detect that Hale included melancholia with his partial insanity, while Esquirol took pains to distinguish the former disease under the term "lypemania." Melancholia is no longer confused with monomania by systematic writers.

But the term "monomania" was never entirely satisfactory to alienists, and, in spite of Esquirol's high authority, it has had to run the gauntlet of criticism ever since its birth.[6] The objections to the term rest mainly on the fact that it gives rise to erroneous ideas as to what is meant by partial insanity.

1024. The two kinds of systematized delusions.—There are two

[3] "Paranoia" has not attained favor with British authors, but it is more popular in America. For a statement which reflects the British prejudice, see Bevan Lewis, Mental Diseases, 2d ed. p. 232. Lewis prefers "primary systematized insanity," but this is a cumbersome term.

[4] Des Maladies Mentales, Paris, 1838. Also American translation (abridged) by Hunt, Phila. 1845.

[5] 1 P. C. Chap. IV.

[6] For a luminous account of the history of the term "monomania" and the criticisms to which it has been subjected, see Spitzka's treatise on Insanity, chapter on "Monomania: Preliminary Considerations." 1st ed. 1883. In his 2d ed. 1887, Spitzka adopted the word "paranoia."

kinds of systematized delusions, which it is necessary to distinguish: the delusions of persecution and the delusions of grandeur. In the former the patient believes that he has enemies; that he is the object of conspiracies; of designs against his peace, his welfare, even his life. In the latter he believes that he is a personage of importance; that he is reserved for a great destiny; that he is a reformer, an inventor, a prophet, a king, or even a Messiah. These two types of delusions, as may readily be understood, cause different reactions in the life and conduct. They are not, as a rule, present in the same individual in full force at the same time; in other words, they appear at different periods in the evolution of the disease. They also have different significance as to the degree of insanity. The patient who believes merely that he is persecuted is not so far advanced in mental derangement as the patient who has evolved the delusion that he is a Messiah. The latter is a much more crazy idea than the former. A man in his senses might have some reason for believing that he was persecuted by enemies, but no man in his senses would believe that he was a Messiah. The latter delusion involves a more profound change and perversion of the personality than the former: the patient is more fundamentally insane.

Esquirol included in his monomaniacs the patients chiefly with expansive delusions, or delusions of grandeur. The patients with depressive delusions, or delusions of persecution, he included along with the melancholiacs, in the group which he called "lypemania."[7] By this arrangement the fault was committed by this great master of confusing two classes which should be kept distinct. The melancholy patient is not by nature in the same group with the patient who has delusions of persecution. A moment's consideration should make this point clear.

1025. The distinction between paranoia and melancholia.—The melancholy patient, as explained fully elsewhere (chapter on "Melancholia," p. 625), is the victim of a profound emotional disturbance, which has for its basis a sense of personal unworthiness, or a sense of mental pain. The central idea is one of abasement,—of limitation; the person is not persecuted, but he suffers from defects which he believes he fully deserves; and for which he holds no one responsible but himself.

With the persecuted patient the central idea is exactly the reverse

[7] Lypemania is derived from λυπη, sadness, and μανια, madness. The word continues in use by French writers, but has never been naturalized in England and America.

of all that. Far from meriting his sufferings, he is the object of unjust machinations. The sense of personality is affected, therefore, in quite the reverse way from abasement. The patient sees nothing in himself that is to be blamed for his sufferings. He loses nothing of his sense of personal esteem. On the contrary, this sense of the personality is rather stimulated or goaded into a state of morbid egotism. Instead of being emotionally depressed, as is the melancholiac, the persecuted lunatic is incited to self-justification, to resentment. It is the vital difference between the man who believes that he has sinned and the man who believes that he is sinned against. The mental reaction is entirely different in the two cases. Hence, melancholia should be distinguished, and, in fact, has now for many years been distinguished by the best alienists, from the insanity of persecution. From the medico-legal standpoint this distinction is also of the first importance.

1026. Delusions of persecution.—Among the first to make this vital distinction was Lasègue.[8] From the class designated by Esquirol as lypemania, Lasègue had the merit of detaching a group of patients with a form of monomania or partial insanity which he called the "insanity of persecution." These patients were not melancholy,—they did not suffer mental pain from a sense of personal unworthiness,—but they had the belief that they were the objects of the evil designs of other persons. Lasègue included in this group all patients who had delusions of this kind, whatever the origin of these might be, or whatever their termination. This distinction was an immense gain in psychiatry, for it was strictly in accord with natural phenomena. It served to mark out and separate a group of the insane who have no natural affinity with melancholia. It did not, however, distinguish as clearly as might be the fact that persecutory delusions may occur in several varieties of insanity; for instance, in chronic alcoholism as well as in so-called monomania.

1027. Delusions of grandeur.—Now, in the same way as the delusions of persecution were made a basis for a special form of insanity, as we have just seen, so the delusions of grandeur were seized on to form a separate group. This was a natural tendency, because the two classes of delusions seemed so distinct. In fact, Esquirol, as we have seen, made the delusions of grandeur the basis for his monomania; and after his time, Foville,[9] another French alienist, voiced

[8] "Du Délire de Persécution," in Arch. Gén. de Méd. Fév. 1852.

[9] Étude Clinique de la Folie avec Prédominance du Délire des Grandeurs, Paris, 1871. Also, "Megalomania," in Trans. Int. Med. Cong. 1881.

this tendency by creating a special group of the insane, which he based upon these exalted delusions, and which he named "megalomania."[10] These are the patients, as we have said, who have exalted opinions about themselves, like the score or more whom Clouston[11] says he has had in the Royal Edinburgh Asylum, who were to marry Queen Victoria. In fact, the popular, and even the legal, notion of monomania still takes its cue largely from this old distinction. The monomaniac, for most persons, is an erratic, eccentric individual, with fantastic and impracticable schemes, with unfailing self-confidence and self-assertion; the genius who is popularly called a "crank." This idea is accurate so far as it goes, but it does not include the whole of paranoia. Moreover, the group outlined by Foville and others included patients with various sorts of delusions of grandeur, whereas it is now well recognized that these grandiose ideas are not all alike. Thus, some of them belong to general paresis (Chapter XLII.), and are to be easily distinguished from those of the monomaniac. Others are seen in chronic mania.

1028. Systematized delusion made the criterion of monomania.—Another step in advance, therefore, required to be made in demarcating the delusions of monomaniacs, and this was done especially by Morel,[12] when he pointed out that the delusions of these patients were systematized. This term has already been defined. A systematized delusion is one which has a logical construction: the patient explains and defends it. In its premisses and its conclusions it is faulty and insane; but it has, nevertheless, for the patient himself, a logical coherence. It molds character and controls conduct. It is, in itself, consistent. Thus, a patient who believes that he is deprived of his fortune, or that he is a Messiah, is always ready to give his reasons and live up to his belief. Nothing is more real, more ever-present, more determinative of a line of conduct, than the systematized delusion of a paranoiac. It may be an error to say unreservedly with Locke,[13] that an insane person always reasons correctly from wrong premisses, for in fact many lunatics reason incorrectly from incorrect premisses: the whole logical process is wrong. But the fact remains that in systematized delusions we see a logical form or construction,

[10] From *Μέγας, Μεγάλη*, great, and *Μανία*, madness.

[11] Mental Maladies, chapter on "States of Fixed and Limited Delusions."

[12] Traité des Maladies Mentales, Paris, 1860.

[13] Human Understanding, Bk. II. Chap. XI. § 13. Speaking of madmen, Locke says: "They do not appear to me to have lost the faculty of reasoning; but, having joined together some ideas very wrongly, they mistake them for truths, and they err as men do that argue right from wrong prineiples."

although the whole process may be insane. In some instances, however, Locke is correct.

It is characteristic of monomania, or paranoia, as distinct from most other forms of insanity, that the delusions are thus systematized. The one other form of insanity in which this feature is seen to anything like the same extent is melancholia; but melancholia is distinguished from monomania by the emotional depression, as already explained.

1029. Degeneration.—It remained also for Morel[14] to give currency to a term which has had great vogue in respect to monomania. This is the term "degeneration." For Morel this meant merely "a morbid deviation from a primitive type." The book in which he expounded his idea has had great influence, and his scheme may be called Darwinian in its general scope, although Morel wrote before Darwin. The French alienist saw in the history of the human race a struggle against adverse circumstances. On all sides mankind, from the moment of birth, is surrounded with risks and dangers. These are climatic, social, political, hygienic, and all such as arise from vices, diseases, accidents, and occupations. Such causes, innumerable and unceasing, act disastrously not only upon some individuals but also upon their offspring; for the law of heredity acts with precision to pass on to future generations what was begun in the progenitor. It thus happens that in the course of generation after generation, morbid types are established, and these show themselves in the evolution of mental disease.

Morel thus made a broad generalization which is of immense value in mental pathology. He unfolded this idea with great ingenuity and learning, and his book remains as a treasure-house of facts and inductions. According to this philosophy, there is always to be found a remnant of humanity who show in their minds and persons the fatal blight which has been transmitted to them as a resultant of evil influences acting through former generations, or acting even on the individual in his formative period. It is in this soil, especially, that paranoia flourishes in some of its worst forms.

1030. The stigmata of degeneration.—The signs of degeneration, called usually the *stigmata* of degeneration, are of great variety and extent, and they have been studied in great detail since the time of Morel. They are mental and physical.[15]

[14] Traité des Dégénérescences, Paris, 1857.

[15] Legrain, Du Délire chez les Dégénérés, 1886; Church & Peterson, Nervous and Mental Diseases, 1901, p. 637 *et infra;* Berkley, Mental Diseases, p. 536; Meyer, "Signs of Degeneration," in Am. Journ. Insanity, Vol. 711.

The mental *stigmata* have been defined as general want of harmony between volition and instinct; instability; excess or deficiency of emotion; obtuseness; slow mental development; defects of speech; all stages of mental weakness, down to idiocy.[16] In fact, the mental defects in degenerates are of infinite variety, and are not incompatible, in a few cases, with considerable ability and even brilliancy; but in all these cases there is a want of balance, and in many of them there are moral and mental perversions of extraordinary types. These patients are often visionary, impractical, desultory, lacking in common sense, and the creatures of impulse and of queer or evil propensities. They are the cranks, vagabonds, ne'er-do-wells, moral imbeciles, and border-line cases, who often present the most perplexing problems in medical jurisprudence. Thus, all grades and varieties are seen, from the merely eccentric to the outright insane; from the dull and intractable to the downright imbecile. To define them in a few set phrases is impossible.

The physical *stigmata* of degeneracy are also of great variety. To describe them accurately would require the use of many technical terms. In general, they consist in bodily defects and deformities in the stature of the body, in the bones of the face and skull, in the ears and palate. Here, too, all grades and varieties occur, as is always the case in the works of nature. A very common condition is asymmetry, or an unequal development of the two sides, as of the skull and face. Thus, there exist defects which range from the slightest inequalities, such as sometimes excite the ridicule of the unthinking, down to the most conspicuous deformities of idiocy, such as microcephalus and hydrocephalus. In some cases the sexual organs are undeveloped; and some of these patients are deaf and dumb.

1031. Paranoia has several stages.—From the foregoing account, historical and descriptive, it is now possible to present a picture of what is meant by paranoia. This form of insanity is characterized by systematized delusions, such as have been described, but these delusions present themselves in a particular manner of evolution.[17] This proceeds by stages, as follows:

1031a. The first stage.—In the first stage the patient passes through a period of disquietude, in which he begins to realize that he is out of harmony with his environment. He is uneasy and dissatisfied. He becomes introspective, and subjects himself to analysis in an attempt to interpret his disorderly feelings and thoughts. This has

[16] Tuke, Dict. Psych. Med. Vol. I. p. 331.

[17] Régis, Mental Medicine, translated by Bannister, p. 212, *et infra*.

been called the hypochondriacal stage, although this term is not entirely accurate. It is rather a period of beginning suspicion, of rudimentary delusions. The patient, in full possession of his intelligence, comes to realize that he is not in accord with others, and from this it is but a step for him to believe that others are not in accord with him. He is gradually, as it were, breaking up the ties of confidence and harmony upon which all rational society is founded. He becomes to himself something peculiar and apart from others.

1031b. The second stage, or stage of persecution.—In the second stage the patient passes on to the formation of delusions of suspicion and of persecution. Some observers believe that these arise by a sort of logical process in the patient's mind. It is thus that he interprets his own disquietude. However that may be, these delusions now gradually become more and more systematized. The victim believes that he is the object of the evil designs of other persons; he is talked about and maligned; he is shunned; his plans are thwarted; he is unjustly dealt with; he is defrauded of his rights; he is tormented by unknown and unseen foes; he is worked upon with electricity; his semen is drawn from him.[17½] In some cases he begins to have hallucinations of hearing. Tormenting voices call to him; they insult and revile him; they repeat aloud his innermost thoughts. In time he may fasten his suspicions upon some particular person or persons. He meditates plans of protection, and then of resentment. He has now become the persecuted paranoiac, the most dangerous of all the insane.

1031c. The third stage, or stage of grandeur.—In the third period the patient undergoes what has been called the transformation of the personality. Either gradually or quite suddenly he conceives delusions of grandeur. He who was persecuted, who was reviled and rejected by man, rises superior to this adverse fate. He becomes a personage of exalted destiny. Herein his disordered mind finds an interpretation of his sufferings. It was not for nothing that he was singled out for persecution and infamy. By a sort of reaction, or mental recompense, the insane conscience passes into a state of exaltation. This marks the zenith of his delusions. He becomes a reformer, a prophet, or a Messiah. He is marked for a great destiny in the state: he is to be, or is, a scion of royalty, king himself, political

[17½] Delusions about the sexual organs are not uncommon in alcoholic paranoiacs; in fact, Spitzka (Insanity, 1st ed. p. 254) thinks they are specially significant of that form of the disease. Falstaff, who was certainly an alcoholic case, expresses a queer notion on the subject of spermatorrhea, but it is too inelegant to quote. (Merry Wives of Windsor, Act. V. Sc. V. lines 15, 16.)

reformer, or president. These delusions take many and extravagant forms; but all of them indicate a more profound derangement than the ideas of persecution. They involve a transformation in the patient's conception of his own personality,—a transformation which is profound and complete.[18]

1032. Paranoia is a primary affection.—It is to be noted that paranoia, as thus described, is a primary affection; that is to say, it does not follow on a more generalized insanity, such as mania or melancholia. It was held by some of the older alienists, such as Griesinger,[19] that the insanity of systematized delusions always succeeded a state of mania or melancholia; in other words, that it was secondary. But this idea yielded to a more accurate view of monomania or paranoia, which, as we have seen, develops as a primary disorder in a soil of degeneracy. Therefore the later German writers —Snell, Meynert, Mendel, Krafft-Ebing, and others—adopted for this form the term *Primare Verrucktheit,* which means practically the same as primary monomania, or paranoia.[19½]

1033. Various forms of paranoia.—As the case stands at present there is a disposition to see several forms of primary systematized insanity, or paranoia. Some of the French and Italian alienists, for instance,[20] make two great subdivisions: First, those cases that are purely degenerative. In this class the evolution of the disease is irregular or atypical; all sorts of aberrant forms are seen. Second, a class in which there is not a distinct hereditary or degenerative taint. This develops more regularly, as in the type described in the foregoing pages, and may be acute or chronic. They also recognize a secondary form, following on mania or melancholia, very much as Griesinger had done; and this secondary form, in fact, is not easily distinguished from ordinary chronic mania or melancholia.

This non-degenerative form of paranoia has recently found an

[18] A very remarkable autobiography by a paranoiac has been published in part by Dr. Frederick Peterson (Ment. and Nerv. Dis. by Church & Peterson, 1901, p. 774). The patient, although badly insane, analyzed his own case with accuracy, and recorded it in a literary style which is unique. It shows the evolution of the disease in very nearly the exact way described above. The patient, with pathetic force, records how he could, in his own case, at times "see the man he ought to have become rising up like a shadowy phantom in judgment on the wreck he really was." Such self-analysis is very rare.

[19] Mental Pathology and Therapeutics, translated by Robertson and Rutherford, p. 228.

[19½] A useful review of the whole subject of paranoia, especially as reflecting the opinions of German and continental alienists, has been given by Dr. Percy Smith in his "Presidential Address on Paranoia," in the Journal of Mental Science, Oct. 1904, p. 607.

[20] Amadei and Tonnini, Arch. Ital. per le Mal. Nerv. Anno XXI., quoted in Tuke's Dict. Psych. Med. Vol. II. p. 887.

advocate in Magnan,[21] a leading alienist of the French school, who describes it as chronic insanity of systematic evolution. It pursues a course of development by stages, such as have been described above.

These various distinctions and subdivisions are of interest to the professed alienist rather than to the medical jurist. For the latter it is sufficient to bear in mind that paranoia, whatever its form, is a primary insanity, characterized by the formation of systematized delusions. Without such delusions there is no true paranoia, although rudimentary cases are observed, especially in degenerates, in which the mental derangement has not advanced to the formation of such delusions in their fully developed form. In these rudimentary cases erratic conduct and moral perversions are not uncommon.[22]

1034. Common types of the disease.—Although in typical cases the evolution of paranoia is by stages, as has just been shown, still there are cases in which one form of delusion persists so long, or predominates so much over the others, that some alienists describe different types of this disease. Thus, Krafft-Ebing[23] recognizes several forms. First, there is the early or precocious form, developing before puberty; practically a form of dementia præcox (see Chapter XLIX.). Second, there are the forms developing after puberty; and among these are persecutory paranoia, in which the delusions of persecution are uppermost; and the expansive paranoia, in which the grandiose forms of delusion control the case. Of this latter group the commonest are the paranoia inventoria, or the class of insane inventors; paranoia religiosa, or the class of prophets and Messiahs; and paranoia erotica, or the class of insane lovers,—lunatics who believe that they are the objects of amorous regard on the part of prominent persons.

1035. The persecutory form is the most dangerous.—These patients develop their delusions often insidiously; and these delusions may become most elaborately systematized before they begin to lead the patient to commit overt acts. In the meantime the patient may attend to his work and go about his daily life as though he were in his sane mind. The writer once had for several years in his employ a young colored man, who rode with him daily, and who, in the course of the professional rounds, often stopped at a large hospital, contain-

[21] "Délire Chronique à Évolution Systematique," in Leçons Cliniques sur les Maladies Mentales, Paris, 1890.

[22] A notable discussion of this whole subject of paranoia, or primary delusional insanity, took place before the French Medico-Psychological Society in 1886–1888. Those who are specially interested are referred to the proceedings of that distinguished body, as well as to Magnan's work, already quoted, in which the subject is reviewed.

[23] Traité Clinique de Psychiatrie, traduit par Laurent, Paris, 1897.

ing more than a thousand insane patients, and visited daily by large classes of medical students. The colored youth gradually formed the delusion that these students were in league against him, to secure his person, and that his employer was a ringleader in this scheme. He began to have hallucinations; would not go into the streets alone after dark; and (as transpired later) he secured a pistol, with which in his pocket he rode alongside of his unsuspecting employer for three months. When his condition became known he was already hopelessly insane, and died a year or two later in an asylum. To this persecutory class belonged Bellingham, M'Naghten, and Guiteau.[23½]

1036. Hallucinations in paranoia.—Some of these patients have auditory hallucinations, which still further aggravate the mental disorder. These hallucinations are of an alarming or insulting character. The patient hears voices and may reply to them; and in cases in which he attempts to conceal them, as is not unusual, he may be observed listening to them, and moving his lips in answer. Hallucinations grow only in an insane soil: the patient who is haunted by them is mad.

1037. The religious paranoiacs.—These belong to the expansive type, in which has occurred the transformation of the personality, already referred to. A complete change in the individual's conception of himself has occurred in these patients. They believe that they are commissioned by God to work out great destinies. History has many examples of them. There is reason to believe that, in ancient Palestine, the Messianic dream of the Jews gave origin to not a few of this class of pseudo-Messiahs before the time of Jesus.[24] In the Middle Ages the crusades were both the cause and the effect of insanity.[25] In our own America there seems to be a fruitful soil for

[23½] Felton, the assassin of Villiers, Duke of Buckingham, Prime Minister of Charles I., in 1628, was actuated by ideas of persecution as well as by religious and political excitement. He was considered a lunatic by some persons. He is worthy of being commemorated from the fact that he was the means of forcing from the English judges the historic declaration that torture is contrary to the law of England. When he was threatened with the torture, he stoutly maintained that there was no law for it, and told the Duke of Dorset, the agent of the King, that if he was put on the rack he would implicate him, Dorset, as his accomplice. When the question was referred to the judges they made answer that "no such punishment is known to our law." Thus "the manly spirit of Felton . . . wrenched the hidden law from the judges who had hitherto been too silent; and produced that unexpected avowal which condemned all their former practices. But it was reserved for better times, when philosophy, combining with law, enabled the genius of Blackstone to quote with admiration the exquisite ridicule of torture by Beccaria."—Disraeli, "Felton, the Political Assassin," in Curiosities of Literature, Vol. III. pp. 115 *et seq.* See also Blackstone, 4 Com. 325, 326.

[24] Renan, Life of Jesus, Chapter IV. See also Josephus, Antiquities of the Jews, Bk. XVIII. Chap. I. for an account of Juda the Gaulonite.

[25] Peter the Hermit, who started the

these insane prophets and preachers. We have had in recent years, in the Philadelphia Hospital, a typical case of a Messiah in a man who wore his hair and beard long, and cultivated a remarkable facial resemblance to the conventional portraiture. Hadfield, who shot at George III., was a paranoiac with the delusion that he was called by the Almighty to do a great deed.[26]

Religious fanatics are often paranoiacs, and act from a deep conviction that they are right. Jacques Clement, the assassin of Henry III., of France, responded, after the deed, that he was satisfied; that he had no regret. This illustrates an important trait in delusional lunatics,—their domination by their delusions; their satisfaction in acting according to them; and their profound belief that they have acted right.

1038. Insane inventors.—The insane inventors are described as a separate class by Krafft-Ebing.[27] Their schemes are often extravagant, absurd, puerile, and evolved from the idea or dream of great fortune awaiting the individual. Some of these patients also imagine that they are great poets, artists, scientists, mathematicians, or statesmen.[27½] The discoverers of perpetual motion are usually of this class, and this delusion reveals the mental incapacity of such fools, for they have not minds enough to appreciate the fact that such a scheme is, of necessity, contrary to the laws of nature. Hence, as Krafft-Ebing has observed, these inventing paranoiacs are often of inferior intellect.[27⅔] The man who believes that he can square the

first crusade, was probably a border-line case, if not downright insane. It was an age of extreme ignorance and religious credulity,—two things which always favor monomaniacs. For a brief but graphic history, see Bémont and Monod, Medieval Europe.

You may as well
Forbid the sea for to obey the moon,
As by an oath remove, or counsel shake
The fabric of his folly, whose foundation
Is pyl'd upon his faith.
—Winter's Tale.

[26] Chief Justice Taney, when a child in Maryland, went to school to a teacher who was such a lunatic that he was drowned in attempting Peter's feat of walking on the water. (7 Alb. L. J. p. 3.) This was a good example to teach a judge what delusional insanity can really do. (Matthew, xiv. 22–33.)

Maudsley (Responsibility in Mental Disease, 1874) tells of a commissioner in lunacy who went to an asylum in his official capacity to discharge patients who he believed had recovered. He found one man in whom he could detect no sign of insanity, so he discharged him on the spot. When the patient was required to sign his release papers, he signed "Christ." A patient examined in open court by Lord Lyndhurst announced himself the prophet Ezekiel; another, whose case is referred to by Erskine in his speech for Hadfield, proclaimed, in the face of the whole court, "I am the Christ."

[27] Op. cit. p. 476.

[27⅓] The scribbling paranoiac was immortalized by Juvenal, 7, 52:

Tenet insanabile multos
Scribendi cacoethes, et ægro in corde senescit.

The fact that this species existed in the degenerate days of ancient Rome is not without significance.

[27⅔] The opinion that "great wits are sure to madness near allied" is not always justified in paranoiacs. *Sine aliqua dementia, nullus phœbus* looks better in Latin than in fact. Charles

A case of religious paranoia in a patient who believed he was a Messiah.

circle is usually a paranoiac. Clouston[28] had a patient who believed that twice two were four and a quarter, and who left his manuscripts, filling two large chests, to the University of Oxford. Occasionally the invention of a paranoiac is not without value; but this fact does not prove the inventor to be sane. I knew such a man, who had invented and patented a harrow; it was of some use, and was adopted by the farmers; but this fact only increased the inventor's insane delusion as to his own importance. He became a political and religious agitator. These inventors may become very suspicious and resentful, especially if they believe, as is not unusual, that they are defrauded of their rights. Bellingham, although not an inventor, and usually classed as a persecutory paranoiac, believed that he had conferred a great benefit upon the government, and was deprived of his just reward. Such a case is of rather an exceptional type; one in which the delusion of persecution follows, instead of preceding, the expansive delusion.[29]

1039. The erotomaniacs.—These are the insane lovers, or lunatics who are enamored of some prominent or exalted personage, whom they pursue as long as they can keep out of an asylum. They usually have the delusion that their love is reciprocated, and they build insane air-castles and schemes on this imaginary basis. Mary Anderson, the actress, had such an insane lover, who followed her up and down the land. He was finally certified, and later he killed one of the asylum physicians, who he believed was his persecutor.[30]

II. The medico-legal aspects of paranoia.

1040. Criminal paranoiacs.—When it is borne in mind that the large majority of the criminal insane are recruited from the paranoiacs, it becomes evident at once that we are in the presence here of

Lamb combated this fallacy in an essay on "The Sanity of True Genius;" but poor Lamb himself was once insane. (See Hazlett's Mary and Charles Lamb, Chaps. VI. and VII.)

[28] Mental Diseases, p. 189.

Huxley has somewhere declared that he could imagine a world in which twice two did not make four. He had probably never heard of Clouston's patient, else he would have hesitated to avow such a belief.

[29] John Brown, the emancipator, who led the raid at Harper's Ferry, probably belonged to this class. He was little better than a vagabond, and had a very large family, which he neglected. His praises have now been hymned for almost fifty years, but if his wild schemes had led him to assassinate the President of the United States instead of running amuck in Virginia, we should have had a different popular verdict.

[30] Cervantes, in his immortal book, has drawn the picture of an erotomaniac in Don Quixote. The fact that it was meant as a satire on the expiring follies of chivalry, only adds to its value as a psychological study. Chivalry was one of the popular crazes which are so prolific of paranoiacs.

one of the most important of the insanities. This is the form, in fact, about which have been waged most of the forensic battles, and it is beyond compare the most intricate of all forms, if we except those that raise the question of testamentary capacity. It is here that we meet in full force with such questions as partial insanity, delusions, moral insanity, partial responsibility, and the knowledge of right and wrong.[31]

1041. Sir Matthew Hale's "partial insanity."—The first recognition in English law of a form of insanity corresponding in a way to paranoia is found in the well-known definition of Sir Matthew Hale,[32] already referred to. (*Ante,* p. 518.) Before Hale's time, and even after it, the subject was without form, and void. Insanity, or "madness," or "lunacy," as it was called by the old writers, was a generalized mental disease, in which the patient (or the prisoner) was "totally deprived of his understanding and memory," or had no more knowledge of what he was doing than a wild beast,[33] or, as the civilians put it, *non intelligit quid agit,*—did not know what he was doing.[34] But Hale, as we have seen, recognized a "partial" insanity, in which it is easy to see that he referred to persons who had systematized delusions, and whose minds, except for those delusions, had "a competent use of reason in respect of some subjects."

For this differentiation Hale would deserve great credit, were it not that he proceeded, almost with the next stroke of his quill, to declare that this delusional insanity was no excuse for crime. "This partial insanity seems not to excuse them in the committing of any offense for its matter capital." When he wrote those words the Lord Chief Justice of the King's bench was literally passing sentence of death on a large number of paranoiacs, who, during the following two hundred and more years, were to perish on the scaffolds of two continents. Hale's doctrine of partial insanity was, indeed, for all that time, the shibboleth of the criminal law of England.

1042. Abuse of the term "partial insanity."—We have already discussed the subject of partial insanity in these pages (§§ 472–475), and refer to it briefly again because it is an essential part of paranoia.

[31] According to Nicolson ("Criminal Lunacy in England," in Allbutt's System of Medicine, Vol. IX. p. 448), of 640 criminal insane in Broadmore Asylum, 467 had committed murder, manslaughter, or attempts at murder. Nicolson's report is very imperfect, inasmuch as he does not state the forms of insanity from which these prisoners suffered, but it is a legitimate conclusion, from the drift of his paper, that many of them were delusional cases.

[32] 1 P. C. Chap. IV.

[33] *Rex* v. *Arnold,* 16 How. St. Tr. 764. Also *Ferrers's Trial,* 19 How. St. Tr. 947.

[34] Justinian, Institutes, Lib. III. title XX. § 8. Bracton, De Legibus, Lib. III. fol. 100.

It is a term that lends itself readily to misunderstanding and sophism. There can be no doubt that the paranoiac, or monomaniac, is not totally insane, in the sense of the old law. His mental disorder is not coextensive with all his mental faculties. Being under the dominion of one or a few systematized delusions, he may be most insane, and yet have the use of his eyes, ears, senses, memory, intelligence, and even his conscience. This use, to be sure, is impaired and interfered with by his delusions in many and various ways, and yet, so long as he has a spark of memory and reason in him, he is only a "partial" lunatic, according to Hale.

Now, from the standpoint both of pathology and common sense, it is surely no longer needful to enter upon a labored refutation of such a doctrine. It becomes a mere quibble of words as to what is meant by "partial." We do not say that a man with typhoid fever is only partially ill, even though some of the organs of his body escape the ravages of the disease. It is a common saying that a chain is only as strong as its weakest link, and a bridge with one rotten span is not a sound bridge. Although this doctrine of partial insanity has appealed, for some reason, with irresistible force to courts and lawyers, it was yet a great judge who demolished it with a phrase; for Lord Lyndhurst said[35] that a person could not be partially insane and sane at the same moment of time: to be sane the mind must be perfectly sound, otherwise it is unsound. And Lord Brougham, who was probably a better analyst than Hale, said that the human mind was one and indivisible, and could not be sound in one part and unsound in another.[36]

1043. Delusion as a test for insanity.—It was not until the trial of Hadfield,[37] in 1800, that the doctrine of delusion as a defense for crime was established in English law, and this was due to the eloquence and insight of Erskine, in his speech at the bar for that prisoner. This was a complete reversal of the doctrine of Hale. "Delusion," said Erskine, "where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death, for a crime, he ought not . . . to be acquitted." The fact that this successful defense re-

[35] *Dew* v. *Clarke*, 5 Russ. Ch. 166, 6 L. J. Ch. 186.
The Lord Chancellor, in using these words, ascribed them to Sir John Nicholl, whose decision he was reviewing on appeal. The phraseology, however, seems to have been his own.

[36] *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947.

[37] *Hadfield's Trial*, 27 How. St. Tr. 1281.

versed the position of Hale seems to have escaped notice at the time, and has been but little dwelt on by subsequent legal writers.[38]

1044. The test of delusion defined.—But the courts did not remain satisfied with the doctrine of delusions, and after the acquittal of M'Naghten, a paranoiac, for the murder of Mr. Drummond,[39] in 1843, the subject was formulated in a set of rules by the English judges. As these M'Naghten rules have already been discussed in these pages (*ante*, Chapter XXVII.) it is not necessary to repeat them here *in extenso*. It is sufficient to point out again that those rules embody two errors with respect to insane delusions. The first error is that the insane act must be traced directly to the delusion, so as to cause it to appear that the prisoner did not understand the nature of his act, and that it was wrong. And the second error is, that a delusional lunatic "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." These errors simply indicate an attempt to return to Hale's doctrine of partial insanity, by which a delusional lunatic is to be regarded as one part insane and nine parts sane. But they depart from Hale, as already said, in the fact that, whereas the Lord Chief Justice denied that such partial lunatics were exempt from punishment, the M'Naghten rules held that they were the only lunatics who were thus exempt, under certain conditions.[40]

1045. The connection of the delusion with the act.—As to tracing the act of a paranoiac directly to his delusion, it may or it may not be possible;[41] but until we have devised some probe that will explore the intellect, or some method of divination that can disclose all the work-

[38] It has been customary for some writers to depreciate Lord Erskine as a lawyer. See Crabb Robinson's Diary, Vol. I. p. 400. Sir Fitzjames Stephen also has a rather cool estimate of him. The reputation which he made as an advocate he seems not to have maintained as Lord Chancellor. But his speech for Hadfield will always give him prominence in the annals of medical jurisprudence.

[39] 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130, note.

[40] 2 Stephen, History Crim. Law, Chap. XIX.; *Com.* v. *Freth*, 3 Phila. 105; *Smith's Case*, 15 L. I. 33; *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427; *Com.* v. *Meredith*, 17 Phila. 90; *Taylor* v. *Com.* 109 Pa. 262; *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275. For an adverse criticism, see *Parsons* v. *State*, 81 Ala. 610, 60 Am. Rep. 193, 2 So. 854; *Boardman* v. *Woodman*, 47 N. H. 120; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *State* v. *Pike*, 49 N. H. 438, 6 Am. Rep. 533.

[41] In *Hall* v. *Com.* 22 W. N. C. 25, 12 Atl. 163, the court, Arnold, charged that "insanity or insane delusions in respect to one thing or person will not relieve the person affected from responsibility for his acts towards other persons or things, unless his insanity or delusion is such as dethrones his reason, and renders him incapable of forming or carrying out a purpose, or to resist the impulse to commit the act if he would." Note the conditional clause, and the odd statement about insanity dethroning the reason. What does insanity do if it does not dethrone the reason?

ings of the human mind, or can unfold these as a man unfolds the map of a country, it will be hazardous to make laws on the subject. If such interpretation cannot always be made in the normal mind, the laws of which are fairly well known, how can it be made unerringly in the insane mind, in which the laws are disordered? A paranoiac with ideas of persecution may build up a most complex system of delusions, which control his conduct by hidden springs of action, and which he may not disclose. Where is the psychiatrist with the slightest personal knowledge of the insane, who will venture to proclaim that he can read unerringly the mental processes in every case? A paranoiac with hallucinations of hearing may receive a command out of the void, and obey it as though it were the voice of the Almighty.[42] In other words, the disturbing action of a systematized delusion may extend to all the mental functions, and control conduct in the most inscrutable ways.[43] Hence, it is an unsafe and unjust rule to judge a man responsible because he is not totally insane (in Hale's sense), or because the connection of his criminal act with his delusions cannot be proved. Such a legal standard is the merest assumption.[44] An insane delusion controls conduct; or, as the courts express it,

[42] Sir Fitzjames Stephen wrote (op. cit. p. 160, footnote): "My own opinion is that if a special Divine order were given to a man to commit murder, I should certainly hang him for it, unless I got a special Divine order not to hang him. What the effect of getting such an order would be, is a question difficult for anyone to answer till he gets it." The man who wrote those lines died insane. If he could have foreseen his own death, and the circumstances of it, he would probably not have written thus lightly of the Divine order of insanity.

[43] In *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427, the connection of the prisoner's delusions with his crime was made a test of his responsibility. Webber had had delusions of persecution, of marital infidelity, and of poisoning; and had been considered insane for some time by his employer and acquaintances. He shot and killed a jeweler in an altercation over a clock. His conduct and speech while in jail were those of an insane man, and he was even chained to the floor by his jailers in fear of him. He was convicted, but was never executed, because, apparently, the governor of the state would not take the responsibility of signing his death-warrant. On appeal, the supreme court sustained the court below, but, in a dissenting opinion, Justice Sterrett said the refusal of the trial judge, Arnold, to grant a preliminary trial, or to hear testimony as to the prisoner's insanity at the time of his trial, was an error. "If that was an exercise of sound judicial discretion," said Justice Sterrett, "it would be difficult indeed to say what, in a legal sense, constitutes abuse of discretion." Legal Intelligencer, May 11, 1888. Also "The Insanity of Oscar Hugo Webber," by the present writer, who was one of the experts for the defense, in Proceedings of the Medical Jurisprudence Society of Philadelphia, for Nov. 13, 1888.

[44] A writer in the Edinburgh L. Jour. Vol. I. p. 542, asks, "What are we to think of making distinctions and drawing the line of responsibility with perfect confidence, as if all were clear between partial and total insanity?" He contends that it is more just and merciful, instead of deciding for responsibility in partial insanity (as Hale does), to doubt as to that essential, when disease of the mind, to a palpable and considerable amount, is proved. In other words, he would give the accused the benefit of the doubt. This is a lawyer's way of putting it, and is not an unacceptable statement.

"controls the will,"—a subject which has been elaborated by a few judges.[45]

1046. Delusions to be judged as though they were real.—What shall be said of the M'Naghten rule which prescribes that an insane man "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real?" This means that if a man commits murder in the false belief that his life is threatened, he shall be exempt; but if he kills merely on some slight provocation, in the delusion, for instance, that he is simply maligned, he shall be hanged. This is on the principle that the law recognizes the right of self-defense, but not of vengeance. This is a proper and just rule to apply to sane men, and it would be equally so for insane men,—if they were not insane. In other words, this rule proceeds on the principle that insane men are to be judged in the same way as sane men; there must be reason in a man's madness, otherwise he is responsible.[46] But insane delusions are not to be judged by the laws of normal ethics, any more than a sick man is to be fitted for a garment to wear when he is well.[47]

1047. The knowledge of right and wrong.—It may be stated as an almost universal rule that a paranoiac is not able to recognize the difference between right and wrong with respect to his delusions, although he may know that the delusion leads him to commit an act contrary to the human law, and he may recognize the difference between right and wrong in general. It is somewhat surprising that there should be so much diversity of opinion between the legal and medical professions on this subject; and it might be better for medical experts squarely to meet the demands of the courts on this rule. A good defense could have been made for Bellingham[48] and for Guiteau[49] on this test alone, for both these assassins were fully convinced that what they did was right. They both protested in open

[45] *Com.* v. *Rogers*, 7 Met. 500; *Dunn* v. *People*, 109 Ill. 635; *Com.* v. *Mosler*, 4 Pa. 264; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420.

[46] Ray, Med. Jur. Insanity, 5th ed. p. 48.

[47] The idea that a delusion is no excuse for crime unless it is "of such a character that, if it had been true, it would have rendered the act excusable or justifiable," is illustrated in *People* v. *Taylor*, 138 N. Y. 398, 34 N. E. 275. A convict killed a fellow convict in Dannemora prison, and the defense was delusion of persecution. Maynard, J., for the court of appeals, rendered a decision in which he used the above language.

[48] *Bellingham's Case*, 1 Collinson, Lunacy, 636.

[49] *Guiteau's Case*, 10 Fed. 182. Judge Cox, in the *Guiteau Case*, said that "the question of insane delusion is only important as it throws light on the question of knowledge of, or capacity to know, the right and wrong." Guiteau had not so much a condition of systematized delusions as a perversion of this very capacity to know the right and wrong of his act.

court against the defense of insanity, and proclaimed that they were justified in what they had done. There could be no stronger evidence of the perversion of their moral sense. We are speaking now of paranoia, and not of all forms of insanity. But in paranoia, we repeat, the moral sense is usually quite perverted by the systematized delusions. An insane man who believes he is persecuted loses all sense of moral restraint in time, and proceeds to avenge himself; another, who believes he is commanded by God to take life, may know perfectly that the law of the state forbids it, but he believes he follows a higher law; hence, his moral insight is perverted with respect to the act itself.

1048. A clear statement of the rule.—It would be fruitless here, even if our space permitted, to marshal all the cases in which the courts have imposed the right-and-wrong rule.[50] Besides, we have already discussed this subject in these pages (Chap. XXVII.), and cannot afford to enter upon longer historical digressions. Coke and Hale knew nothing of such a rule; it seems to have been first promulgated by Hawkins;[51] and since his time it has appeared in pretty much every criminal trial in England and America. It was embodied in unmistakable language in the M'Naghten rules, and has ever since retained the form in which it was then molded. A recent and authoritative English writer[52] has given, perhaps, the best expression of this rule when he says: "I think that any one would fall within the description . . . who was deprived, by disease affecting the mind, of the power of passing a rational judgment on the moral character of the act which he meant to do." This practically exempts every paranoiac who commits a crime upon the promptings either of his systematized delusions or his insane logic; for surely no such paranoiac has a rational judgment of the moral character of such an act.[53]

1049. The rule not logically enforced.—The fault is in part with the courts in failing or refusing to abide by the rule which they themselves impose. They judge of a lunatic's moral sense by his general intelligence, and not by the act of which he is accused. On the other hand, it is a fault of experts in some of these cases not to accept the rule, and endeavor to have it logically applied.

The rule, as we have said elsewhere, is cut out of the same piece

[50] See *ante*, § 175.

[51] 1 P. C. Chap. I.

[52] 2 Stephen, History Crim. Law, p. 163.

[53] "Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong." Baron Rolfe in *Reg.* v. *Layton*, 4 Cox, C. C. 149.

as the doctrine of "moral insanity," to which, nevertheless, the courts are so much averse. In both cases the state of the moral sense is made the test. If this moral sense is competent, say the courts, there is mental health; if this moral sense is incompetent, say some alienists, there is insanity. The one is simply the reverse, the other the obverse, of one and the same proposition. That proposition, in its essence, is that the moral sense is a separate mental "organ," capable of being separately healthy or diseased. So long as such psychology is to prevail it would be better for alienists to get the most out of it possible, and to insist that it be followed to logical conclusions.[54]

1050. The distinction between delusion and erroneous belief.—The question of erroneous belief as distinct from an insane delusion may arise in these cases. An insane delusion is an erroneous belief which is caused by mental disease, and is of such a nature as would not have occurred if the patient had been of sound mind.[55]

1051. The defense of insanity resented by the prisoner.—The defense of insanity is, as a rule, not relished by paranoiacs. These lunatics do not like to be called insane. They resent the imputation, often most vigorously; for it is a well-known characteristic of delusional patients to defend their delusions, and this they will do at any risk; even at the risk of their lives when on trial for murder. An early case was that of Frith,[56] in 1790, who protested against being defended on the ground of insanity. He had thrown a stone at the King in his royal coach, and when put on trial he harangued the court at a

[54] Legrand du Saulle (Traité de Méd. Légale, 12th ed. p. 689) says: "Reason cannot exist intact without the faculty of judging good and evil, . . . and the power to do freely and intelligently the one or the other. This faculty and this power, necessary consequences of human reason, constitute free will, and consequent moral responsibility."

[55] The *Case of Vedder*, 6 Dem. 92, is pertinent. The testatrix believed in witches, and the will was contested on the ground that this belief proved her insane. She died at seventy-seven years of age. The court decided properly that this belief is not an insane delusion. Two hundred years ago the whole Christian world believed thus; the Bible teaches it; and many persons still have this belief. A Chinese missionary, Rev. J. Nevius, has recently written a book (Demon-Possession and Allied Themes) in which he endeavors to prove that such things occur among the Chinese to this day. Instead of converting the Chinese, he had been perverted by them; and although a man of limited scientific comprehension, he was not insane. When Huxley dissected the alleged miracle of the Gadarene swine, Gladstone endeavored to reply to him, and showed thereby that he himself was a believer in witches; yet Gladstone, whose mind was remarkably bound down by theological preconceptions, was not insane. A case illustrating the distinction between a "delusion" and an "insane impulse" is *Reg.* v. *Burton*, 3 Fost. & F. 772, in which the prisoner killed a boy because, as he said, he was tired of life, and wanted to be hanged. He was convicted. There may, however, have been some underlying delusion in the case. Consult also Chaplin, Cases on Criminal Law, 1891, p. 75.

[56] *Frith's Case*, 22 How. St. Tr. 307. The report of this case is quite amusing.

great rate. He believed that he had a claim against the government, and was endowed with St. Paul's gifts, and much else that was crazy. He was promptly found insane by a jury empaneled for that special purpose. It is to be noted, however, that he had not harmed the King; otherwise he might not have escaped so easily. A like scene was enacted at the trial of Pearce,[57] in 1840, for felonious assault. Insanity was admitted by the Crown, but the prisoner would have none of it, and insisted on addressing the court and examining the witnesses himself. The witnesses called and examined by him, so far from proving him sane, proved quite the contrary; and he was found not guilty, on the ground of insanity, in spite of his protests. Earl Ferrers,[58] at his trial, expostulated against the defense of insanity, which he said his family had forced upon him, although this defense was his only chance; and the Solicitor-General in triumph proclaimed that the prisoner was sane because he himself said he was. By this reasoning all paranoiacs are sane. Bellingham addressed the court himself, and spoke so coherently that the Crown lawyers attempted to make much of it, as evidence of a sane mind. Guiteau derided the idea of his own insanity.

III. Moral insanity.

1052. This term is not to be taken too literally.—Bitter controversy has been waged about this affection. The term is not a happy one, or even accurate, if taken literally. But it is not to be taken too literally, any more than is monomania (insanity of one idea), or melancholia (which means, literally, black bile), or hysteria (insanity of the womb), or even that good old law-term, "lunatic," which means a man who is moon-struck, or deprived of his mind by action of the moon. The science of psychiatry, like the science of law, has many terms, derived from the old and even exploded ideas, which are not to be taken in a literal sense. A constable, for instance, who, in our day, is a rather humble officer of the law, was originally a count of the stable, or master of the horse,—a high officer in the Carolingian empire.[59] The cardinals were once the parish priests of Rome, and a juror was originally a witness. Thus usage changes the meaning

[57] *Reg.* v. *Pearce*, 9 Car. & P. 667. The prisoner's counsel said that "he relied on the prisoner's denial of his insanity, under the circumstances which had been proved against him, as one proof of the fact of his being insane." But usually the opposite conclusion has been drawn by the prosecution.

[58] *Ferrers's Trial*, 19 How. St. Tr. 886.

[59] Bémont and Monod, Medieval Europe.

and application of words; and if we were to reject all that have a strained significance, we should impoverish language out of all sense and reason.

1053. A faulty term.—The great fault with this term, "moral insanity," is that it is defined as though it applied to persons who are insane merely in their moral sense, and not at all in their intellect. This leads to a fruitless controversy whether it is possible for a man to be insane in his morals, and not in his reason. Some say yes, others no, and the question soon becomes a mere academic one. The present writer has always maintained the negative of this question.[60] To him it is inconceivable that there can be a moral concept without an intellectual one; or that an emotion can exist without an idea.[61] If, for instance, a man has an emotion of fear or hatred, he must have with it an idea of the thing feared or hated. This idea, as in the very young child or very young animal, may be a very imperfect one, but nevertheless it exists. Otherwise there would be nothing to fear or hate. M. Ribot[62] has indeed sought to prove that the emotions are the earliest of the mental functions to be displayed in young animals; that they precede the intelligence; but he has not made out his case. At least, he has not shown that in an emotion, even in the youngest and least developed of the animate kingdom, there is not also a faint spark of conscious ideation. The proper statement would seem to be that the minds of young animals respond quickest to ideas which excite emotion, not to emotions which are without ideas.

1054. Moral insanity is not to be despised.—In psychiatry this idea of moral insanity has taken deep root, and means something which must not be overlooked, and cannot be despised.[63] It has an unfortunate name, that is all; unless we may also say that it has had some unfortunate advocates, who have insisted on making these academic distinctions between ideas and emotions. It has, however, also had very distinguished champions, among whom have been Pinel, Rush, Pritchard, Ray, Maudsley, and Clouston. The *folie raisonnante,* of Pinel, was not unlike the "moral insanity" of Pritchard. In both

[60] "Moral Insanity; a Plea for a More Exact Cerebral Pathology," in Journ. Nerv. and Ment. Dis. Vol. XIII. p. 669.

[61] "As our Desires, Passions, and Affections are connected, in their origin and development, with the knowledge which we have of their objects, Opinion may be said to be, not merely the condition of these states of feelings, but an element of them."—Fleming, Moral Philosophy, p. 45.

[62] The Emotions, London, 1897. See especially the introductory chapter on "The Evolution of the Affective Life."

[63] Wharton (Wharton & Stillé, Med. Jur. 4th ed.) attempts a refutation of moral insanity, based upon speculative psychology.

there were strange lapses in the moral sense, according to these authors, without a marked disorder of the intelligence; and along with these lapses there was great plausibility, or readiness in explaining and excusing conduct. Such a form of insanity is still described by Krafft-Ebing,[64] who allies it with paranoia.

1055. Confusion among those who describe this affection.—The difficulty in appreciating what these distinguished authors mean by moral insanity is at once felt when we attempt to analyze the cases which they report to illustrate their ideas. There is no agreement among them. Ray[65] tells us that Pinel's cases by no means furnish suitable examples of this affection. Clouston[66] says he would put Pritchard's cases in the category of simple mania; and he himself reports a case of so-called moral insanity (case of F. L.) in which the patient was evidently in the early stages of general paresis. Ray's description of moral insanity is full of inconsistencies. Thus, he included cases of maniacal exaltation, of paranoia, of circular insanity, and of melancholia. The cases of Pritchard,[67] as any one who runs can read, are all instances of intellectual disorder. In maniacal exaltation, as shown in some of Pritchard and Ray's cases, there may, indeed, be no systematized delusions; but surely this is no reason for saying that the intellect is not disordered. Ray's analysis of his own cases will not stand for a moment. He himself acknowledges that they often led to intellectual derangement and delusions. One man had extravagant schemes, another had religious mania. These patients were undoubtedly insane; but they were not cases of "moral" insanity.[68] Guy and Ferrier cite as an example of moral or emotional insanity the case of a lunatic "who imagined he was the Farnese Hercules; had written Clark's Travels in Russia; had painted one of the masterpieces of Raphael; and knew everything." Surely confusion in nomenclature can hardly go farther than to describe such a patient as a case of moral insanity without disorder of the intelligence.

1056. Difficulties of the subject.—There are grave difficulties in the

[64] Op. cit. p. 440.

[65] Med. Jur. Insanity, 5th ed. p. 215.

[66] Mental Diseases, 1884, p. 256.

[67] Cyclopedia of Practical Medicine, edited by Forbes, Tweedie, and Conolly, 1845, Vol. III. art. "Insanity."

[68] For examples of the confusion that reigns on the subject of moral insanity, see, of later writers on jurisprudence, Dixon Mann (Medical Jurisprudence), who says: "In moral insanity the higher levels of cerebral development are either imperfectly evolved . . . or become diseased and more or less functionless: the result being that, although the intellectual capacity is not seriously affected, the emotional and automatic functions have more than normal play." This is altogether fanciful, especially as to "levels." Note that it puts the emotional and automatic functions on a higher level than the intellect! See *Reg.* v. *Edwards*, C. C. C. 1872.

way of a proper criticism of this subject.[69] We doubtless have cases of degeneracy, imbecility, and incipient paranoia, in which the disease has not advanced to the formation of systematized delusions, but in which there is a general defect in the moral nature which is perplexing and exasperating. Such cases will always be the subjects of forensic dispute.[69½] The courts insist upon regarding them as mere criminals; the scientists claim that they are degenerates. The present writer does not feel himself competent to formulate a general rule for these cases. Each must be studied on its own merits or demerits. They are usually "border-line" cases,—cases which occupy that debatable territory between the normal and the abnormal which nature reserves for the manifestation of some of her most puzzling prerogatives. Nothing is gained by extreme dogmatism on one side or the other of this delicate subject. Neither should it be confined to a mere academic question of the distinction between emotions and intelligence. A searching criticism will usually reveal, however, that when the moral concepts are perverted there is, of necessity, a perversion of that much of the intelligence which has to do with such moral concepts; and in many of these cases, as we have already shown from various authors, there is often an unmistakable derangement of the intellect.[70]

1057. The criminal degenerates.—The criminal degenerates are a much exploited class at the present time, especially under the influence of Lombroso[71] and the Italian school. Régis says[72] that the complete study of the criminal appertains more to sociology than to psychiatry. If so, we believe that most psychiatrists in America will be glad to have it off their hands, especially as developed by the extreme anthropological cult. By the abuse of the word "degenerate," by making it include almost all forms of criminality, nothing is gained for real science, and something is lost for truth and justice.[73]

[69] Some cases quoted in the law books as bearing on the subject of moral insanity have practically nothing to do with it. Such, for instance, are *Reg.* v. *Leigh*, 4 Fost. & F. 915, and *Reg.* v. *Dixon*, 11 Cox, C. C. 341. The doctrine of moral insanity is controverted at some length in *Choice* v. *State*, 31 Ga. 424.

[69½] See *Dove's Case*, in 3 Stephen's Crim. Law, p. 273.

[70] Rush (Diseases of the Mind, 1835, Chap. XIX.) distinctly outlines the "moral insanity" of later writers. Pritchard was long thought to be the originator in English of this special form, but it is evident that he must yield the distinction to the American physician.

[71] L'Homme Criminel, translated from the Italian. 1895.

[72] Mental Medicine. p. 307.

[73] A vigorous protest against the excesses of the Italian school has been made by Spitzka in his recent paper. "Regenticides not Abnormal as a Class A Protest against the Chimera of Degeneracy." in the Phila. Med. Journal, Feb. 1902. Of 261 "magnicides" (assassins of prominent persons) whose

1058. Moral insanity has been recognized in a few courts.—A New England judge[74] has announced from the bench that, "if we are to take judicial notice of a fact as settled by the scientific knowledge of experts, we must recognize the fact as established by the unanimous medical authorities of our day, that there is a mental disease sometimes called moral insanity, and that delusion is not the test of it." In a recent and extraordinary case[75] in a professional nurse, aged forty-five years, the prisoner was declared not guilty by reason of insanity, although there was reason to believe that she had fatally poisoned twenty persons. The sequel of this case, however, is most instructive, for in a year or so the patient began to have delusions of persecution and of poisoning, with hallucinations of hearing, and she greatly deteriorated. In other words, her intelligence gave way as well as her moral faculty; and this fact, which is not uncommon in moral insanity, strongly suggests that such patients, when they commit crime, are not as sound in the intellect as they seem to be. Among those who have made similar observations and have reported delusions in such cases, are Schüle,[76] Dagonet,[77] Arnaud,[78] and Hack Tuke.[79] But if delusions occur, these are surely not cases of mere moral insanity. Thus, the controversy is sometimes more over words than things, for most of these patients are unquestionably insane, whatever we may call them, and are first cousins to the paranoiacs.[80]

records were gathered from historical sources, 27 were undoubtedly insane, 11 were uncertain, and 15 were suicides; giving a total of 53, or only about one fifth—20 per cent—abnormal.

[74] Judge Doe in *Boardman* v. *Woodman*, 47 N. H. 120.

[75] Stedman, "A Case of Moral Insanity with Repeated Homicides and Incendiarism and Late Development of Delusions," in the Boston Medical and Surgical Journal, July 21, 1904, p. 57.

[76] Geist, Krankheit, 1881.

[77] La Folie Morale, 1878.

[78] Ballet, Pathologie Mentale, 1903, p. 652.

[79] Dict. Psych. Med. p. 814.

[80] See Blandford (Insanity and Its Treatment, 3d ed. p. 228) for an account of Christiana Edmunds, a notorious case.

CHAPTER XLIX.

DEMENTIA PRÆCOX.

I. The medical aspects of dementia præcox.
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I. The medical aspects of dementia præcox.

1059. Definition.—Dementia præcox is a mental disease appearing at puberty, in adolescence, or, rarely, later in life, and leading rather rapidly to permanent mental enfeeblement in nearly all cases. Pick introduced the term in 1891, though the French equivalent, *démence précoce*, was applied much earlier to one type of this disease by Morel.[½]

Dementia præcox is best defined by specifying separately the meaning of the two words which compose the term. The word "dementia," as noted elsewhere, signifies a state of enfeeblement of the mental faculties. It is usually employed for a terminal stage of insanity; one which has followed a more acute stage, and is permanent and incurable. This is its meaning for most of the cases described under this head. The word "præcox" means precocious; and is used to signify a form of dementia which not only appears, as a rule, in early life, but which also sets in rapidly and without necessarily a prolonged acute or precedent stage.[1]

½ Traité des Maladies Mentales, pp. 562–566.

[1] Deny and Roy, La Démence Précoce, Paris, 1903, p. 12.

1060. The ideas underlying this term.—The conception of dementia præcox has been a slow growth, taking in successively the hebephrenia and katatonia of Kahlbaum, and several types of paranoia (Westphal's, Sander's, etc.) At the present time Kraepelin is the foremost exponent of the subject, and, after him, it is customary to speak of three types; the simplest, called the "hebephrenic form" of dementia præcox, being equivalent to the hebephrenia of Kahlbaum. Its principal symptoms are an irregular alternation of shallow melancholy and clownish excitement, with confusion, weird delusions, hallucinations, and obsessions; especially morbid impulses which lead to the commission of violent acts without motive.[1½]

In the "katatonic form" of dementia præcox (or katatonia) the same symptoms are present, but cataleptoid attitudes, a dramatic or pathetic manner, and various phenomena of automatism are prominent.

In the "paranoid form" delusions of persecution and of exaltation, more or less systematized, dominate the scene. The delusions are more rapidly and irregularly evolved, and more fantastic than in true paranoia; they are often mystic and erotic, and are commonly variable, multiple, and confused.

These three forms are united by their common symptoms and by their outcome in dementia, which may be profound, constituting the "acquired imbecility" of Esquirol and older writers, or may be slight, affecting chiefly the "moral sphere." The whole process of precocious dementia may be subtle and misunderstood by the youth's friends, appearing to them as strangeness or waywardness, and converting him into a ne'er-do-well or into a criminal. Pickett,[2] of Philadelphia, has spoken of this as "moral dementia præcox," corresponding to moral imbecility, but acquired at puberty or later.

1061. History of this term.—The history of this form of insanity is not without interest. Cases of juvenile insanity had, of course, long been observed; such cases, for instance, as appear about or soon after the age of puberty.[3] These cases were recognized, in a general way, as having some special features, such as a weak or foolish type of

[1½] The term "hebephrenia" was first proposed by Hecker, in Virchow's Archiv. 52, p. 394. Kahlbaum's work is in Klin. Abhand. Ueber Psych. Krank. Heft. 1 Berlin, 1874.

[2] In the Journal of Nervous and Mental Diseases, August, 1901, Pickett discusses the insanities of adolescence. Of 58 cases classed as instances of dementia præcox, 11 were cases of katatonia, 30 hebephrenia, and 17 paranoid dementia. Pickett follows the German authorities, but his ideas are original in the way he explains the reaction of these patients to their insane ideas.

[3] Willis, in 1672, mentioned the hebetude into which adolescents may fall; and Morel, in 1851, gave a true résumé of dementia præcox under the name of *stupidité*.

mental disorder and often a rapidly downward course, so that the patient passed into a state of hopeless dementia. It seems that in adolescence, or early maturity, the mind more rapidly and more completely succumbs to an attack of insanity. It has not yet the resistive power of later life; mental disease plays havoc more rapidly, and the patient is arrested in his normal career of brain development or expansion.

Recognizing these cases, Kahlbaum,[4] in 1863, proposed to group them under the term "hebephrenia" (ἥβη, "puberty" and φρήν, "the mind"); but this term was not received with universal favor. It was criticized as covering cases merely of degeneration in early life, and was denied a separate place, especially by Krafft-Ebing and Schüle, in Germany, and almost uniformly in England and America. But the ideas of Kahlbaum slowly gained place. In 1891, Pick,[5] in Germany, claimed that hebephrenia was a form of chronic primary dementia, occurring in adolescence; and he assigned as causes for it in some cases the febrile and infectious diseases. Other observers demonstrated that these forms of insanity occurring in pubescence were not necessarily dependent on heredity. They could occur in subjects of normal descent; but they were grave in type, and led to an incurable dementia. It was in 1893 that Kraepelin,[6] professor in Heidelberg, collected in one group various forms of juvenile insanity under the head of dementia præcox. These forms of Kraepelin included the hebephrenia of Kahlbaum, the form known as katatonia, and a third variety, which he called paranoid dementia. Without going minutely into the further history, it is enough to say that dementia præcox is now accepted by many alienists as signifying a form of insanity occurring in early life, and marked by a strong tendency to permanent enfeeblement of the mental faculties.

1062. The causes.—Among the causes of all forms of juvenile insanity the commonest is heredity. This has been established in about 70 per cent of the cases.[7] It has been shown by numerous examples that children of insane parents are not only predisposed to become insane in their own turn, but at an earlier age than the parents. An insane heredity, however, is not the only form of heredity that acts in these cases. Alcoholism in the parent, as well as tuberculosis and infectious diseases in the mother during pregnancy, injuries to the mother, fright, moral and mental shocks, and pov-

[4] Gruppirung der Psychischen Krankheiten, 1863. See also Hecker, "Die Hebephrenie," Virchow's Arch. LII. s. 394–429.

[5] Prager, Med. Woch. 1891.

[6] Psychiatrie, 4th ed. 1893.

[7] Deny and Roy, op. cit. p. 82.

erty,—all have their effect upon the health of the offspring, and may cause such a faulty development as leads to an early break-down in the nervous system.

Among other causes, special importance is assigned to onanism. Maudsley ascribed a peculiar character to these cases, especially a self-conscious and hypochondriacal tinge. Many authorities believe that this vicious habit, so widespread in youth, is the cause of mental disorder.[8] It acts both physically and morally: in the first place, by constituting a drain upon the system; in the second, by degrading the sense of self-respect.[9]

In fact, any cause that acts to depress or to interfere with the healthy action and growth of the juvenile brain may conduce to insanity. Any person who has seen the total wreck which results in some of these cases must be impressed with the gravity of such causes as overtax or poison or overwhelm the brain in children or in young adults. Overschooling,[10] overworking,[11] cruel treatment, bad hygiene, poor food, and the infectious diseases are among the occasional causes of dementia præcox. The greatest number of cases of this disease occur between the ages of fifteen and twenty-five years. Christian has noted, among 100 patients, that 56 occurred before the twentieth birthday.

1063. An objection to this term.—It may be objected that most of these cases are merely instances of ordinary insanity of various kinds, occurring in early life; and that there is not good and sufficient reason for separating them in a group by themselves. This objection has already been noted. The features in these cases which are, in a

[8] Clouston (Mental Diseases, chapter on "The Insanity of Masturbation") gives a graphic picture, as usual, of this mental destruction, and reports a typical case of what would now be called dementia præcox, due to this cause. (Case of K. A. p. 346, 1st ed.)

[9] See Monograph by Spitzka, Journal of Mental Science, 1887–88.

[10] The statistics of Christian showed that of 100 male patients with dementia præcox, 46, or almost one half, had been pursuing what may be called higher studies and the professions. Law, medicine, and theology claimed 9 of them. A large number were from the colleges and polytechnic schools. The mere statement of this fact shows that all these cases are not recruited from congenital imbeciles, but that many of them occur in young persons who had given great promise in early life. Ann. Med. Psych. 1899.

[11] The growing evil in this country of forcing young children into the mills and factories will yet contribute its quota to the number of these early human wrecks. For some literature on the subject of "child-labor," see "Diseases of Occupations" in Twentieth Century Practice, Vol. III. p. 324.

This danger has long been recognized abroad. "The promising child of ten, entering the factory, degenerates into the lean and sallow person of thirteen; and this process continues until a whole population becomes stunted: and thus the conditions of life in factory towns become a real source of danger to England's future."—Torrop, quoted by Arlidge, in The Hygiene, Diseases, and Mortality of Occupations, 1892.

sense, special, are the rapid weakening of the mental faculties and the tendency to incurable dementia. This point will be discussed later.

1064. Hebephrenia.—The commonest form of juvenile insanity is "hebephrenia." This is the insanity of puberty, properly so-called, and bears the impress of adolescence. These cases may occur in young patients who, up to that time, have been of normal promise. But a change comes. The youth grows morose, irritable, depressed, and insubordinate. This unaccountable change of character is shown in the affections as well as the intellect. The patient ceases to care for parents and relatives; resists them; absents himself; avoids society; is downcast and obviously not well. There may be physical signs of ill-health, as headache, insomnia, loss of appetite, and loss of weight.

When the disease is once well established the patient is in a state of exaltation, or maniacal excitement; and, in fact, hebephrenia might be called juvenile mania. It takes its special characteristics from the youthful age of the patient. The conduct, the gestures, the language, the expression, are puerile and foolish. The boy boasts, tells extraordinary tales, is silly in his speech and behavior, wanders about without object, cannot be made to attend to his duties, and may be emotional, affected, or sentimental. His excitement alternates with sadness; he weeps, begs for forgiveness, and is then inclined to be self-accusatory. The intellectual faculties suffer. Delirious ideas soon appear, and these often are grandiose; the patient exaggerates and has delusions of riches or of his own merits; but the logical sense, the sense of probability and of proportion, is lost. The mental state is peculiarly reflected in what the patient writes; this is juvenile in tone and character, of course; it is marked by exaggerations, set phrases, puerile and trivial conceits.[12] In manner these patients

[12] Clouston (Mental Diseases, 1st ed. p. 380) preserves the following bit of verse, which was composed by a juvenile maniac:

A SOLEMN ANTHEM IN CELEBRATION OF THE NEW JERUSALEM.

O Rosaly, my warm and panting girl,
Just image to yourself the gates of pearl!
The angels sitting in illustrious row,
Kissing their hands to the Holy Ghost below;
That glorious unimagined mystery,
The very hot and lovely Trinity.
Afar they see the lake of crystal shine,
Filled with the juice of maidens' paps divine.
They hear the sappy sound of neighboring love,
And kisses, sacred as the brooding dove.
They look unto the Great White Throne and laugh.
Christ plies the Virgin with luxurious chaff
Jehova feels the Queen of Sheba's beauty
And refers to the loveliness of Judy
The Devil reads the Sermon on the Mount,
And adds a little on his own account.
And so they sing their wicked songs together,
While God in anger frowns upon the weather.

This verse, which is said to have been inspired by a desire to imitate Swinburne, illustrates the mixture of sexual and religious emotionalism often seen in these patients. This youth, aged twenty years, had been a brilliant

are often affected, theatrical. There is usually some incoherence of ideas and speech. Impulsive acts of violence are not uncommon; these show a malicious intent, not usually a homicidal one. Suicide is rare. In a word, the normal transition from boyhood to manhood is interrupted in these patients. The foolish notions, silly propensities, and obtrusive egotism of youth continue to be reflected in a maniacal conduct long after the patient should have put aside childish things.[13] Heredity is well marked in some of these cases.[14]

1065. Katatonia.—Another variety of dementia præcox is "katatonia," also first described by Kahlbaum.[15] Just as in hebephrenia we see a type of mania in juvenile cases, so in katatonia we see a type of melancholia; but this juvenile melancholia is distinguished by rigidity of the muscles, approaching to a catalepsy.[16] On the mental side this disorder is marked by melancholia of the atonic variety, or, as some authors describe it, by stupor. The patients are apathetic, taking little notice, and are often plunged in a profoundly negative state of mind. On the physical side there is muscular rigidity; the limbs are fixed and held in statuesque positions. Séglas[17] held that these cases are varieties of melancholia, with stupor more or less profound, and of an hysterical type. Kraepelin, as already shown, includes them among the cases of dementia præcox.

They are, in fact, cases of atonic or stuporous melancholia, occurring in young persons, and tending to rapid deterioration, or permanent dementia. They take their special characteristics from the early age of the patient. The catalepsy, or tendency to remain in a state of muscular rigidity, is very similar to the catalepsy seen in hysteria. The patient is passive, and retains for a long while the posture in which he is placed by another person; as, for instance, with an arm elevated.[18]

1066. The paranoid form.—Kraepelin's third form of dementia præcox is the paranoid form, or what we may call "juvenile paranoia." Just as in paranoia in adult life, so here, there is a tendency

and successful student. He broke down while studying hard, sleeping little, supporting himself by teaching, and probably indulging in sexual excesses. After a period of hyperacute mania he passed into a state of hopeless dementia.

[13] Spitzka, Insanity, chapter on "Insanity of Pubescence."

[14] Krafft-Ebing (Traité de Psychiatrie, traduit par Laurent, p. 181) relates a case in a girl aged nineteen years. The patient's maternal grandmother was an imbecile; two brothers of her mother had died insane; another was a suicide; the mother was abnormal; a brother was an idiot; and the patient herself had developed slowly.

[15] Die Katatonie, Berlin, 1874.

[16] Séglas and Chaslin, La Catatonie, Paris, 1888.

[17] Nouvelle Iconographie de la Salpêtrière, 1889.

[18] Tuke, Dictionary of Psychological Medicine, art. "Katatonia."

to form delusions, first of persecution, then of grandeur. In the juvenile type these delusions are quickly formed and transformed, and the tendency is towards mental enfeeblement, or dementia,—a tendency much more rapid than in adult life. This juvenile type, just as the adult type, is often constitutional or hereditary. These young patients rapidly deteriorate. They are eccentric and morally perverse. Some of them answer to the description of moral imbeciles. From the medico-legal viewpoint these young paranoiacs are of special interest, because they may perform criminal acts. There does not seem to be adequate reason in all cases to separate them from the ordinary paranoia (described elsewhere in these pages) except for the juvenile traits of mind, reflected in their delusions, and the tendency to early and complete dementia,—a tendency not so marked in the ordinary paranoia. The delusions in the juvenile cases are not well systematized; they are irregular, fantastic, puerile, and not so formative of character as in the older cases; yet they may lead, and do lead, to criminal acts.

1067. A criticism of terms.—It must be apparent to anyone who has followed the evolution of dementia præcox that Kraepelin and his followers have simply included under this term cases, first, of mania; second, of melancholia; third, of paranoia, as these several forms of insanity manifest themselves in early life, especially during pubescence; and that the special character of these cases is due to the fact that they evolve in a juvenile soil; and, moreover, that they owe their tendency to rapid deterioration to the additional fact that the brain, in this critical formative period, is not able, in some cases, to resist the onset of the disease.[18½]

1068. Juvenile insanity not always incurable.—But it must not be ignored that all cases of juvenile insanity are not necessarily hopeless; many of these young patients recover. Accordingly, if an incurable dementia is to be the criterion by which we determine cases of dementia præcox, we must separate these curable cases from this group. Clouston[19] claims that 65 per cent of the cases of juvenile insanity recover. Bevan Lewis[19½] agrees with him. These figures are

[18½] Some writers (especially Italians and Germans) go to absurd extremes in their use of the term "dementia præcox." Thus, Lugaro has described the case of an old man, with melancholia and attempts at suicide, as an instance of this disease! How an old man can have a form of juvenile insanity is hard to understand. See a paper by Norman, before the British Medical Association, section in psychological medicine, July, 1904.

[19] Art. "Developmental Insanities," in Tuke's Dictionary of Psychological Medicine.

[19½] Text-Book of Mental Diseases, 2d ed. Phila. p. 395. He claims that the recovery rate is nearly as high as 80 per cent.

probably too high; or, at least, they do not indicate the fact that many of these patients have recurrences later. But they serve to prove, from the observations of eminent authorities, that juvenile insanity is not always a hopeless dementia præcox. Now, in any particular group of diseases, like the insanities of adolescence, to separate the curable from the incurable cases, and to include all the latter in a distinct class, and to give to this class a separate name, is not a satisfactory way to describe disease; and this is a criticism to which dementia præcox is justly open.[20] Nevertheless, as indicating a mere clinical grouping, it is a convenient term, and therefore will probably prevail.[20½]

II. The medico-legal aspects of dementia præcox.

1069. Juvenile insanity and juvenile crime.—To the medical jurist all forms of juvenile insanity are of importance in so far as they affect the moral accountability of these patients; but this problem is not quite the same in all these cases.[20⅔] The hebephrenic patient, for instance, with his confusion, his puerile weaknesses, his exaltation, his almost fatuous state, does not offer a perplexing problem. His condition is too manifest to admit of a doubt that he is an irresponsible creature; moreover, he is not likely to commit crime. His impulsive acts, to which, indeed, he is quite subject, may be mischievous and malicious, but they are seldom dangerous. Much that has already been said of maniacs in general (Chap. XXII.) applies to him.

The same may be said of the katatonic patient. He is, if anything, even more fatuous, more irresponsible. His prevailing mental state is stuporous. He is oblivious of his surroundings, or indifferent to them. Absorbed in a dull, confused, apathetic delirium, he

[20]Kraepelin seems to acknowledge that some cases of dementia præcox recover; if so, the name is a misnomer as applied to them. Deny and Roy (op. cit. p. 76) would evidently confine the term to incurable cases.

[20½] G. Stanley Hall (Adolescence, etc. 2 vols., N. Y., 1904) devotes two chapters, IV. and V., to the diseases, faults, immoralities, and crimes of juveniles. His work is useful for the references it contains.

Sepelli ("Della psicosi della puberta," Atti del V. Cong. della Soc. Fren. 1886, p. 321) found that out of 6,000 insane patients only 400 became so between twelve and twenty-two years of age. He laid great stress upon heredity, especially from the mother, and upon precocious mental work and emotional strain. He found mania more common than melancholia, and that such cases took on a periodic or circular character, and often passed into stupor or dementia.

[20⅔] Goethe said that every person has committed crime at some time in his or her life. Every one must search his own conscience for an answer to this universal indictment. The decalogue contains but few offenses (three, or, at most, four) which today are crimes. Thus the definition of crime changes with the ages.

is not given to criminal impulses, as a rule, and anything amiss that he may do cannot be ascribed to a rational and moral intelligence. From this torpor he is sometimes aroused in a crisis of agitation, resembling superficially agitated melancholia; but such a crisis is not likely to be violent. Such crises are remarkable for impulsive tendencies, for verbigeration, or the senseless use of words, and for the repetition, almost automatic, of certain stereotyped movements. Like the hysterical patient, the katatonic can be impressed by suggestions from without, and will react almost like a machine; but his impulses and reactions are not usually of a criminal type.[21]

1070. Simulation in these cases.—The question of simulation may arise in some of these juvenile cases, especially when there is a motive for shamming. In France these cases have been noted in the army,[22] where they have led to desertions. The patient leaves his post suddenly under an impulse to decamp, and may not be apprehended for weeks or months. The foolish conduct, mannerisms, the silly speech, lead to a suspicion of simulation, but close observers will soon detect the underlying mental feebleness which characterizes all these patients.

1071. Grave problems may arise.—In the paranoid form the problem is often more serious, for under the sway of delusional ideas these patients may commit crime. There is a moral perversion in most of them, and their deeds may sometimes be flagrant.[23] Mar-

[21] *Hays* v. *Com.* 17 Ky. L. Rep. 1,147, 33 S. W. 1,104.

[22] Deny and Roy, op. cit. p. 90.

[23] George Nelk, twenty-two years old, was tried in Philadelphia, March 23, 1903, for the murder of his mother. She had been found, on the afternoon of February 10, lying in a pool of blood, by her rocking-chair, in the sitting-room of her home, her head literally split open, and a hatchet, covered with blood, beside her. Up stairs her daughter Minnie, twenty-five years old, was found with a gash in the top of her head. In the entry-way of the house, nailed to the wall, was a large piece of wrapping-paper over which was scrawled a confession of the crime, signed "George." Minnie survived; but being a congenital, middle-grade imbecile, could tell little more than "George did it," and that there had been no quarrel.

At the trial, a relative and some acquaintances testified to various peculiarities of conduct shown by George Nelk. On one occasion he hurled a pair of shears at a friend who refused him some candy, and said, as the point of the shears stuck in the boy's heel, "If that don't kill you something else will." At another time George chased his elder brother with a carving knife. Not long before the murder, one Sunday afternoon, another brother and their mother were chatting quietly, with George lying apparently asleep on a couch near them, when George suddenly sprang at his brother and pushed him upon the stove, with no evident motive. Two witnesses declared that George laughed much in a foolish way, when "the joke was all to himself;" another, that he often saw George walking back and forth in the house or in the back-yard, "swearing and hollering." A man delivering goods at the house saw George stand, with his head dropped on his chest, motionless, for three minutes; the mother was weeping and exclaiming "O, my God!" Mrs. Nelk had several times confided to friends her fears that "George will kill me some time;" and her belief that "George is crazy;" but she "didn't want to put him in an asylum; they wouldn't

ro[24] has discussed the relations of puberty to criminality. At this age, in these patients can be noted offenses against propriety, thefts, incendiarism, and even homicidal assaults; but underlying all is the state of dementia,—of mental weakness,—which is characteristic of all forms of dementia præcox.

1072. Crimes committed by juvenile paranoiacs.—Acts of atrocious cruelty are sometimes committed by young paranoiacs, as in the case of Jesse Pomeroy. Within recent years a somewhat similar case occurred in Philadelphia: a boy killed a little companion while playing with him, and hid his body.[25] A boy only eight years old was hanged in England in the 17th century for firing two barns; and Blackstone tells us that many years later a boy ten years old was convicted on his own confession of murdering his bedfellow, and that there appearing in his whole behavior plain tokens of a "mischievous discretion," and as the sparing of this boy merely on account of his tender years might be of dangerous consequences to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.[26] But fortunately the bloody days of criminal jurisprudence, when it was possible to execute children of eight and ten years without a question being raised of their mental soundness, have now gone by. And yet,

be good to him." On the other hand, many acquaintances testified that they never had seen any evidence of insanity in George Nelk. It was acknowledged that he had taken a sum of money, which his mother was known to have, and that he had spent this in houses of prostitution, in neighboring towns, after the murder.

He was promptly convicted of murder in the first degree, and sent to Moyamensing Prison. Here, in a short time, he lapsed into a state which has persisted to the present time. He lies motionless, save for uttering the half-articulate sound "Bo!" over and over; he never utters a word aside from that, and pays no attention to anything; the whole body is rigid and resistive: all the reflexes are exaggerated, and there is ankle-clonus; the extremities are livid; urine and feces are voided in the bed; he is nourished ordinarily by forced spoon-feeding, although at times he will take food in a gross fashion, by hand; he sleeps very little. (The above notes were supplied by Dr. William Pickett, one of the experts for the defense.)

[24] La Puberté chez l'Homme et chez la Femme, 1901.

[25] For important recent papers, see Dunton (American Journal of Insanity, Apr. 1904, p. 761), who reports a case with autopsy and references; also Régis ("Note à propos de la Démence Précoce" in Rev. de Psych. VIII. No. 4, p. 150), who does not regard the disease as a distinct affection, but only a terminal dementia. For a general discussion of juvenile insanity, see Spitzka, in Keating's Cyclopedia of the Diseases of Children, Vol. IV. p. 1038. Also, Clouston, "The Insanity of Puberty and Adolescence" in Allbutt's System of Medicine, Vol. IX. p. 296.

[26] Blackstone, 4 Com. 24.

so late as 1828, a boy aged twelve years was executed in New Jersey, on his own confession, for murder.[27]

[27] Keating, "Juvenile Crime," in Keating's Cyclopedia of the Diseases of Children, Vol. IV. p. 424. In a recent English case, *Rex* v. *Rodgers* (Journal of Mental Science, July, 1904, p. 588), the defense of "uncontrollable impulse" was allowed. A boy aged fifteen years shot his mother, who was a chronic drunkard. Evidence of both physical and mental impairment, though not great, was accepted. The case was such as to appeal to the sympathies, as the mother's drunken habits had driven the boy to despair, and his motive, he said, had been to save his little sister from a vicious bringing up. The judge said he thought the theory of irresistible impulse a dangerous one, but in this case it might be considered as of great weight.

CHAPTER L.

IDIOCY.

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I. The medical aspects of idiocy.

1073. The distinction between idiocy and insanity.—There are by universal consent two great divisions of mental disorder, and these

have long been recognized, both in law and in medicine. They are "idiocy" and "insanity." In the former the defect is said to be acquired before, in the latter after, the normal development of the brain. In the former the patients are born insane; in the latter they become so. The insane have, at one time, enjoyed mental health; the idiots have never had a sound brain.[½]

1074. The definition of idiocy and imbecility.—Idiocy, therefore, represents a state of arrested development. The defect dates back to a period in which the brain was still in process of formation; consequently, to a period preceding birth; or, at least, to a period in very early life, before the brain of the infant or young child had fully developed. Imbecility is only a milder grade of idiocy, and is often found in those patients whose arrest of development dates from early childhood. The distinction, therefore, between idiocy and imbecility is quite arbitrary; the two conditions merge into one another.

1075. Malformation of the brain.—It follows that idiocy is sometimes associated with gross malformations of the brain,—defects never seen in insanity. But these malformations vary widely, from a slight defect to an almost complete absence of the organ. In some cases, however, even of a low grade of idiocy and imbecility, there is no such gross deformity, but the mental faculties have not properly developed; doubtless because of defects in the finer elements of the brain-mass, such as the nerve cells in the cortex.

1076. The various kinds of idiocy.—There are many varieties of idiocy. Ireland,[1] one of the best of authorities, has described no less than ten kinds. These are as follows: "Genetous," the congenital idiot, often with bodily defects, usually hereditary; "microcephalic," in which the brain has not developed, and the skull is correspondingly small; "eclamptic," due to infantile convulsions and the disorders associated with them; "epileptic," associated, as the name implies, with epileptic fits; "hydrocephalic," in which there is effusion of fluid within the ventricles of the brain, leading to distention, often immense, of the brain and skull; "paralytic," in which, owing to gross defects in the brain, there are various forms of paralysis of

½ It is needless to say that from the purely scientific standpoint there is no hard-and-fast line to be drawn between "idiocy" and "insanity." The two conditions practically merge into each other by way of the degenerates and paranoiacs. Tuke (art. on "Insanity," in Brit. Encyc. Vol. XIII.) includes idiocy under the head of "Congenital Insanity:" but all idiots are not congenital, for many of them date merely from early life, having been born in good health.

[1] Idiocy and Imbecility, London, 1887. By William W. Ireland, M. D., Medical Superintendent of the Scottish National Institution for the Education of Imbecile Children.

A case of hydrocephalic idiocy, with deformity of the spine known as spina bifida.

the limbs; "cretinism," a special type, stunted in mind, dwarfed in body, often prevailing in certain localities, as in the Alps; "traumatic," due to injury, especially at birth; "inflammatory," due to inflammation of the brain or its membranes, either before birth or in early life; "by deprivation of the senses," as in cases in which a child is born deaf and blind.

We need not stop to engage in tedious criticism of the foregoing list. It explains much, even though it does not explain everything. Its main defects are the defects of most schemes of classification which are based on imperfect knowledge; for our knowledge of idiocy is not yet perfect. Some of these varieties overlap, as it were; therefore, it would be possible to include some idiots in more than one of Ireland's groups. If we take, for example, the genetous, or congenital, group, we can include in it many of the epileptics, microcephales, cretins, and the deaf and blind. Again, some idiots are both paralytic and epileptic, while a small number of both these classes is due to injury. Some hydrocephalic patients are both paralytic and epileptic, and even congenital. Thus it is possible to bring the whole subject of idiocy into confusion if we attempt to follow too rigidly Ireland's scheme or any other scheme.

The best plan is to follow nature; and this is quite possible by adopting Ireland's scheme as merely a sort of catalogue or guide-book. These groups represent certain prevailing types; not distinct diseases, separable from one another by hard and fast lines. They are mere variants, showing different modes by which disease has wrought ruin upon the tender brains of very young children, and giving certain permanent results with which we have to deal in our institutions, wherein we provide care and training for these unfortunates.

Nor is it desirable to enter here into a minute description of all these types.[2] For the purpose of the medical jurist it is sufficient to point out in what general ways the mental faculties are impaired in the various forms of idiocy.

1077. The intelligence always involved in idiocy.—By the very nature of these cases, the intelligence is involved. This fact is implied in the very idea of idiocy. This defect is seen in many grades, from the complete obliteration of this faculty, as in microcephales, up to a slight weakness in high-grade imbeciles. Not a few idiots, therefore, can be educated to some extent, and at the present time training

[2] Very good descriptive monographs on idiocy have been contributed by Mills in Starr's American Text-Book of the Diseases of Children, 2d ed. p. 667; and by Brush in Keating's Cyclopedia of the Diseases of Children, Vol. IV. p. 1,019.

schools, which are also hospitals and asylums, supply the best mental development of which these patients are capable.[3]

1078. The other mental faculties involved.—As with the intelligence, so with the memory, the attention, the affections, and, in fact, all the mental functions,—these are more or less involved in idiocy. It is not in the nature of disease, as a rule, to separate the mental faculties, and to mark out some for preservation, others for destruction. The degree of impairment varies in different cases; and yet, in some rare cases of idiocy or imbecility, we do see remarkable precocity, or the almost preternatural development of some one function at the cost, apparently, of the others. Thus, some idiots of low intelligence have extraordinary powers of imitation, as for music or for arithmetic. But these idiots have no originating power; their abnormal faculty, whatever it is, acts mechanically.[4]

1079. The moral faculties also involved.—It follows, of necessity, that, in the great majority of feeble-minded children, the moral faculties are stunted, and that in some of them these faculties are quite undeveloped. A microcephalic idiot has no better moral perceptions than he has intellectual ones; his mind is practically a blank. But, just as in the case of the mental faculties in general, there are many grades and varieties of moral defect. We cannot reduce the moral accountability of idiots and imbeciles to fixed rules. Only personal contact with these patients can reveal how complicated is this subject. It is only the study of individuals that can justify anyone in reaching conclusions. In every training-school for the feeble-minded a system of moral discipline is adopted, and rewards and punishments are meted out somewhat as in ordinary schools; yet this system and these rewards and punishments have to be modified in countless ways to meet the various cases of idiots and imbeciles. It would be as unscientific, on the one hand, to ignore the moral accountability in various degrees of some of these patients, as it would be, on the other hand, to claim (if any person could be so rash) that they are all equally accountable, or that all idiots are equally weak-minded. There is no equality, either of mind or morals, among these patients, taken as a whole class.

[3] This work is well reflected in the Annual Reports of the Pennsylvania Training School for Feeble-Minded Children, at Elwyn, near Philadelphia.

[4] The case of the negro, "Blind Tom," who could imitate the most complicated music on the piano, was an instance. He was quite idiotic. Some of these patients have an abnormal capacity for remembering dates, or for doing problems in mathematics. Such individuals are called by the French *idiots savants*.

Barr (Mental Defectives, 1904, p. 228) has a chapter on this subject, with some interesting examples seen by him or culled from the literature. Barr com-

1080. The moral imbeciles.—There is a class of imbeciles, of the higher grade, in whom the moral faculties are poorly developed, and hence easily perverted, while the intellectual faculties are by no means idiotic. In these cases there seems to be a disproportion between the development of the moral and intellectual functions. As a rule, however, such patients have not normal minds; the intelligence is usually below par. They are not often brilliant or even passable scholars, but are slow to learn, without being positively stupid in all cases; and yet their mental faculties seem much nearer a normal standard than their moral ones. These patients are insubordinate, bad, untruthful, not amenable to good influences, easily led astray,[5] or they go astray without being led, and are quite as likely to lead others astray. Such patients are sometimes called moral imbeciles, —a misnomer, because it ignores the fact that the intellectual faculties are really never normal in these cases. The intellectual defects are merely obscured by the moral defects.[5½]

bats the idea that these *idiots savants* have no originality, and that their precocious power tends to decrease in adult life. He agrees with Down, however, that *idiots savants* are confined almost entirely to the male sex, only one case in a female being on record.—that of Quénan, a female idiot at the Salpêtrière, in Paris, who was a mute and unable to dress herself, but was a "rare musician."

[5] The fact, reported by Voisin (Revue de l'Hypnotisme, Nov. 1888), that some moral imbeciles are benefited by hypnotism, is not without significance. It shows how susceptible these patients are to novel and bizarre influences. As to the permanent effects of hypnotism, that is another question.

[5½] The marvelous story of Kaspar Hauser is well worth reading in connection with moral imbecility. At one time it created a great sensation in Europe. Kaspar Hauser appeared mysteriously as a foundling, aged about sixteen, at one of the gates of Nuremburg, in May, 1828. No one knew whence he came, and his own story was that he had been reared in solitary confinement, without learning to talk or being allowed to communicate with any living creature. He was a moral pervert, a liar, simulator, and pretended victim of some great political conspiracy; and he found many to believe him, among others the English Earl of Stanhope. On three occasions he was mysteriously assaulted, the last time receiving a wound in the chest from which he died. The evidence was strong that he had inflicted the wound himself, in order to maintain the popular interest in himself, but he struck too hard and deep, and perished from the injury. He left a sensational note in mirror writing, in itself an evidence of degeneracy. Attempts were made to prove that he was the heir to the throne of Baden. See The True Story of Kaspar Hauser, by the Duchess of Cleveland (daughter of Lord Stanhope), London, 1893. Also Feuerbach's work, Beispiel eines Verbrechens am Seelenleben des Menschens (History of a Crime Against a Human Soul), 1832.

Hauser's case was an instance of how easily these individuals receive morbid and unwholesome suggestions. This boy's case was talked about and written about all over Europe; crowds of people went to stare at him; he was discussed as the possible heir of half the crowned heads of the continent; his vanity was flattered and his hopes stimulated by officials, professors, and learned doctors; and he was patronized by an English nobleman. When all this evil had been done, the tide turned, and he was doubted, scolded, and rejected. It is no wonder the poor fellow lost his moral equipoise, and resorted to shamming to keep up the farce.

For a note on mirror writing, see Wylie, Disorders of Speech, p. 359.

In these cases there is usually a bad heredity, and the patients are not far removed from the paranoiacs. (See § 1029.) In fact, later in life they may develop into well-marked cases of paranoia, with delusions and morbid projects. Such imbecile children are usually selfish, mischievous, cruel, untruthful, devoid of the ordinary affections for parents and friends, onanists, sexual perverts, and the creatures of morbid impulses. Among their delinquencies may be theft, incendiarism, and sexual and homicidal assaults.[6]

1081. The epileptic idiots.—In epileptic imbeciles and idiots we sometimes see acts of violence, automatism, mania, and fury, caused by the fits, such as have already been described under the head of "Epileptic Insanity" (page 726). Epileptic children may have peculiar moral perversions, not unlike the cases of so-called moral imbecility.[7]

1082. The pathology and morbid anatomy of idiocy.—We have more knowledge of the pathology of idiocy than of insanity, because in idiocy there are often gross defects in the brain which are not difficult to observe. Idiocy, indeed, furnishes the most conclusive proof, if such proof were longer needed, that healthy mental functions are merely the activities of a sound brain.

In the brains of idiots after death we see the havoc caused by disease or injury, just as, during their lives, we see weak-mindedness, which is the result and the evidence of this havoc. Among the changes found in the brains of idiots are atrophy, or wasting of tissue; hypertrophy, or overgrowth of the supporting tissue; inflammation of the membranes; sclerosis, or hardening; in other cases, softening; the formation of cavities and cysts; effusion of fluid; distention of the ventricles; thinning of the skull; and, occasionally, tumors.[8]

II. The medico-legal aspects of idiocy.

1083. Ancient laws on defective children.—In the laws of the Twelve Tables of ancient Rome[9] it was written, "If a father has a

[6] Spitzka, "Insanity," in Keating's Cyclopedia of the Diseases of Children, Vol. IV. pp. 1051, 1052; Clouston, Mental Diseases, p. 212, 1st ed. "Congenital Imbecility," case of E. C.

[7] Spratling, Epilepsy. This work contains an excellent description of the mental changes caused by epilepsy.

[8] Shuttleworth, Mentally Deficient Children; their Treatment and Training. London, 1895; Sachs, "Amaurotic Idiocy," N. Y. Med. Journ. May 30, 1896; Osler, Cerebral Palsies of Children, Phila. 1889; Spiller, "A Contribution to the Pathology of Imbecility and Idiocy," Phila. Med. Journ. Vol. I. No. 11; Shuttleworth and Beach, "Idiocy and Imbecility," in Allbutt's Syst. of Med. Vol. IX. p. 233; Mills, "Cretinism," in Starr's Text-Book of the Diseases of Children, 2d ed. p. 680; Lloyd, "Hydrocephalus," *ibid.* p. 624; Lloyd, "Sporadic Cretinism," in International Clinics, Vol. II. 2d Ser. 1892, p. 113; Schutte, Centralbl. f. allg. Path. und Path. Anat. June 15, 1900. The last is a valuable digest.

[9] Table IV. Law III.

Sporadic cretinism

child born which is monstrously deformed, let him kill him immediately." This early written law reflects the prejudice of primitive people against deformed and sickly infants; and in some of the ancient states it was customary to expose such weaklings on the mountain-tops to perish.[9½]

Even the early English law shared this prejudice, for we read in Britton[10] that any child born a monster, "as, one that has more than the proper number of members, as three hands or three feet, or a deficiency in the same, as, no hands or no feet," cannot inherit, and such are not to be "accounted as children, but as beasts and monsters." But Bracton[11] says that an increase or decrease in the number of members "not affecting the human form," as six or four fingers on one hand, does not affect the person's rights. But the law made a distinction between a "monster" and an idiot, *fatuus naturalis,* for it does not appear that an idiot could not inherit. In fact, the early statutory law made special provision for the estates of idiots.[12]

[9½] In ancient Rome it was the custom of the great ladies to keep an idiot as a sort of freak of nature with which to amuse themselves. Seneca, in a letter to Lucilius, regrets that his wife's idiot girl had remained to him as a burdensome legacy, "for personally," he said, "I feel the profoundest dislike to monstrosities of this kind. If ever I want to amuse myself with an idiot, I have not far to look for one. I laugh at myself." See Tuke, Dict. Psych. Med. Vol. I. p. 17.

[10] 167*b*. English translation by Nichols.

[11] Quoted by Nichols, op. cit.

[12] It is almost needless to say that the old common law disinheriting "monsters" was based entirely on old fables and superstitions. Blackstone tells us (2 Com. 246, 247) that the reason for the law is "too shocking to bear a minute discussion," and he evidently means us to understand that a "monster" is the product of the copulation of a lower animal with a woman. The learned commentator never hints that there may be anything fabulous in such a being, but expounds the old law with all due gravity. He says that a "monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood." But he proceeds to say that "although it hath deformity in any part of its body, yet if it hath human shape it may be heir." These points of resemblance or nonresemblance to brutes must have been nice questions to determine in an unscientific age, and cases of arrest of development might occasionally have passed for the offspring of goats or dogs, to the mortification of the poor mother. The very fact that there was such a law proves that such atrocious errors must have been made in times past.

In such bad odor had the Latin word *monstrum* fallen, because of these and similar fables which had gathered round it, that modern scientists would have nothing to do with it, and when they wanted a name for the new science which deals with these embryological freaks, they took the Greek word τερας (which means the same as *monstrum*) and coined the term "teratology." Human monstrosities are now, of course, well known to be mere deviations in the development of the embryo (with which none of the lower animals has had anything to do). See Hirst, Am. Syst. of Obstetrics, Vol. I. p. 761, for some striking pictures of human monsters.

See a quaint description of a double monster, by Montaigne, in his essay "Of a Monstrous Child," with characteristic comments, in which he points out that such things are not against the laws of nature, for "nothing, whatever it be, is contrary to her." How different the mental attitude of Martin Luther, who, when he heard of the birth of a monstrous calf, believed it was a portent

1084. The Statute De Prerogativâ Regis.—This law was the statute 17 Edward II. chap. 9, which plainly distinguished between the insane, *non compotes mentis,* and idiots, *fatui naturales,* and gave the estates of the latter into the keeping of the King, who had the right to the revenues of the same during the idiot's life, but was obliged to restore the estates to the heirs at the idiot's death. The reasons for this provision have been explained elsewhere (chapter on "Non Compos Mentis," page 482), and need not be repeated here. It is noteworthy, however, that the word "idiot" was not used in that statute, and, indeed, it seems at one time to have been used indiscriminately for the insane and for the feeble-minded.[13] There was an old common-law writ de idiota inquirendo which apparently antedated the writ de lunatico.[14] Nevertheless, as already said, the old statute distinguished clearly between these two classes, although it did not use the terms "lunatic" and "idiot."[15]

1085. Hardship and confusion caused by the old law.—In order to avoid the hardship imposed upon the family of the idiot by that statute, it became later a common custom to find the feeble-minded person not an idiot, but a lunatic;[15½] for the revenue of the latter did not fall to the King; and thus some confusion arose about terms, as explained elsewhere in these pages. (§§ 406, 407.) Moreover, the test for idiocy was exceedingly crude, for, according to Fitzherbert,[16] he was not an idiot who could tell his parents and his age, and could count 20 pence. This test, if applied at the present day, would empty our training-schools for the feeble-minded of a large proportion of their inmates; but perhaps it was a good enough test in an age when to be found an idiot meant to forfeit one's income to the King for one's natural life. Certainly, it must have comported with the wishes and the welfare of the idiot's family, who would have thought no test was too light which saved his estate from the King.

of some great event, and hoped the catastrophe might be the Last Day itself. All because of a deformed calf! (Luther's Works, Halle, Vol. XIX. p. 2416.) There is a vast literature on monsters. Index-Catalogue, Vol. IX.

[13] 1 Collinson, Lunacy, p. 117 *et infra.*

[14] Fitzherbert, Nat. Brev. 232; 1 Bl. Com. 304.

[15] The word "idiot" comes from the Greek word ἰδιωτης, meaning a private person,—one in a private station of life (ἴδιος, one's own, or private). Hence it came to mean an unskilled, ignorant person,—a common person, or plebian. Among classical writers it does not seem to have been used generally, if at all, in its more modern significance. (Liddell and Scott, Lexicon.) In classical Latin it was used with the same meaning as in the Greek, from which the Latin derived it. (Anthon, Dictionary.) Even in England, as late as 1623, an "idiote" was defined by Cockeram as "an unlearned asse." There is nothing pathological in that.

[15½] *Wenman's Case,* cited in 3 Atk. 173.

[16] Nat. Brev. 233.

These records are now of little more than historic interest, especially in America, where the estate of an idiot is administered in nowise differently from that of an insane person.

1086. The deaf and dumb were regarded as idiots.—It is worth while to note that a person who was born deaf, dumb, and blind, was, by the old common law, looked upon as in the same state as an idiot.[17] Thus, the law clearly recognized that class of idiots whom Dr. Ireland describes in his classification as idiots, "by deprivation of the senses," as already shown (*supra,* § 1076). But, while such an unfortunate may be idiotic, it no longer follows that he is so of necessity, for modern instances are well-known in which such patients have had normal minds and have been well educated.[18]

1087. No scientific test for idiocy.—There is no scientific test for idiocy any more than for insanity; for, as Sir Matthew Hale[19] said of Fitzherbert's test, it is too narrow; "For idiocy or not is a question of fact, triable by jury, and sometimes by inspection." It is much to be wished that the courts would constantly keep in mind this wise saying of the Lord Chief Justice. Idiocy is a general term for a wide group of *fatui naturales,* persons who by nature are deficient in mind, memory, and morals, of the greatest variety, extent, and complexity. It is impossible to reduce this group to the limits of fixed rules.[20]

1088. The presumption of law in cases of idiocy.—The presumption of the common law is that, if a person is born an idiot, he will always remain so;[21] and in this respect the law is in accord with science. It is a fact that few of these patients ever entirely recover, or, to speak more correctly, ever properly develop.[22] There is, therefore, not the same presumption either of recovery or of lucid intervals

[17] Co. Litt. 42; 1 Bl. Com. 304.

[18] The cases of Laura Bridgman and Helen Keller will recur to all readers.

[19] 1 P. C. Chap. IV. p. 29.

[20] Extreme statements are sometimes made by the courts in defining idiocy. Thus, in *Owing's Case,* 1 Bland, Ch. 372, 17 Am. Dec. 311, the judge said that idiocy is "not a condition of deranged mind, but that of a total absence of all mind." This would apply only to the very lowest grades of idiocy, such as microcephalus, and would exclude the vast majority of cases.

[21] 1 Bl. Com. 303. "An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any."

[22] Renton ("Idiocy in its Legal Relations," in Tuke's Dict. Psych. Med. Vol. II.) says that the old *presumptio juris et de jure,* that an idiot cannot recover, is now of little importance, owing to its having been displaced by modern science, as well as by statute (The Idiots' Act, 1886, 49 Vict. chap. 25).

Now, the fact is that, although science claims that many idiots can be improved by education, science does not claim that many of them can be cured. Extravagant statements are made by some writers about the results obtained in training-schools, but moderation is called for.

that is so often claimed in the case of insanity. And yet, in the old common-law writ de idiota inquirendo, it was declared that the escheator, who acted as a modern commission, was to inquire whether the alleged idiot had lucid intervals,—*si lucidis gaudeat intervallis.*[23] But this writ evidently dates from a time when the word "idiot" was used in a loose way, and possibly not restricted to "natural fools,"—*fatui naturales.* In no other way can we explain the inconsistency implied in the writ, which recognizes "lucid intervals" in patients whom the law presumes never likely to have any.

1089. The rights and responsibilities of idiots.— In most ways, however, idiocy is associated with lunacy in the common law in all that pertains to civil rights and criminal responsibility. What is said of one is said of the other. An idiot cannot make a will;[24] his conveyances and purchases, if not actually void, are voidable;[25] and he cannot make a valid marriage.[26] Blackstone combats the idea that the issue of an idiot can ever be legitimate, for, since consent is absolutely requisite to matrimony, and "neither idiots nor lunatics are capable of consenting to anything," their marriage cannot be valid. In criminal matters an idiot would be subject to the same tests apparently as an insane person.[27] Most courts would probably insist on the right-and-wrong test in a doubtful case.

Thus it follows that, exactly as in insanity, the hitch in this matter of idiocy occurs in individual cases when the question arises in court as to what constitutes idiocy or imbecility. These cases, from the nature of things, are not so numerous in jurisprudence as cases of insanity, but they have occurred.[28] They are not reducible to a uniform and simple definition.

1090. The marriage of imbeciles.—The marriages of imbeciles have been annulled in a number of cases. Sir John Nicholl,[29] in the *Case*

[23] 1 Collinson, Lunacy.
[24] 2 Bl. Com. 497.
[25] 2 Bl. Com. 291.
[26] 1 Bl. Com. 438.
[27] 4 Bl. Com. 24.
[28] Gerard-Marchant. "Rapport Médico-Légal sur un Cas d'Imbécillité," Ann. Med. Psych. 1855, I. 250.
[29] 1 Hagg. Eccl. Rep. 359. The Earl of Portsmouth was a well-recognized imbecile to all who knew him. One of his trustees, a solicitor named Hanson, secured possession of him, and in a week's time married him to one of his, Hanson's, daughters. "It is unnecessary," said Sir John Nicholl, in giving judgment, "to state the jealousy with which the law looks at all transactions between parties standing in those relations to each other." And again: "Every circumstance conspires to prove that he was the mere puppet of the Hanson family, and that the celebration of this marriage was brought about by a conspiracy among them to circumvent Lord Portsmouth, over whom they, and particularly the father, had a complete ascendency and control, so as to destroy all free agency and rational consent on his Lordship's part to this marriage."

Mr. Hanson was Lord Byron's solicitor, and the poet knew something about the affair, as is seen in his correspondence, published by Murray.

of Earl of Portsmouth, held that the facts that the person was capable of receiving some instruction, that he had once given testimony in court, and had some limited knowledge of farming and other subjects, were not incompatible with imbecility. In fact, this learned judge did not rely upon tests, but upon an analysis of the symptoms in the individual case before him; and this is what gives this *Case of Earl of Portsmouth* its special importance in the annals of medical jurisprudence. The method adopted was a scientific one; the individual was found to be imbecile, and the marriage was annulled. An imbecile who happens to have a fortune is tempting game for the adventurer, but the law will not always condone the offense of marrying such a person off-hand.[30]

This subject has still another aspect, for there have not been lacking thoughtful writers who have advocated, first, that the marriage of epileptics, imbeciles, and feeble-minded persons should be prohibited by statute law; and, second, that these unfortunates should be put into a condition by castration that would forever prevent them from reproducing their kind. In European countries, if we are correctly informed, no such legislation has been secured; but in America there are laws on the statute books both in Connecticut and New Jersey that forbid such marriages.[30½] But such legislation will not prevent procreation by and of idiots. It could be evaded in many instances by the usual conventional proof that the individual was not an "imbecile" or "idiot;" while in the case of epileptics, such law is a doubtful expedient and might be regarded by the courts as a grave infringement on personal rights. Moreover, idiots can procreate without going through the formality of a marriage, and not a few of them do so.

To meet such emergencies the radical position is taken by some writers that epileptics, imbeciles, and idiots should be castrated or "asexualized." It is safe to say, however, that the day has not yet arrived when this Oriental practice can be legalized in many of our American states.[30⅔]

[30] See report of the *Bagster Case*, in Ray. Med. Jur. Insanity, 5th ed. p. 108.

[30½] The Connecticut law of July 4, 1895, forbids the marriage of epileptics, imbeciles, or feeble-minded persons, or their living together when the woman is under forty-five years of age. It prescribes severe penalties, as also for having carnal connection with such defectives. For the New Jersey law, which is similar, see § 881½ of the present work.

[30⅔] Barr (Mental Defectives, 1904, p. 189) has a whole chapter on the subject of "Asexualization." Some years ago, he tells us, a circular was sent out from the Pennsylvania Training School at Elwyn, asking for opinions on this subject. Of 61 institutions addressed only 12 responded, of which 9 were American, 1 German, 1 Scotch, and 1 English. The answers in these few cases were "cautious" and noncommittal, and the idea of an appeal to legislation met with

1091. Testamentary capacity. — The testamentary capacity of idiots and imbeciles will doubtless come under the same rules as that of lunatics and dements generally. It will be merely a question of a sound and disposing mind. The courts in some cases have been extraordinarily blind to the facts, even though the common law presumes that a person born an idiot will never have the use of his reason. The will of a congenital imbecile has been sustained on a technical construction of what constitutes "unsoundness of mind."[31] If a mere "glimmering of reason," as Blackstone puts it, is sufficient to prove a person not an idiot, then there are no idiots but the lowest grades

little approval. The fact that this circular was so widely ignored seems to show that the proposition was not taken seriously. And yet in America feeble-minded children have been deliberately unsexed in a few institutions, but the writer is not aware that the subject has ever been adjudicated in any court of last resort. According to Barr, 58 boys have been castrated by Pilcher, of Winfield, Kansas; Flood, of Palmer, Mass., practised this method in 26 cases; in 24 of these cases the patients were epileptics and persistent masturbators; one half the number were under fourteen years, and two over twenty years of age. Barr has practised "asexualization" in 6 cases,—3 women and 3 boys. The operation on boys is either by castration proper (testectomy) or by cutting out a portion of the excretory duct of the testicle (vasectomy). By the latter operation the person is not really unsexed, for the testicle remains; he is merely rendered unable to procreate, and is not even incapacitated for sexual congress. Hence vasectomy has no beneficial effect on the patient, by extinguishing sexuality, but merely renders him harmless to posterity. Some years ago the legislature of Pennsylvania passed a law legalizing "asexualization," but it was returned by the governor unapproved. See Barr, loc. cit.

The pious practice of making eunuchs of boys in order to secure the male soprano voices, so much prized in the Sistine Chapel at Rome, may be recalled here; as also the fallacy of supposing that all eunuchs are destitute of courage and high intelligence. Narses, the famous general of Justinian (the Roman emperor and law-maker), was a eunuch.

[31] *Stewart* v. *Lispenard*, 26 Wend. 256. Alice Lispenard was an idiot, as the testimony in the case amply proved, and had always been so regarded and treated by her family. Toward the close of her life she lived with her brother-in-law, A. L. Stewart, and made a will, leaving him all her estate.

The will was refused probate, but, on final appeal to the New York court of errors (composed largely of state senators), it was sustained. The court held that "imbecility of mind in a testator will not avoid his last will and testament. Idiots, lunatics, and persons *non compotes mentis*, are disabled from disposing of their property by will; but every person not embraced within either of the above classes, of lawful age, and not under coverture, is competent to make a will, be his understanding ever so weak. Courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator; if he be not totally deprived of reason . . . his will stands as a reason for his action."

The decision in the *Lispenard Case* has been much and justly criticized. Justice Davies (in *Delafield* v. *Parish*, 25 N. Y. 27) said that the *Lispenard Case* had "not been regarded with favor by the bench and bar. The circumstances under which it was heard and decided on the part of the court are such as to carry with it little, if any, weight of authority." The court at that sitting "was composed exclusively of senators, . . . and reversed the decree of the chancellor, which affirmed the judgment of the circuit judge, who affirmed the decree of the surrogate, refusing to admit the will to probate."

It is satisfactory to know that such a decision was not made by a bench of learned judges, but by a coterie of state senators. See the case discussed also by Redfield, Wills, Vol. I. Chap. IV. § 15, and footnote.

of microcephales; and if such a glimmering is all that is required for testamentary capacity, then, indeed, can most idiots make lawful wills. But to attempt to confine idiocy and imbecility within such a rule is simply to revert to the crude test promulgated by Fitzherbert, which Lord Chief Justice Hale, as we have seen, condemned more than two centuries ago.

1092. Capacity in civil matters.—Idiots and imbeciles cannot contract. Moreover, it is sufficient to invalidate any instrument executed for an inadequate consideration by a person of weak intellect, to show that the person in whose favor it is framed holds a situation of confidence with respect to the maker of such instrument.[32]

1093. Responsibility in criminal matters.—In criminal cases the responsiblity of an imbecile or idiot would probably, in most courts, be made subject to the right-and-wrong test, unless the case were so evidently one of low-grade idiocy that the court would dismiss it merely on inspection.[33] In cases of so-called moral imbecility the question will always arouse controversy; but as this question is discussed elsewhere in these pages it need not be pursued further here. (*Ante,* §§ 1052–1058.) It is believed that the youngest person ever executed for crime was a boy named Dean, aged eight years, who, in 1629, was found guilty of burning two barns at Windsor.[34] A boy, aged twelve years, was executed in New Jersey, in 1828, for murder. All juvenile crime does not necessarily imply imbecility, but in very heinous crimes committed at such a tender age the question of abnormality may well arise.

In a case of burglary, wherein it appeared that the accused was an imbecile boy, who committed the crime by the persuasion of others, the supreme court of Kentucky granted a new trial, on the ground that the prisoner did not know right from wrong, and had not mind enough to resist persuasion.[35]

Sexual assaults have been made by imbeciles. The sexual instinct is strong in some of these patients, and not always controlled by the moral sense. The victims of their assaults are sometimes young children.[36]

[32] *Arnold* v. *Townsend,* 14 Phila. 216.

[33] 1 Hale, P. C. Chap. IV.: "For idiocy or not is a question of fact, triable by jury, and sometimes by inspection." See also 3 Bl. Com. 331, 332.

[34] Keating, "Juvenile Crime," in Keating's Cyclopedia of the Diseases of Children, Vol. IV. p. 424.

[35] *Hays* v. *Com.* 17 Ky. L. Rep. 1147, 33 S. W. 1104.

[36] Gerard, "Rapport Médico-Légal sur un Cas d'Imbécillité Compliquée de Délire Melancolique; Viol sur de Jeunes Enfants." Ann. Med. Psych. XIII. 515.

III. The deaf and dumb.

1094. The civil law on deaf-mutism.—By the Roman law the deaf and dumb were held to be without civil capacity,[37] and were on the same footing as persons deprived of intelligence (*mente capti*), to whom curators or trustees were to be appointed.[38] But an exception seemed to be made in favor of soldiers, for such persons, though deaf and mute, might yet make their testaments.[39]

It is evident from Bracton, that the early common law of England followed the Roman; or, at least, Bracton followed Justinian, for on this subject, as usual, he copied the Roman code almost verbatim.[40]

1095. The legal presumption in deaf-mutism.—The presumption of the old common law was that a deaf and dumb person was an idiot. But Coke[41] added blindness to the defects that seemed necessary to constitute an idiot in the presumption of law; thus, a person born deaf, dumb, and blind was such an idiot. In *Elyot's Case*[42] it was decided that a person who is deprived of one or two senses only, and who can convey his meaning by writing or signs, is not incapacitated.

Therefore, the presumption of idiocy in deaf-mutism could be rebutted, and this is clearly expressed by Hale.[43] "A man," wrote the Lord Chief Justice, "that is *surdus & mutus a nativitate* is, in presumption of law, an idiot; and the rather because he hath no possibility to understand what is forbidden by law to be done, or under what penalties; but if it can appear that he hath the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein."

Thus a door was left open for abolishing the old presumption, and at the present time nothing much is left of it.[44] This is largely due

[37] "It is evident that a dumb man can neither stipulate nor promise; and so of deaf persons; for he who stipulates ought to hear the words of the obligor; and he who promises, the words of the stipulator. But we speak not of him who hears with difficulty, but of him who has no hearing."—Justinian, Institutes, Lib. III. title XX. § 7, translated by Cooper.

[38] *Ibid.* Lib. I. title XXIII. § 4.

[39] *Ibid.* Lib. II. title XI. § 2. This exception may have been more apparent than real, for it may have been meant to apply to soldiers who were deaf or speechless from injuries. It is inconceivable that deaf-mutes should have been in service in the Roman legions.

[40] De Legibus, fol. 100; also fol. 421. Bracton uses the word *naturaliter* as meaning "from birth."

[41] Co. Litt. 42.

[42] Carter, 53.

[43] 1 P. C. 34.

[44] *State* v. *Howard*, 118 Mo. 127, 24 S. W. 41. "The presumption that a person deaf and dumb from birth should be deemed an idiot does not seem to obtain in modern practice, at least in the United States."

to the more scientific view of deaf-mutism which now prevails, and to the education of those unfortunates, as inaugurated by the Abbé Sicard. This is a happy instance of a legal presumption on the subject of mental unsoundness yielding before a more enlightened opinion. For the truth is that there are various kinds and grades of deaf-mutism. Some of these patients are undoubtedly idiotic or imbecile; education can do little or nothing for them; but others are of quite competent intelligence. Each individual case must be judged on its own merits, and not by legal rules or presumptions, many centuries too old.

1096. An error to be avoided.—Deaf and dumb idiots are included in that class described by Ireland[45] as "idiots by deprivation of the senses;" described also by Blackstone[46] as "being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." But an erroneous idea may easily be conveyed here. Deaf and dumb idiots are not idiotic merely because of the fact that they cannot hear and talk. Their deaf-mutism is only a part of a larger fact. The arrest of development has involved not only the hearing apparatus, but also the brain. They are idiotic plus their deaf-mutism. If it were otherwise, they could be educated in the sign-language like the more intelligent deaf-mutes. Hence, as already said, the only scientific way is to study individual cases, and determine the capacity of each person; for deaf-mutes vary within wide limits.

1097. The mental capacity of deaf-mutes varies.—It is now, therefore, recognized in law that the only question in the case of deaf-mutes, as in the case of any person, is their mental capacity.[47] Long ago, in fact, Lord Chancellor Hardwicke[48] tested the matter by inspection in court in the case of a woman who, having attained her majority, applied for possession of her estate. He put questions to her in writing, to which she replied properly in writing, and the application was granted.

Thus, in civil matters, the modern rule seems to be that the fact that a person is deaf and dumb does not, unless he is actually deficient in understanding, render him incompetent to hold and manage property, or to prosecute and defend actions in court;[49] but it must be

[45] Op. cit.

[46] 1 Com. 304.

[47] *Barnett* v. *Barnett*, 54 N. C. (1 Jones, Eq.) 221. "In the earlier history of the law a person who was born deaf and dumb was considered an idiot. That period has long passed, and the question as to their legal ability to make a contract is placed on its proper grounds,—their mental capacity."

[48] *Dickenson* v. *Blisset*, 1 Dick. 268.

[49] 8 Am. & Eng. Enc. Law, art. "Deaf and Dumb."

clear that he is not deficient. An inquisition finding a deaf-mute competent has been set aside because it appeared that the person, a woman, sixty-five years old, who had been deaf and dumb from the age of two years, was very ignorant, never having learned the sign-language, could not read or write, and could not be made to understand ordinary business. This was a righteous judgment.[50] It was probably with respect to such cases that Chancellor Kent observed that the old presumption was reasonable "in order to insure protection, and to prevent fraud."[51] But, as already observed, this is a matter of evidence, not of presumption.[51½]

1098. Deeds and wills by deaf mutes.—In the matter of deeds, a a deaf and dumb person can execute one, if it be shown that he understands the nature of the instrument he is signing.[52] But the wills of deaf-mutes are often regarded with suspicion, and the courts properly demand satisfactory evidence that the signs by which the testator had communicated his wishes were unmistakable.[53]

1099. The marriage of deaf-mutes.—The marriage of deaf-mutes is a question of grave sociological import. Intermarriage is not uncommon among these persons, but the risks of imperfect offspring are not slight. Clouston[54] speaks of such a marriage as "a physiological sin." He voices the prejudices of most, if not all, psychiatrists in that opinion.[54½] But the marriage of deaf-mutes is lawful if the contracting parties have mental capacity.[54⅔] A question of fraud, however, has arisen in such a case, even although there was no question of mental capacity.[55]

1100. Deaf-mutes as witnesses.—A deaf-mute may be a witness in court, if he can understand and be understood by signs or by reading and writing. But a deaf and dumb child, who has never been edu-

[50] *Re Perrine*, 41 N. J. Eq. 409, 5 Atl. 579. Chancellor Runyon said: "Whether persons born deaf and dumb are to be treated judicially, as persons mentally incompetent to manage their affairs, must depend upon the evidence they are able to give of the possession of capacity."

[51] *Brower* v. *Fisher*, 4 Johns. Ch. 441.

[51½] There is quite a voluminous medical literature on the capacity of deaf-mutes. See Index-Catalogue, Vol. III. pp. 616, 617, for bibliography.

[52] *Farmer* v. *Farmer*, 1 H. L. Cas. 724; *Barnett* v. *Barnett*, 54 N. C. (1 Jones, Eq.) 221.

[53] *Owston's Goods*, 2 Swabey & T. 461, 31 L. J. Prob. N. S. 177, 6 L. T. N. S. 368, 10 Week. Rep. 140; *Geale's Goods*, 3 Swabey & T. 430, 33 L. J. Prob. N. S. 125, 12 Week. Rep. 1027.

[54] Mental Diseases, 1st ed. p. 216.

[54½] For some statistics on the subject of deaf-mutism as occurring in consanguineous marriages, see Senator and Kammir, Health and Disease in Relation to Marriage and the Married State, N. Y. 1904.

For statistics of hereditary deaf-mutism, see Large's excellent paper in the Encyc. Brit. Vol. VII.

[54⅔] See *ante*, § 43.

[55] *Harrod* v. *Harrod*, 1 Kay & J. 4, 18 Jur. 853.

cated in the sign-language, is not a competent witness, if it is impossible to communicate with him or to understand his pantomime.[56]

1101. The legal presumption of sanity in deaf-mutes.—The presumption of sanity has been held not to apply to a deaf-mute accused of crime, and it is incumbent on the prosecution to prove capacity and the ability to distinguish right and wrong.[57] This is a reversion to the old presumption of idiocy in deaf-mutes; and it remains to be seen whether, in future cases, this ruling will be followed. But deaf-mutes are not often accused of crime.

1102. The distinction between deaf-mutism and acquired deafness.—Finally, it is important to distinguish deaf mutes *a nativitate* from persons who have acquired deafness; for neither the Roman nor the common law applied to the latter; and from persons who have lost the use of speech from disease, as in cases of aphasia.[58]

1103. Standing mute.—In court it may be a nice question to determine about a person who stands mute; and in such cases a special jury may be sworn to determine, first, whether the prisoner be mute of malice or by visitation of God; second, whether he be able to plead; third, whether he be sane or not.[59] (See Chapter LVII.)[60]

[56] *Territory* v. *Duran*, 3 N. M. 194, 3 Pac. 53. For other references see the Am. & Eng. Enc. Law, loc. cit.

[57] *State* v. *Draper*, 1 Houst. Crim. Rep. (Del.) 291.

[58] *Potts* v. *House*, 6 Ga. 324, 50 Am. Dec. 329. This case is often quoted on the subject of deaf-mutism, but it was not such a case. The person was ninety years old, a senile dement, and probably aphasic.

[59] See footnote, 1 Hale P. C. 34, Am. ed. Also, *Rex* v. *Pritchard*, 7 Car. & P. 303; *Rex* v. *Dyson*, 7 Car. & P. 305, 1 Lewin, C. C. 64; *Thompson's Case*, 2 Lewin, C. C. 137 (the prisoner wrote his plea). 1 Russell, Crimes, 7, note; *People* v. *McGee*, 1 Denio, 19; *Com.* v. *Hill*, 14 Mass. 207; *State* v. *De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

[60] N. B. But little space has been devoted in the above chapter to the subject of monsters, and that chiefly in footnote 12. The subject, however, is not without medico-legal interest, now mostly historical, for the curious student. A wonderful discourse on the subject is found in Ambroise Paré's opera, Francofurti, 1594, Lib. XXIV. Many illustrations of fabled monsters are given, showing the miscegenation of the human race with brutes, and throwing a strong light on the passage in Blackstone's Commentaries (2 Bl. 246, 247). It is remarkable that men of the intelligence of Ambroise Paré, who was a great surgeon, and of Blackstone, who was a great lawyer, should have been deluded into such grotesque beliefs, even making due allowance for their times.

CHAPTER LI.

NARCOMANIA.

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I. The medical aspects of the opium habit.

1104. Meaning of the term.—By this term is meant particularly the opium habit, although it is properly made to include also the habit of using other narcotic drugs.[1] When the term "opium" is used thus, it must be understood as including the various alkaloids or active principles of that drug, the chief of which is morphin. There are practically few, if any, distinctions to be made between the opium habit and the morphin habit, although there are some; and these distinctions are urged by some writers.

[1] Kerr, "Narcomania, the Disease of Inebriety," in the Twentieth Century Practice of Medicine, Vol. III. p. 115.

1105. Some historical data.—Opium was known to the ancients, but it was not used by them to anything like the extent to which it is used by the moderns. The crude drug is the inspissated juice (ὄπος) of the poppy,—a plant which is now widely cultivated, but the original home of which is placed by some writers in the valley of the Nile. There seems to be no better reason for that opinion than the fact that the first mention of the use of opium is found in hieroglyphics of an early date in Egypt.[2] In the fourth book of the Odyssey a drug which may have been opium is described by Homer.[3] The ancient physicians—Hippocrates, and, after him, Dioscorides[3½]—used opium; and during the Middle Ages it was much in vogue as a remedy. The dates of its introduction or first use in India and China are probably no longer to be ascertained with certainty, nor does the question concern us here. In those countries, and especially in China, the abuse of opium is now carried to a greater extent, probably, than in any country on the globe; and the Chinese, as has always been their wont, may have had as early a knowledge of the drug as any of the other ancients.

The spread of Islamism is said to have spread the use of opium, but possibly it only increased it; for religious and political excitement, and especially war, have usually tended to increase the abuse of all stimulants and narcotics. Still, as the Mohammedan religion forbids the use of wine, it may readily have increased the use of opium as a substitute. Mankind will not be deprived of its favorite poisons with impunity.[3⅔]

[2] Crothers, Morphinism, 1902, p. 17.

[3] Meantime, with genial joy to warm the soul,
Bright Helen mixt a mirth-inspiring bowl;
Tempered with drugs of sovereign use, to assuage
The boiling bosom of tumultuous rage;
To clear the cloudy front of wrinkled care,
And dry the tearful sluices of despair;
Charmed with that virtuous draught, th' exalted mind
All sense of woe delivers to the wind.
Though on the blazing pile his parent lay,
Or a lov'd brother groaned his life away,
Or darling son, oppressed by ruffian-force,
Fell breathless at his feet, a mangled corse;
From morn to eve, impassive and serene,
The man, entranced, would view the dreadful scene.
These drugs, so friendly to the joys of life,
Bright Helen learn'd from Thone's Imperial wife.
—Pope's Odyssey, Book IV. 301–316.

There is also, as is well-known, a reference in the Odyssey, Book IX., to the lotus and to the lotus-eaters, or "lotophagi;" but this plant is not to be confounded with opium. It seems to have been a kind of date, and is referred to by Herodotus, Polybius, and Pliny. See also Tennyson's poem, "The Lotus-Eaters."

[3½] U. S. Dispensatory, art. "Opium."

[3⅔] If it be "not poppy, nor mandragora, nor all the drowsy syrups of the world," it will be something else equally noxious. This is the only instance where Shakespeare (Othello, Act. III. Sc. III.) uses the word "poppy."

But while opium has been known, and doubtless abused, for many centuries, it is evidently due to the discovery of its alkaloid, morphin, that the habit has become more widely spread to-day than in former times. Morphinism is a modern disease. It dates back only about a century, or since the discovery of the alkaloid by Sertürner, in 1804.[4]

1106. The peculiar features of morphinism.—The fact that morphinism, as a form of opium-addiction, has some peculiar features, is due to several causes. In the first place, the alkaloid can be taken in small doses. But the chief reason is the use of the hypodermic syringe, introduced by Pravaz, in 1866, for use in the French army. By the aid of this nefarious little tool, whose sting is worse than that of any serpent that lies coiled in the wine-cup, morphin can be used with great comfort, perfect convenience, and the utmost secrecy. It is a more refined and captivating habit than drinking laudanum, and far more so than drinking whisky; and is not attended with some of the disagreeable features which attend the grosser uses of the drug. In its ultimate effects, that is, in its pathology, it does not materially differ from the use of other forms of opium. In the facility with which it can be concealed, the morphin habit has many advantages over the use of alcoholic drinks. It leaves no odor, nor the besotted look of the toper.[5]

1107. The various forms of the opium-habit.—The attempt has often been made to distinguish the pathological effects of the various forms of the opium habit. Thus, opium-eating, which is very prevalent in India, is usually supposed to be more deleterious than opium-smoking, which is the mode among the Chinese. In America and England the drinking of laudanum is not uncommon, although it is probably yielding before the use of morphin by the syringe.[6] From the medico-legal standpoint it is not possible to draw distinctions based on these various modes of taking the drug. Opium, however

[4] Fowne, Elementary Chemistry, 1875, p. 751.

[5] It is claimed by some observers that the morphin habit is particularly rife among physicians; and statistics tend to confirm this statement. According to Oppenheim (Diseases of the Nervous System, translated by Mayer, p. 882), among one hundred male morphinomaniacs, forty-two were physicians. Druggists come next in point of frequency.

[6] But opium-eating is also common in England. "Shearer (Opium-smoking and Opium-eating, etc.) states that the increase in the practice of opium-eating among the workpeople of Manchester (England) is such that on Saturday afternoons the druggists' counters are strewed with pills of opium of one, two, and three grains, in anticipation of the known demand of the evening."—Wilson, "The Opium Habit and Kindred Affections," in Pepper's Syst. of Medicine, Vol. V. p. 647.

it is introduced into the system, probably acts in the end very similarly in all cases.[7]

1108. The opium habit becomes a disease.—Just as in the case of alcohol, so in the case of opium, the prolonged use of the poison constitutes a disease. The confirmed *habitué* of opium becomes enslaved not only mentally and morally, but also physically. It is impossible to poison the nerve cells daily with such a potent narcotic, and not set up changes in them which are pathological. This is shown in chronic cases by the physical condition of the patient, and by the grave consequences which may result from a sudden withdrawal of the drug. And yet opium, or its alkaloid, morphin, does not cause such gross anatomical changes in the tissues as does alcohol. It is a more insidious poison, but it is none the less destructive.[8]

1109. The physiological action of opium.—The physiological action of opium is, first, exciting, secondly, somniferous. The after-effects are depressant, with nausea, headache, and a sense of *malaise*. In time, as a tolerance for the drug is established, the exhilarating effect is the one most sought after, and it is often secured to a degree not possible for the neophyte, who soon falls asleep, and awakens nauseated and depressed.

1110. The chronic effects of the drug.—By the habitual use of the drug a truly abnormal mental state results, which is characterized by moral perversions, enfeebled will, loss of power of attention, and the establishment of a delirious or delusional psychosis. In this chronic stage the victim of the drug is often insane and irresponsible, although even in this stage the patient can sometimes conceal his disorder with remarkable success.

Lentz[9] has tabulated the symptoms in morphinism, as follows:

First, diminished power of recollection. Increasing amnesia, or inability to recall past mental images and ideas.

Second, diminished power of attention and volition.

[7] For the benefit of nonmedical readers it may be explained that the principal preparations of opium are as follows: Crude opium, or the dried juice of the poppy, used in pills; the extract of opium, twice the strength of the crude drug; Dover's powder, a mixture of opium, ipecac, and sugar of milk; laudanum, or tincture of opium, an alcoholic preparation; paregoric, a weaker and flavored tincture; and the various alkaloids, or active principles, the chief of which is morphin, combined with an acid to form a salt, as sulphate of morphin. Wood's Therapeutics, 8th ed. p. 171.

[8] Berkley, Mental Diseases, p. 282. "In India, where the opium habit is widespread and is continued from one generation to another, the children of such parents eventually reach a plane of lowered mental activity; and the population of opium-eating districts contains a larger proportion of idiots and imbeciles than is found in others in which the habit is not prevalent."

[9] La Tempérance, 1894.

Third, diminished power of initiative and energy of conduct.

Fourth, diminished muscular power, frequently marked by trembling.

Fifth, blunting of the higher moral and ethical senses.

Sixth, insomnia, loss of desire for sleep, and nutritive disturbances of the brain.

Seventh, disturbances in the balance of representation between the external world and the ego, with false impressions, hallucinations, delusions, and suspicions of wrong.

In addition to these purely mental disturbances, there are, as Crothers points out, disturbances of the special senses. The perception is at fault rather than the sense-organ itself; thus, the musician loses his fine appreciation of notes; the singer loses his command over his voice; the eyes also are involved, and the sense of taste.

There are many physical signs of chronic opium poisoning, among which may be mentioned impaired nutrition, disordered secretions, loss of appetite, sallow skin, loss of the sexual function, and, in women, amenorrhea.[9½]

1111. Moral perversions.—Of the mental symptoms, enumerated above, the most characteristic, perhaps, are the moral perversions. The chronic morphinomaniac is often a confirmed liar. The truth is not in him, especially with reference to himself and his habits. There is something quite pathological in this mendacity; the lying is unblushing, inexpert, spontaneous,—a sort of second nature. I have known a confirmed morphin-taker to deny point blank his own signature to a letter, referring to a business transaction, although the signature had been written by him only a short while before, and its identity was absolutely unquestionable, and confirmed by all the attendant circumstances, and by witnesses. Moreover, the denial was senseless and without sufficient motive, for the transaction in ques-

[9½] Dr. Henry Leffmann, chemist and toxicologist, of Philadelphia, supplies the following note:

The extensive use of patent medicines containing alcohol and other powerful toxic agents constitutes an insidious cause of drug-insanities. These remedies are especially dangerous because the steady use of them may not be suspected, or even if such use is known, the physician and friends may not be aware of their chemical character and thus overlook their causal relation. Malt extracts may contain as high as 7 per cent of alcohol, about double that in lager beer. Remedies advertised for the cure of common chronic affections often contain over 20 per cent of alcohol, —more than in many wines, and nearly half that in strong whiskey. Cough mixtures and emulsions of cod liver oil may contain morphin. Some of the widely-advertised cures for drug habits contain notable amounts of the drug against which they are alleged to be antagonistic. On the other hand, one remedy for drunkenness consists of nothing but milk sugar with a little ammonium chlorid.

tion did not depend upon the letter. The question arises in such a case whether a lapse of memory may not be the underlying cause. This may be a partial explanation, for the minds of these patients are full of blank spaces (if such an expression may be used). They have been so often narcotized, and thus cut off from actualities, living in a dream-state, that they do not seem able to recognize realities when they see them.

1112. The narcomaniac's unreal world.—This is, indeed, the keynote to the narcomaniac's mind. He lives a large part of his time in an unreal world; his mind is filled with ideas and images which have no counterpart in real life. In the course of time these ideas become real to him; there is a confusion in his mind between the dreams and the facts.[10] This leads to a complete disorientation of the man. It disturbs his concepts not only of material facts, but also of moral facts. He becomes both delusional and false. But in the great majority of these cases there is preserved a certain coherence of ideas,—a certain balance of the mental faculties,—which gives the patient a misleading appearance of normality. These patients are seldom confused, incoherent, or tipsy, as in the case of alcoholic drunkenness.

1113. The mental changes.—As a consequence of this breaking up of the normal connections of the mind with its actual environment, the narcomaniac becomes the prey of delusions and false sensory impressions, or hallucinations. His delusions may be persecutory or grandiose. In fact, in some advanced cases the patient's mind undergoes what may be called a paranoiac change; that is, he degenerates; first developing delusions of persecution, believing that he has enemies; and then later evolving delusions of grandeur. In other cases the patient may sink into a condition strongly resembling general paresis;[11] especially if the drug has been taken along with alcoholic drinks,—a not uncommon thing.[12] Under the influence of delusions the patient may commit criminal acts.

[10] De Quincey was an example of a brilliant mind half-ruined by opium. "De Quincey's mind never wholly recovered from the effects of his eighteen years' indulgence in opium. He himself says, half jocularly, but apparently quite truly, that it is the characteristic of the opium-eater never to finish anything." Quarterly Review, No. 219, pp. 15, 16. It has become customary in recent years to criticize De Quincey for his highly-colored pictures of the dreams of the opium-taker, and to hold him responsible for helping to spread the habit. His writings on the subject, however, are to some readers, among whom is the present writer, rather stupid. See his Confessions of an English Opium-Eater.

[11] Régis, Mental Medicine, translated by Bannister, pp. 497 and 514.

[12] In a case observed by the writer, in a physician, there was a close resemblance to general paresis, both in the mental state and in the tremor and defects of speech. But in this case morphin was not the only poison, for the

The affections are usually blunted in advanced cases, especially if it comes to a question of the patient procuring the drug. Many of these patients, it is true, live in seemingly happy relations with their families, but they are well known to be utterly selfish and unreliable. The confirmed *habitué* would sell his soul for his poison. So intense is the craving for the drug that in China a man has been known to mortgage his mother and sell his wife to gratify it.[13]

From this loosening of the moral sense and from this dazed state of the consciousness arise many and various impulses, conceits, and queer acts. These patients sometimes make promises which they never keep; they also steal, become shoplifters, or kleptomaniacs; and even do worse, as setting fire to buildings. From their forgetfulness alone arise many unconventional acts, as broken engagements, failure to attend to business, and bearing false witness.[13½] These mental, moral, and affective changes in the narcomaniac constitute the soil from which evolve his acts which bring him to the notice of the medical jurist.[14]

II. The medico-legal aspects of the opium habit.

1114. Crimes by narcomaniacs.—Crothers gives some instances of morphinomaniacs who have been violators of the law.[15] Crimes against the person are not common in these patients, and when they occur they are usually due to the peculiar delusional or unreal state in which these persons pass so much of their time. A woman killed her infant child, and was unable to recall the act or explain the motive. She became a maniac shortly after being taken to jail; probably from the enforced abstinence from the drug.[16] In another case a narcomaniac became an accessory to a murder. Some of these patients become pyromaniacs.[17]

patient had also used chloral, bromids, and not a little alcohol. This use of more than one drug is not uncommon in narcomaniacs.

[13] "One man sold his wife for 12 pounds, and smoked the proceeds. . . . In some localities, especially in China, the opium degradation is so terrible that gross immorality abounds. Sometimes men think nothing of gratifying their mania for this narcotic from the proceeds of their wife's prostitution. Even little children . . . are sold into slavery to secure supplies of the demoralizing drug."—Kerr, Inebriety or Narcomania, p. 89.

[13½] *State* v. *White*, 10 Wash. 611.

[14] Levinstein, Morbid Craving for Morphia, translated by Harrer, 1878.

[15] Op. cit. Chapters VIII. and IX. Dr. Crothers' valuable book is quite a mine of information for the medical jurist. but unfortunately he omits to give the references to the cases he quotes. These cases, therefore, cannot be verified and satisfactorily used by other writers.

[16] Crothers, op. cit. p. 246.

[17] A noted politician and banker, retired from business, was detected setting fire to buildings. After taking a large dose of the drug he would sally forth in the night and go and set fire to

It is in business transactions, in positions requiring trustworthiness, honor, and integrity, that the moral lapses of the morphinomaniac are most flagrant. Change of character in a reliable business man, shown by recklessness in speculation and in business enterprises, is sometimes one of the indications of a confirmed opium habit. But the difficulty in these cases consists in finding adequate proof,—proof that will satisfy the judgment of the court. These patients are often exceedingly plausible, and show great skill in concealing their habit. When it comes to a question of the knowledge of right and wrong, upon which the courts usually insist, this difficulty may be well-nigh unsurmountable. It is usually greater than in the case of alcoholism. According to Crothers, only a few cases of swindling have been contested on the ground of irresponsibility from the use of morphin, and the courts have declined to recognize fine distinctions of mental health. A morphinomaniac who sold out his business to a clerk at a very low price has been found insane by a commission in lunacy.[18]

Kleptomania, or the impulse to steal, is not uncommon in some of these patients. They accumulate and hoard their ill-gotten gains. In some notorious cases of shoplifting among respectable women, who are not in need of money, the motive may be found in the disordered mental action due to morphin.[18½]

Some morphin-takers make their wills upon the slightest provocation, and unmake and remake them. Instances are recorded of such patients making as many as eight wills in one year.[18⅔]

some old structure. He set fire to a building of his own, and the next day offered a large reward for the apprehension of the guilty person. There was no malice in these acts. Crothers, op. cit. p. 250.

[18] It is well known that judges themselves have become the victims of the opium habit, and have discharged their duties on the bench while narcotized. In one instance the competency of the seller of a piece of property was questioned from the fact that the person was a morphinomaniac, and the judge gave a decision supporting the claim of irresponsibility, charging the jury that morphinism is a disease, and all users of morphin are incompetent. At the very time he was himself under the influence of the drug. Crothers, op. cit. p. 269.

[18½] See *Rogers* v. *State*, 33 Ind. 543, which this narcotic played a part. The opium habit has been held to be a good defense in some cases. *State* v. *Rippy*, 104 N. C. 752, 10 S. E. 259; *State* v. *Mahn*, 25 Kan. 182.

The opportunity may be taken here to acknowledge the care with which Mr. F. H. Bowlby (in Clevenger's Med. Jurisp. of Insanity, Vol. II. Chap. XVI.) has collected the references to medico-legal cases in which drug-addiction has figured. Mr. Bowlby has, indeed, not only there, but elsewhere in that work, laid both the legal and medical professions under obligation to him for collecting the references to medico-legal cases in all their various bearings. It has thus become a work of supererogation for any other writer to attempt such a laborious task.

[18⅔] Narcotics have figured in some cases of disputed wills. In *Hamilton's Estate*, 4 Pa. Dist. R. 161; also 16 Pa. Co. Ct. 303, it was alleged that the

1115. Medico-legal cases not numerous.—Instances are not numerous, up to the present time, of morphin-takers having figured in medico-legal cases; not nearly so numerous, for instance, as in the cases of alcoholism.[19] The chief reason is that the use of opium in all its forms is a secret vice, and one not easily proved; and, especially, that the mental changes in these patients are insidious and often hard to demonstrate. It is probable, however, that, with the increasing use of the drug in various forms, this question will assume more prominence in the courts in the future. Opium, in its various forms, can cause mental disorders, as already shown, prominent among which are maniacal outbursts, delusions, and moral perversions; and the question in each case will have to be determined according to the evidence, as in every case of mental disorder.[20]

Tuke[21] calls attention to the fact that morphinomaniacs may commit forgery. It is well known that they forge prescriptions, and it might well be that they would forge other papers. Still, the motives for forging prescriptions for their favorite drug are so special and so overpowering that they do not necessarily imply that these persons would forge checks and notes.[22]

testator was under the influence of narcotics when he made his will; and it was true he had been given chloral by his physician during his last illness to induce sleep, but the evidence of lack of capacity was of the flimsiest kind.

In *Re Glockner*, 17 N. Y. S. R. 798, 2 N. Y. Supp. 97, the testator had been given opium for the pains of uterine cancer, but the evidence did not prove that she was incapacitated for making her will. But in *Hildreth* v. *Marshall*, 51 N. J. Eq. 241, 27 Atl. 465, the will was rejected, partly on the ground that the testatrix, a woman aged ninety-four years, was under the influence of opium, and debilitated by age and disease, and did not know what she was signing. See also *Carlin* v. *Baird*, 11 Ky. L. Rep. 932, 13 S. W. 434, in which the will was set aside.

[19] See Kane, "Some Medico-Legal Aspects of Morphia-Taking, with Special References to the Lason Case," in Alienist and Neurologist, 1882, Vol. III. p. 419; Motet, "Rapport Médico-légal sur Annette G." Arch. de Neurolog. 1886, XI. 398.

[20] The amount of opium or morphin taken by some *habitués* is very large. De Quincey is said to have taken as much as a quart of laudanum in a day. The therapeutic dose is from 15 to 30 drops. A well-known professor, in Philadelphia, took about 20 grains of morphin a day; the therapeutic dose being only from ⅛ to ¼ of a grain; he eventually became violently insane, with delusions of persecution, and threatened to use his pistol. He was taken to an asylum. The gravity of the case is not always exactly proportionate to the size of the dose. Some confirmed narcomaniacs take a comparatively moderate quantity, and eventually break down under it. The secrecy with which the drug can be taken is extraordinary. The writer attended professionally, for many years, a retired physician who took 4 or 5 grains of morphin daily, but the habit was not discovered until the patient was on his deathbed. This man had mental peculiarities and lapses, the true nature of which had not been suspected.

[21] Dict. Psych. Med. art. "Morphiomania." Consult also Guimball, Les Morphinomanes, 1892; Kane, Drugs that Enslave, 1881. The literature is immense; Index-Catalogue, arts. "Morphin" and "Opium."

[22] A curious example of literary thieving, due to opium, was seen in the case of the poet Coleridge. This brilliant man was, for a part of his life, the slave of opium, and wrote not a little (but not his best) when under the in-

In the East opium causes maniacal paroxysms; and in the Malays it excites the homicidal impulse called "running-a-muck." This is also ascribed to hashish.[22½]

III. The medical aspects of the cocain habit.

1116. The abuse of coca and cocain.—Cocain is the active principle of a South American plant known as the *Erythroxylon coca*. This plant is largely cultivated in Peru and neighboring countries, and has been used since the days of the Incas as a stimulant. The leaves are chewed, somewhat like tobacco; and the action is to exhilarate and to increase temporarily the sense of physical strength and well-being. The drug was gradually introduced into medical practice, but only gained a limited use until after the discovery of the alkaloid "cocain" by Gardeke, in 1855, and its description by Niemann in 1859.[23]

1117. Cocain is a powerful poison to the nervous system.—The abuse of cocain, and its poisonous effects on the nervous system,[24] began to be apparent, especially among physicians and druggists, after the demand for it as a therapeutic agent had once become well

fluence of the drug. His alleged plagiarisms caused much discussion after his death, and his reputation for literary honesty was ably defended by his daughter Sara. "The infirmity of his character," says Boyle, "and the mental confusion caused by the unhappy habit which so long had dominion over him, indisposed him for the exactitude rightly demanded from all who undertake philosophic discussion. In the latter part of his life, more than one of those admitted to his confidence have given curious instances of his confusion between the words of an author and the *marginalia* which he had written in that author's pages." Encyclopedia Britannica, art. "Coleridge."

[22½] Dr. F. Peterson ("Medical Notes in Egypt") says that of 248 patients whom he saw in an asylum in Cairo, sixty men and four or five women were insane from the use of hashish, or *cannabis indica*. This drug, also known as Indian hemp, is but little if at all used as an intoxicant in America.

But in the East its use is not uncommon. "Ganjah" is prepared from the flowers of the hemp plant, and is potent for evil. In Bengal 53 per cent of all cases of lunacy in which the cause can be traced are attributed to ganjah. Acute intoxication from this drug is said to be especially marked by homicidal impulses. (See Kerr, Inebriety, 3d ed. N. Y. pp. 95, 96.)

With a heart of furious fancies,
Whereof I am commander:
With a burning spear,
And a horse of air,
To the wilderness I wander;
With a knight of ghosts and shadows,
I summoned am to tourney;
Ten leagues beyond
The wide world's end:
Methinks it is no journey!
—Tom-o'-Bedlam Song.

From Disraeli, Curiosities of Literature, Vol. III. pp. 51–53.

[23] Wood, Therapeutics, 8th ed. p. 242.

[24] The early travelers in Peru noted the use of coca as a masticatory by the natives, and reported that the plant had thus been used by the Peruvian Indians from the most ancient times. Contradictory accounts were given of its effects: some observers seemed to think it did no harm to the Peruvian natives, who had become used to it; but a more accurate statement was made by Pöppeg (Travels in Chili and Peru), who said it was as dangerous to health as opium-eating.

established. Erlenmeyer was the first writer who gave a systematic description of the cocain habit, and of the disastrous effects caused by the abuse of the drug.[24½] Unfortunately, this abuse was increased by the belief, entertained formerly more than at present, that cocain is a remedy for the opium habit. The consequence was that many morphin-takers became addicted to cocain too; and, in fact, it is very common to find the abuse of the two drugs in the same person. Probably the majority of cocain users are also addicted to morphin, although the converse is not true. Many of them begin the use of the former drug in order to escape the tyranny of the latter, but the result is simply to enslave themselves to two masters. Those who use cocain alone are probably in the minority.[24⅔]

The cocain habit is, by general consent, held to be more deleterious even than the morphin habit. These victims deteriorate rapidly, both in body and mind, and soon become wrecks. A well-marked form of insanity is one of the common results. Hence we are not so likely to observe the long continued and secret cases, such as are observed among morphinomaniacs. The secret will out. The victim goes to pieces, and is usually consigned to the asylum early in his career.[25]

1118. The tragic history of the all-round victims of drugs.—There is something tragic in the extreme in the history of some of these victims to drugs. Having succumbed to morphin, the victim turns to cocain; then back again to morphin; then yields indiscriminately to both, or varies his debauches with a resort to chloral, the bromids and alcohol. It is needless to say that these confirmed drug fiends are often hopeless cases. Even when snatched from themselves by friends and physicians, and set once more upon their feet, they are only too likely to relapse. The craving becomes worse than a habit, it is a disease.[25½]

[24½] "Ueber Cocainsucht." in Deut. Med. Ztg. 1886, VII. 483.

[24⅔] The raw material comes from Peru, and exports of it from that country have more than doubled in the five years since 1899. The bulk of the product is gathered by Indians from the wild plants in the forests. (Med. News, Sep. 17, 1904. p. 564.) These statistics are melancholy evidence of an increase in the abuse of the drug, for although the therapeutic use of cocain has also greatly increased, the legitimate demand for it does not explain such enormous figures.

[25]Obersteiner, "Zur internen Anwendung des Cocains bei Neurosen und Psychosen," Wien Med. Presse, 1885, XXVI. Also by the same, Ueber Intoxications-Psychosen, Wien, 1886.

[25½] Simonton, in a recent paper ("The Increase of the Use of Cocain Among the Laity in Pittsburg," in Phila. Med. Journ. Mar. 28, 1903. p. 556) describes the extraordinary increase of the use of cocain, especially among the negroes in Pittsburg. It is used by colored waiters, prostitutes, and various classes of this race. They even have a nickname for one of the streets which they frequent, calling it "Cocain Street." One druggist sold his store because he

1119. The symptoms of cocain poisoning.—Apart from the physical symptoms, which are those of chronic poisoning, such as loss of weight, muscular weakness, tremor, anesthesia, and disturbance of the heart and circulation, there is, for our consideration here, the mental disorder. This was described by Erlenmeyer as cocomania.[26] After the habitual use of cocain for a longer or shorter time the patient develops this psychosis, which, in most cases, is quite characteristic.

It is a delusional insanity, marked especially by hallucinations. It may appear suddenly, and it usually develops quickly. The patient has delusions of suspicion and persecution. He believes that he has enemies; that people are in league against him or talking about him; that his wife is unfaithful to him; or that burglars break into the house. These delusions are of great variety, changeable, and not well systematized. They are accompanied with hallucinations: the patient hears voices, usually menacing or insulting, and sees various objects, such as insects or small animals. These visual hallucinations, as Erlenmeyer points out, may be due to a poisoning of the optic nerves, causing what are called "scotomata," or blank spaces in the field of vision. The disordered mind of the patient fills in the spaces with bugs, insects, etc. Very common hallucinations are those of general sensation: the patient imagines that he feels objects on his skin and in his hand. So common is this symptom that it has been called, colloquially, the "cocain bug." It is quite characteristic, and this foreign body is felt as though it were under the skin; doubtless because the tactile nerves are dulled by the action of the drug. This is known as Magnan's sign.[27]

1120. Various forms of the disorder.—In this mental disorder memory and attention are impaired, and the patient is often restless and combative; but there is also a depressive type, in which the victim is downcast. In some cases great distress is manifested. The patient moans and bewails his condition. There is a corresponding loss of physical strength and muscular energy.

In slower and more chronic cases the cocomaniac presents distinct marks of mental feebleness; total inability to apply the mind and, of course, to work. Slow and tedious mental processes are seen: the patient is prosy and prolix in speech and writing. He accomplishes nothing, and seems never able to bring anything to a conclusion.

did little business except selling cocain, and he wished to be rid of this feature of his trade. Unfortunately all druggists are not so conscientious.

[26] Tuke's Dict. Psych. Med. Vol. I. p. 236.

[27] Berkley, Mental Diseases, p. 292.

1121. Cocomania is a form of insanity.—In short, cocomania is a form of hallucinatory and delusional insanity, with attendant enfeeblement of the mental faculties, and with marked physical impairment.[28] In a few cases hysterical and epileptic convulsions occur. As may be observed, it has some marked resemblances to alcoholic delirium in its hallucinations and delusions. Most observers agree that the delirium of abstinence, *i. e.*, the symptoms that occur on the withdrawal of the drug, are not nearly so severe in the case of cocain as in the case of morphin.[29]

IV. The medico-legal aspects of the cocain habit.

1122. The cocomaniac not responsible.—We have to do here mainly with a delusional and hallucinatory insanity, and one which is marked with very positive mental deterioration for the time being. Hence, all that has been said elsewhere in this work about such mental disorders applies to these cases.[29½] The patient who is converted into a paranoiac by a drug is not a responsible being in the eyes of the law, even according to the doctrines of the old common-law sages,—Coke,[30] Hale,[31] and Blackstone,[32]—for although these authorities were referring to alcohol, and wrote in an age when cocain was unknown, there can be no doubt that what they said applies as well to the one poison as to the other. And, indeed, Sir Matthew Hale expressly mentions the actions of some drugs as causing "a temporary phrenzy." But the underlying principle is that, although a man is not to be excused for any crime committed while in a state of voluntary drunkenness, "yet if, by one or more such practices, an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man in the same condition in relation to crimes as if the same were contracted involuntarily at first."[33] This applies exactly to cocomania, or the insanity caused by addiction to cocain, and the discussion of the law can therefore be read in the article on "Alcoholic Insanity" (p. 766, *ante*), without repeating it here.

[28] Régis, Mental Medicine, translated by Bannister, pp. 520, 521.

[29] Krafft-Ebing, Traité Clinique de Psychiatrie, traduit par Laurent, p. 238.

[29½] In *Re Underhill*, 21 Ohio L. J. 279, the will of a cocomaniac was not allowed.

[30] 1 Litt. 247.

[31] 1 P. C. 32

[32] 4 Com. 25, 26.

[33] 1 Hale, P. C. Chap. IV. p. 32.

1123. The great danger from the cocomaniac is violence.—Under the influence of his delusions and hallucinations, desperate and confused, such a patient might make a homicidal assault. The delusion of marital infidelity is peculiarly likely to excite to violence. Up to the present time, however, this danger seems rather hypothetical than real, for the annals of medical jurisprudence contain but little, if anything, on the subject of cocomania. The cocain victims are, as a rule, not physically strong, and some of them might easily be controlled; but this would not apply to all.[34]

V. The chloral and other drug habits.

1124. These drug habits are various.—Although morphin and cocain are the chief, they are not the only drugs that enslave. From the standpoint of the medical jurist, however, it is hardly necessary to enter upon a detailed discussion of all the various drug habits. Among these drugs are chloral, ether, chloroform, and some of the coal-tar products, such as antipyrin. The legal principles are the same in all these cases, and the pathological distinctions are not such as modify the law on the subject of intoxication generally. If a drug produces an insanity, that insanity, for all practical purposes in law, is the same as in all other cases.

1125. More than one drug used by the patient.—Chloral and the bromids are often abused by the victims of alcohol, opium, and cocain. Some of these patients range over a wide field, and have a variety of poisons to which they resort. They are the all-round drug fiends. Curious instances are given of the substitution of ether for alcohol; thus, in Ireland, in 1842, after the celebrated crusade of Father Matthew against drunkenness, some of his converts began to use ether, holding that they were not breaking the pledge. In a few years ether-drinking had spread over 295 square miles of the country.[35]

[34] Smith, Journal of Mental Science, 1892. Ihlow, Ueber Morphio-Cocainismus und hallucinatorische Cocain-Paranoia, Berlin, 1895. Also Index-Catalogue, 2d Ser. Vol. III. pp. 709, 710.

[35] Kerr, "Alcoholism and Drug Habits," in the Twentieth Century Practice, Vol. III. p. 96. For much information on this subject, in general, Dr. Kerr's article is especially useful to the physician; but it contains very little on medical jurisprudence.

CHAPTER LII.

COMMUNICATED INSANITY.

1126. Insanity transferred from one person to another.
1127. Mental contagion.
1128. Communicated insanity is practically always a delusional insanity, or a paranoia.
1129. A case in three sisters.
1130. Insanity in twins.

1126. Insanity transferred from one person to another.—Under the term *folie communiquée,* or "communicated insanity," the French have described a form of mental disease which is transferred from one person to another.[1] For instance, a person having a fixed delusion imposes this delusion on another person, who in turn becomes equally insane. The affection has also been called *folie à deux,* or the insanity of two; but this is not a satisfactory term, for the reason that communicated insanity is not always confined to two persons. The writer has seen a marked example of it in three sisters.

1127. Mental contagion.—This extraordinary affection depends upon what is called "mental contagion,"—a force which is sometimes seen also in epidemic insanity, such as prevailed in the Middle Ages, and still prevails at times, under the influence of religious excitement. In such epidemics, however, the insanity which attacks numerous people is due to one cause acting upon all equally, rather than upon contagion from one to another, although such contagion also acts; hence, it is better called "epidemic" or "simultaneous" insanity.[1½] In the genuine communicated insanity the disease is transferred directly from one person to another; it is like an infectious disease which spreads by personal contact. It has also been called "imposed"

[1] Macey, De la Folie Communiquée, ou Délire à Deux, etc. Paris, 1874; Lasegue and Falret, "La Folie à Deux, ou Folie Communiquée," in Ann. Med. Psych. Nov. 1877.

[1½] The curious incident related in 1 Samuel, x., of King Saul joining a band of prophets, and prophesying with them, is possibly a case of communicated or epidemic religious excitement. The first Hebrew king was undoubtedly insane at several periods in his life. These primitive bands of "prophets" were probably not unlike the dancing dervishes still seen in the East. The spectacle so amazed the people that they cried out, "What is this that has come unto the son of Kish? Is Saul also among the prophets?" See also 1 Sam. xvi. 15; xviii. 10; and xix. 24.

or "induced" insanity; but the term adopted at the head of this chapter is the most satisfactory, and the one now generally employed.

1128. Communicated insanity is practically always a delusional insanity, or a paranoia.—The acute generalized insanities, such as mania or melancholia, are not easily thus transferred.[2] It is usual for the first patient to have a fixed, systematized delusion. This patient is called the active patient; while the one receiving the delusion from the other is passive, and is usually a neurotic individual with an hereditary taint; in other words, one whose mind is easily thrown off the balance.

It is necessary, of course, that conditions should be favorable in order that one patient should be able to impose his or her delusions on another. The two persons usually live in intimate association, as in the same family; and the active patient is usually older, or of more personal force, and is also, as a rule, very badly insane; in other words, very profoundly under the influence of the insane delusion. Thus it happens that communicated insanity is usually seen among brothers and sisters, or other members of the same family. It has also occurred in asylums; as where one insane patient influences another and weaker patient to adopt a delusion.

The delusions most likely to be communicated are those of persecution; such as fear of enemies, of unseen agencies, of robbery, of fraud, and of poisoning. The insane propaganda, as Tuke has well called it, proceeds from the active, or primary, patient, whose delusion is so firmly fixed and so plausible that in time one or more relatives or associates are converted to a belief in it; and, by reaction and mutual influence, the delusions are gradually strengthened in all the parties concerned. What is this but the force of example, or suggestion, so potent even in normal minds, but acting with tenfold power in the minds of weak and neurotic persons? This deplorable weakness suggests how carefully the insane should be isolated, not only for their own welfare, but also for that of others. It is especially important that young and susceptible persons should not be left to associate with older relatives who are insane. I have known morbid ideas to be implanted in the mind of a child by association with an insane grandparent.

1129. A case in three sisters.—A few years ago I saw a striking

[2] Sequin (Arch. Med. N. Y. 1879, Vol. I. p. 334) reported a case of apparent contagion in melancholia.

example of communicated insanity in three sisters, resident in Washington, D. C. They had been living by themselves in a house in that city, and were discovered by the police in a half-starved condition, and suffering from a series of elaborate delusions. They believed that unseen and unknown agents were admitted beneath the house through pipes, and that their brothers were personated by strangers. They had therefore not cashed checks sent by their brothers, and were without the necessaries of life. The eldest sister was the weakest in mind, the youngest the most rational, and the second sister the most inveterately monomaniacal. This second sister had been the primary, or active, patient, and had gradually influenced the others to adopt her delusions. These sisters were all committed at one time to the Pennsylvania Hospital for the Insane, where they were separated and placed in different wards.[3]

1130. Insanity in twins.—Among the curiosities of mental medicine is insanity in twins, of which a number of cases are reported. Tuke[4] refers to the case of twin sisters who were observed in Bethlem Asylum. They were twenty-three years old, single, and domestic servants. The attacks dated in both patients from the same day; both were delusional about being poisoned, and they were suicidal and dangerous to others. Both sisters recovered, one much sooner than the other. The one who recovered sooner was probably the passive patient. Another case was that of twin brothers, both of whom had general paresis; but this could only have been a coincidence, because it is inconceivable that general paresis should be communicated in the sense here discussed.

We have already discussed the force of insane example as seen in some cases of double suicide. (*Ante,* §§ 678–681.) For the medical jurist this general subject might have interest, if it could be shown that criminal acts were induced under the influence of communicated insanity.[5]

[3] The ancients, who expressed so much truth in their mythology, had the fable of the insane Prœtides. These were the three daughters of Prœtus, king of Argolis, who were seized with insanity, and fled to the wilderness, communicating their madness to other women, who killed their children and also fled to the wilds. Anthon, Classical Dictionary.

A very early case probably of communicated insanity in three sisters is referred to by Cox (Practical Observations on Insanity, London, 1806, p. 186, footnote) as having been related by Dr. Gregory in his Lectures. Few details are given, but it is said that all the sisters had the same mental malady.

[4] "Folie à Deux" in Brain, Vol. X. p. 418.

[5] Régis, La Folie à Deux, ou Folie Simultanée, Paris, 1880 (an excellent monograph, both historical and scientific); Smith, "Mental Contagion: Its Relation to Crime, Suicide, and Certain Neuroses." in Austral. Med. Journ. Vol. XX. p. 394. Also Index-Catalogue, Vol. VI. p. 1035, for bibliography.

CHAPTER LIII.

SIMULATED INSANITY.

1131. Popular errors on this subject.
1132. Historic instances.
1133. The simulation of insanity is not common.
1134. Neither is the simulation of insanity easy.
1135. Motives for simulation.
1136. The mode of onset is to be scrutinized carefully in such cases.
1137. Overacting the part.
1138. Dementia is commonly simulated.
1139. Loss of memory is not unfrequently feigned by criminals.
1140. The simulation of mania.
1141. Violent conduct.
1142. The simulation of epilepsy.
1143. Injurious effects of feigning.

1131. Popular errors on this subject.—To the medical jurist the simulation of insanity offers important problems. There are popular errors on the subject, however, and these are apt to influence legal opinion. The most common of these errors are, first, that the simulation of insanity is quite common; and, second, that it is quite easy.[½]

1132. Historic instances.—The feigning of insanity has been dignified with not a few historic and poetic instances. King David played the part of a madman, and, as usual, overdid it, although he succeeded in imposing on the king of Gath. He scrabbled on the doors of the gate, and let his spittle fall down upon his beard.[1] Ulysses, for the love of Penelope, and to avoid going to the Trojan war, yoked a horse and a bull together and ploughed the seashore in an effort to prove himself insane; but he was quickly detected, for when Palamedes placed the infant Telemachus in the way of the plough, Ulysses turned aside in order not to harm his child.[1½] This was probably the first instance on record of feigned insanity in a conscript. Solon, the Athenian law-giver, shammed insanity by

½ Hale (P. C. Chap. IV.) speaks of the "easiness of counterfeiting this disability."

[1] I. Samuel, xxi. 13.

1½ Harper, Dict. of Classic Lit. art. "Odysseus."

writing a poem and reciting it in the market-place, in order to incite the Athenians to recover the island of Salamis.[2] This is one of the few instances known of a lawyer, instead of a client, feigning insanity.

1133. The simulation of insanity is not common.—That the simulation of insanity is not common is true in spite of the popular belief, shared unfortunately by too many courts, that the "insanity dodge" is of frequent occurrence. This dodge is played usually not so much by the patient as by his counsel; and it is to be noted that in most of such cases the evidence is based upon the past history of the prisoner, before his crime, rather than upon his alleged insanity after his crime. Now, there has usually been no motive for simulating insanity before the crime, and yet most of the testimony in criminal cases has reference to that period, during which there could be no allegation of feigning.

Alienists of wide experience have said that they have seen but little, if any, simulated insanity. Schüle, in the second edition of his treatise on insanity, declared that he had never seen a case.[3] Morel[4] said that such cases were rare. The present writer, who has had experience with several thousands of the insane, does not recall, at this writing, ever having seen a well-marked case. Some years ago, however, a newspaper reporter succeeded in having himself committed, as insane, to the Philadelphia Hospital, in order to write a sensational article, and this case came indirectly under my notice. In such a case there is no reason to suspect a motive; the patient is not critically examined for shamming, and he may be lost for a short time in the general population of a large asylum. There is, therefore, nothing surprising in this cheap trick succeeding for a while, as it has done in several instances. It is very different in the case of a criminal who is suspected of feigning, and is carefully watched with that possibility in view.

1134. Neither is the simulation of insanity easy.—Another common mistake is to suppose that simulation is easy. All that a man has to do is to "scrabble" like David, and to let his spittle fall down upon his beard. In other words, any witless speech and senseless behavior are enough to impose upon experts whose lives are passed in daily contact with real insanity. Such is the theory of the laity.

[2] This was not the battle of Salamis, as some writers seem to suppose, but an attempt to wrest that island from the Megarians, many years before the Persian invasion. See Anthon's Classical Dictionary, art. "Solon."

[3] This is on the authority of Norman, in Tuke's Dictionary of Psychological Medicine. Vol. I. p. 502.

[4] Ann. Med. Psych. 3 S. Vol. III. p. 57.

Nothing can be further from the truth than this, for nothing is more difficult in the whole range of histrionics than successfully to simulate insanity. It is not enough to appeal to the poets,—to quote Hamlet, who thinks meet "to put an antic disposition on" in order to fool Polonius and the others.[5] Hamlet was not playing to a committee of alienists. Georget said that he did not believe that an individual who had not studied the insane could so imitate insanity as to deceive a physician well acquainted with the disease.[6] How, indeed, can it be possible for a man successfully to imitate what he knows nothing about? In order to succeed in the simplest task of a copyist the individual must, at least, know what he copies. But an ignorant, and usually a stupid, criminal assumes to portray in his conduct the intricate disorders of the human mind,—disorders which require the greatest care and study to understand; and yet such a man hopes to present a counterfeit which will deceive those whose constant business it is to analyze the genuine thing. It is impossible for this to be done with success in most cases.

1135. Motives for simulation.—Let us proceed to a brief analysis of this subject; and, in the first place, we must consider the question of motive. It is hard to conceive that any person would feign insanity without a sufficient motive. It is not done for sport. It is a difficult, an arduous, and an irksome thing to do, and one that requires much power of sustaining a part, and consumes much time. The instances on record are largely those of criminals, who have wished to escape the penalties of their crimes. In European armies, also, this trick is resorted to, just as in the case of Ulysses, in order to escape military service. Instances are known in which the insane have simulated insanity, strange as it may appear.[7] But for the medical jurist the criminal cases are of chief interest, just as they are the most numerous. In estimating the force of motive, however, it is possible to make mistakes, and great caution is required; for the fact that a man has a motive for feigning insanity is not a proof that he is not genuinely insane. Criminals are usually suspected when they show signs of mental disorder, but there is, of necessity, no presumption that such a person is a malingerer. Insanity may

[5] Act I. Scene V. 171, 172.

[6] Discussion Médico-légale sur la Folie ou Aliénation Mentale, Suivie de l'Examen du Procès Criminel d'Henriette Cornier, et de Plusieurs Autres Procès dans lesquels cette Maladie a été alleguée comme Moyen de Défense. Paris, 1826.

[7] Kiernan, "Simulation of Insanity by the Insane," in Alienist and Neurologist, April, 1882; Hughes, "Simulation of Insanity by the Insane," Trans. International Medical Congress, Phila. 1876, p. 1110.

not be feigned until long after trial and sentence; as in capital cases, in order to avoid execution. This was so in the *Case of Gaffney.*[8]

1136. The mode of onset is to be scrutinized carefully in such cases.—It is right here at the beginning that the malingerer may show his profound ignorance, for he often unfolds the drama with an abruptness that is not natural. In most cases of real insanity the disease is of gradual onset, and the patient has prodromes, or premonitory symptoms, often ranging over many days. Explosive or fulminating attacks of insanity, *i. e.,* cases beginning suddenly and with violence, are rare. Exceptions to this rule are seen in epilepsy and in acute delirium; but such exceptions are not hard to recognize. When simulated, such explosive attacks are very unreal. Gaffney began to shout, rave, and blaspheme suddenly in the afternoon, after rising from a quiet nap; there had been a complete absence of any premonitory symptoms.

1137. Overacting the part.—These simulators usually overact the part. In their ignorance of the workings of the insane mind they think that any extravagance and absurdity will pass for insanity. They affect ignorance of the most ordinary facts. They pretend that they cannot tell their names, their ages, their relatives and friends, or whether it is day or night. One of the best examples, often quoted, was that of Derozier, which has been reported in great detail by Morel.[9] This man, when asked his age, replied, "245 francs, 35 centimes, 124 carriages to carry it, 35 millions," and so on. When asked how long he had been deranged, he replied, "The cats, always the cats. I am not insane; the insane do not turn around." He then arose, and, as though to give himself the lie, turned around several times. Asked for his right hand, he extended his left. There was much more of this extravagance, and Morel pointed out that such responses are not those of an insane person. The insane mind retains some idea of cause and effect, of substance, of time, of existence; in other words, the elementary concepts are not totally abolished in insanity, unless, indeed, it be in advanced cases of delirium or dementia.

1138. Dementia is commonly simulated.—When we come to classify these cases, or to assign them to their proper groups, we meet at

[8] Brush, "Feigned Insanity. Case of John Gaffney, Hung for Murder," in the Am. Journal of Insanity, Vol. XXXV. p. 534. Gaffney did not feign until four days before the day fixed for his execution. Governor Dix granted a reprieve of one week in order to test the matter. The ruse was easily exposed, and the man was hanged.

[9] "Rapport Medical sur un Cas de Simulation de Folie," in Ann. Med. Psych. 3 S. Vol. III. p. 57.

once with difficulties and inconsistencies. One of the commonest forms of simulation, as we have just seen in Derozier's case, is extreme fatuity, or dementia. These patients affect to have no mind for the most ordinary matters; but they are ignorant of the fact that such an extreme dementia, or "amentia," is only seen, if at all, as a terminal stage; in other words, after a long precedent attack of acute insanity, such as mania or melancholia. Moreover, even in genuine dements, it is usually possible to arouse the patients to their best efforts; they will often make some attempt at a response, and may even appear at their best on a little urging and persuasion; but it is just the reverse with the simulator: the more notice that is taken of him the worse he grows; his efforts to appear fatuous are more and more strained. While the genuine dement is always natural and unaffected, the malingerer is manifestly playing a part. Moreover, when left to themselves, these simulators often cease from playing their parts, as can sometimes be detected with a little finesse.

1139. Loss of memory is not unfrequently feigned by criminals.—In cases where loss of memory is feigned they will answer "I do not know," or "I do not remember," to questions about the most ordinary facts or well-known events. Laros, whose case is cited further on, affected not to remember that his father and mother were dead, although he had killed them both with poison, and had just stood a long trial for the crime.[10]

1140. The simulation of mania.—Maniacal excitement and incoherence are sometimes assumed, but this is an almost impossible part for an ignorant person to play. The genuine incoherence of mania, the broken and fragmentary ideas, the flow of speech, the motor excitement, the perfect naturalness of the patient, his aversion to assuming or inability to assume a part,—all these could be simulated by only the most consummate actor, after a careful study of the real disease. Even then it would be impossible for a person in health to play the part hour after hour, day after day, and night after night. The simulator usually has a mere rigmarole of words, which he repeats again and again; moreover, he tires at last, and sleeps soundly all night: he cannot simulate insomnia. Neither has he the physical disorders,—the rapid pulse, vitiated secretions, bad tongue, loss of weight, and general appearance of ill-health. Gaffney tried to assume this rôle, but merely swore, abused everybody, repeated set forms of gibberish, and pretended to pay no attention. He was finally tripped, and confessed his deceit.

[10] See Report of the trial, by Edgar, Easton, 1877, p. 240.

1141. Violent conduct.—Obstreperous conduct, destruction of clothes and bedding, filthy practices, and loud shouting, are a part of the *répertoire* of the malingerer. Such displays have sometimes been stopped by heroic treatment. William Barr, whose case was reported by MacDonald,[11] indulged in such loud shouts that he disturbed the whole neighborhood of the jail in the early part of the nights (for he slept soundly in the later parts), but the warden had the hose turned on him whenever he began to shout, and the noise soon ceased. Such heroic treatment is recommended by some writers for detecting malingerers, but the best authorities condemn it. Etherization has also been used in an effort to unmask the pretender. But such methods are not always reliable; for an insane man, as well as a sane one, might object to a cold deluge from a hose, and decide to remain quiet, and he might also, under the influence of ether, display some glimpses of rationality. Hence, such crude tests may be misleading.[11½]

1142. The simulation of epilepsy.—Epilepsy is sometimes simulated by criminals, often with remarkable success. But to do it with success requires practice. The tonic and clonic spasms are usually a little overdone, but the bloody froth may be imitated by voluntarily biting the tongue, or even cutting it with a knife; and a little soap in the mouth will supply all the froth wanted. But there are some things that a simulator cannot well do: he cannot simulate the pallor, followed by lividity, or the deep unconsciousness, and pupillary changes (although these latter are not constant in epilepsy). Extraordinary tests have been resorted to in some of these cases; such as dropping melted sealing-wax on the skin, blowing snuff into the nose, scratching the eye-ball with the thumb-nail, and thrusting a penknife blade under the finger-nail.[12] The reliability of some of these tests may be questioned, especially the snuff test, for a real epileptic might sneeze under some circumstances.[13] Genuine epi-

[11] "Feigned Insanity, Homicide, Suicide. Case of William Barr," in Am. Journ. Ins. Vol. XXXV. p. 411.

[11½] "Feigned Insanity: Malingering Revealed by the Use of Ether," by C. G. Wagner, in the Medical News. The prisoner, under sentence of death, simulated paralysis and dementia. The ether unmasked the fraud, which had been kept up in Sing Sing Prison for eighteen months. The prisoner said, "You never would have caught me only for the ether;" and also that "he had been under an awful strain," and would rather go to the electric chair than go through the same experience again.

[12] Trial of Allen C. Laros, etc., by F. W. Edgar, Easton, Pa. 1877, p. 107 *et infra*. This case will always be a standard one, but it is not conclusive as to the existence of epilepsy in the prisoner, who had attempted to poison nearly his whole family, and succeeded in killing his father, mother, and the hired man.

[13] Aitken, Practice of Medicine, Vol. II. p. 358. Also Watson's Lectures, XXXVI. for an account of various tests for epilepsy.

leptics sometimes injure themselves in the fall, and sometimes void urine during or just after the fit; but these things are not common in malingerers. Thieves in England are said to have a trick by which one of them falls in a fit in a public place while his confidants proceed to pick the pockets of the on-lookers.[14] Soldiers simulate epilepsy in order to escape military service; and convicts, in order to be transferred to the hospital or to better quarters.[14½]

1143. Injurious effects of feigning.—So powerful is the influence of suggestion on the human mind that the continued attempt to feign insanity is not without injurious effects. Some authors even claim that persons have gone insane from pretending to be so. Such statements may readily be exaggerated; and yet persistent feigning, by keeping one idea uppermost for a long time in the mind, may become such a habit as to be second nature. Something like this was seen in the old days of the torture. It is well known that under the influence of torture the victims would not only confess falsely that they were guilty, but would adhere to it ever afterwards; and the instance is told of a Milanese judge, who, becoming sceptical about the value of torture as a mode of eliciting the truth, caused one of his mules to be killed in such a way as to fasten the guilt on an innocent servant, whereupon, under torture, this servant confessed that he had done the deed.[15] Indeed, the capacity of the human mind not to tell the truth is almost without limit. In this way may occur self-imposed delusions.[16]

[14] Gray, Treatise on Nerv. and Ment. Dis. 1893, p. 393. "Among the English thieves there is a class of what are known as 'dummy-chuckers.' One of this undesirable class honored our American prisons with his presence for a number of years, and I have frequently had him 'chuck a dummy,' as simulating an epileptic convulsion is called in the thieves' parlance, for my class; and I must confess that when this simulation is artistically done, the fraud cannot be detected except by close and repeated observation," etc.

[14½] See a paper on malingering by Mitchell, Morehouse, & Keen, in the Am. Journ. of Med. Sci. Oct. 1864, p. 384.

[15] Lea, Superstition and Force, 3d ed. It is further related that this judge thereupon resigned his judicial office, and afterwards became a cardinal.

[16] The following are valuable as works of reference on feigned insanity:

Laurent, Étude Médico-légale sur la Simulation de la Folie, etc., Paris, 1866; Spitzka, Insanity, chapter on "The Recognition of Simulation;" Tuke, Dictionary of Psychological Medicine, Vol. I. p. 502; Régis, Mental Medicine, translated by Bannister, p. 658; Snell, Ueber Simulation von Geistesstörung, in Allg. Ztschr. f. Psych. 1856, XIII. 1–32. See also Index-Catalogue, Vol. VI. p. 1036, for bibliography.

CHAPTER LIV.

SOMNAMBULISM.

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I. The medical aspects of somnambulism.

1144. A definition of this disorder.—Somnambulism, or noctambulism, is a disorder of sleep, in which a dream is acted. It differs from ordinary dreaming in this one fact particularly, that in somnambulism the patient reacts to the dream, whereas in ordinary dreaming there is practically no response to it.[1]

1145. Unconsciousness in somnambulism.—In profound somnambulism the patient is unconscious, and yet he reacts to a mental picture. But this reaction is entirely automatic. The mental faculties are variously involved. Somnambulism is not incompatible with a

[1] Maury, Le Sommeil et Les Rêves, Paris, 1878. See also the article "Sommeil" in Dict. Encyc. des Sciences Médicales, for bibliography and a discussion of medico-legal questions. Also the article "Somnambulisme."

high degree of mental activity; even the reasoning power may be active, if we are to believe the stories about sleep-walkers who have solved mathematical problems.[2] Even in the less sensational cases these patients perform highly complex acts; but, as a rule, these acts do not call for much mental vigor. The emotions are not greatly excited, but exceptional cases have been reported in which the patients have been violent. The memory is almost dormant, and the patient recalls nothing of the scene on waking, unless it be a confused remembrance, as of a dream. The attention is absorbed in the contents of the somnambulistic dream; and cannot be distracted without waking the patient. Hence it follows that these patients, as a rule, are not open to suggestions; no impression is made upon them; their conduct cannot be directed or controlled; and this is a very important feature, as we shall see.

1146. The self-absorption of the sleep-walker.—So absorbed is the sleep-walker in his dream that no ordinary obstacle stops him: he passes around inanimate objects, and, if an attempt is made to oppose him, he resists vigorously. Hence, he is not a tool, willing or unwilling, in any person's hands. The special senses are obtunded: the eyes may be open or closed; but, even if open, they see nothing, or, at least, the patient perceives nothing;[3] so is it also with hearing. But general sensibility is acute, for these patients readily react to external objects if these are placed in their way; and yet they seem insensible to heat and cold.

1147. Two kinds of somnambulism.—Of recent years it has become customary to distinguish two varieties of somnambulism,—the "natural," and the "provoked." The former is the kind alluded to

[2] Very much that is unauthentic and even fanciful is written about somnambulism. In a passage that is often quoted, Sir William Hamilton (Metaphysics, ed. by Bowen, p. 220) makes some statements which would be hard to confirm. He says that he was in possession of "three works, written during the crisis, by three different somnambulists," but he omits to tell us anything about these extraordinary "works," the circumstances under which they were written, or the patients themselves. Some of his other statements are equally extravagant; as, for instance, that the somnambulist speaks languages of which, in his senses, he knows not a word. Sir William Hamilton, when he wrote that passage, was trying to bolster up a pet theory of his; namely, that consciousness never sleeps. Neither the theory nor the passage will bear scientific scrutiny. Mr. Wharton, in the former editions of the present work, accepted Sir Wm. Hamilton's statements and quoted long passages from him. He also quoted page after page from Abercrombie (The Intellectual Powers, p. 238), many of whose statements must be taken *cum grano salis*.

[3] Shakespeare, who let little escape him, notes this condition in Lady Macbeth:

> *Doctor.* You see, her eyes are open.
> *Gentlewoman.* Yes, but their sense is shut.—Macbeth, Act V. Scene I.

above.[3½] It arises spontaneously, entirely apart from the will or knowledge of the patient or of any other person. It is, in every sense, a morbid process, indicative of a functional disturbance of the brain, and is usually seen in neurotic persons, especially children, and is occasionally hereditary.[4] It occurs periodically, but with no regularity, and is not followed by any other disorder, as headache, depression, etc. There is nothing artificial about it, nor is it often simulated. As a rule, it is a harmless affection, both to the patient and to others.

1148. Somnambulism and hypnotism.—The second variety, or provoked somnambulism, is a form of hysteria,—especially of that kind of hysteria which receives its greatest development in hypnotism at the hands of the French school of neurologists.[5] It has many points of superficial resemblance to the natural, or true, somnambulism, but it is not identical with it.[6] It is characterized, like all phases of hypnotism, by suggestibility; and in this respect it is in striking contrast with the other form. These hysterical, hypnotized sleep-walkers are in a psychosis which is artificially induced, and during which they often act a part impressed upon them by another person. In many ways this state resembles the real thing, but it is doubtful whether there is the profound unconsciousness that is seen in the natural variety. In both forms the tendency is for the attack to reproduce itself in each succeeding attack; but this tendency is much more easily broken up in the hysterical patient under the influence of suggestion than in the spontaneous form.[7]

[3½] Laurent, Du Somnambulisme Naturel, Paris Thesis, No. 148, 1834, with historic references.

[4] Chambers (Reynold's Syst. of Med. Vol. I. p. 659).

[5] Bernheim, Hypnotism.

[6] The French, who are largely to blame for confusing somnambulism with hysteria, have lately seen the necessity of more care in distinguishing the two varieties named in the text. See "Les Somnambulisms," by Blocq, in Clinique d. Mal. du Syst. Nerv. Guinon, 1893.

[7] A very curious case of what seems to have been hysterical somnambulism was observed many years ago in New England. It was the case of Jane Rider, the "Springfield somnambulist," reported by Dr. Belden (Boston Medical & Surgical Journal, 1834, Vol. XI. p. 53). The patient was seventeen years of age when she began to attract attention. She did all sorts of complex acts in her sleep, such as setting the table for breakfast. Later, and evidently under the influence of suggestion (for she was much stared at and talked about), her attacks became more complicated, and occurred even in the daytime. Before the attacks she had headache, flushing, and other symptoms like the prodromes seen in hysteria. During the attacks she would recite poetry, and very palpably act a part. She eventually landed in an insane asylum, but did not recover, and was discharged. A very significant symptom was the fact that she usually could not be aroused from her "spells" by urging; in other words, she could not be awakened; she took her own time to come to. This is exactly what is seen in hysteria, and is not seen in the genuine somnambulism. Dr. Belden's account is interesting, but intolerably prolix. He anticipated the French school by many years.

1149. The influence of suggestion.—And yet the influence of suggestion is not entirely nil in the natural variety. The story is told of a school-master whose custom it was to call the young somnambulist aside at bed-time, and sternly rebuke him, and tell him not to let the thing happen again.[8] He claimed that this method seldom failed to break up the habit. The reason for the success of such a method lies in substituting a strong impression, which continues to act during the dream-state. But this method is of doubtful value in most cases.

1150. Somnambulism and epilepsy.—Somnambulism has some resemblance to the automatism seen in epilepsy.[9] There is the same profound unconsciousness, and the same reaction to a dream-like state. But they are not identical, although the possibility of mistaking nocturnal epilepsy for ordinary noctambulism should not be ignored. Nocturnal incontinence of urine, often seen in young children, and sometimes, also, in nocturnal epilepsy, is not usual in somnambulists. Neither has somnambulism any relationship with the so-called spermatorrhea.

II. The medico-legal aspects of somnambulism.

1151. Somnambulism not usually described as an insanity.—Although somnambulism is not, popularly speaking, a form of insanity, still it is in fact a mental disorder, functional and temporary. The analogies between dreams and insanity have often been noticed, but need not be urged here. It is sufficient to say that in somnambulism there is a morbid, or aberrant, action of the brain, and that, in so far as jurisprudence is concerned, it must be regarded as a temporary alienation.[9½]

1152. Somnambulism and hypnotism as medico-legal topics.—The subject of provoked somnambulism, as a part of hypnotism, has received an immense development in France, and its medico-legal relations have been fully discussed by French authors. It is not to physicians alone that this development is due, for the members of the legal profession have also devoted time and attention to it.[10] In fact, the French have accorded a medico-legal importance to hypnotism which has not been accorded to it in other countries, especially Amer-

[8] Tuke, Dictionary of Psychological Medicine, Vol. II. p. 1173.

[9] Spratling, Epilepsy.

[9½] 16 Am. & Eng. Enc. Law, p. 565.

[10] Liegeois (De la Suggestion et du Somnambulisme, Paris, 1889) has written an elaborate work on the jurisprudence of the subject. He is a professor in the Faculty of Law, at Nancy.

ica and England. Their doctrine, in brief, is that a patient who is profoundly hypnotized is irresponsible, and acts upon ideas which have been implanted in the mind by another person by suggestion.[11]

To attempt here to discuss this subject fully would be to traverse the whole field of hypnotism, which is not a part of the plan of this work. It is sufficient to say that provoked, or hypnotic, somnambulism is not, in the judgment of many good authorities, the same as the natural, or spontaneous, somnambulism, and the two should be distinguished in medical jurisprudence. The hypnotic variety, as already said, is characterized by the fact that the patient is acting entirely on suggestion,—on ideas received from without, and usually from another person,—and the medico-legal problem is not the same as in the case of a genuine somnambulist, whose disorder is entirely spontaneous.

1153. Responsibility in somnambulism.—But whatever difference of opinion may exist as to the relationship or identity of the two forms of somnambulism, there can be no doubt that, in a genuine somnambulistic state, the patient is not responsible for his acts. Such cases are rare in the annals of jurisprudence; so rare as to partake almost of the nature of curiosities. One of the most celebrated is that which is related by Brierre de Boismont,[12] of a man who rose at night in his sleep, and, taking a knife, went to the bed of another, and stabbed violently at the place where he evidently supposed the intended victim to be; but the intended victim, not having yet retired, but being seated in the room, which was brilliantly lighted, saw the ugly pantomime from start to finish. This man was acting in a dream, in which he supposed that his companion had killed his mother. A somnambulistic patient has been known to steal,[13] and to attempt suicide.[14]

Some authors have indulged in far-fetched speculations about somnambulists and their responsibility. It seemed to Fodéré[15] that, inasmuch as these patients often show themselves competent to do quasi-rational acts, such, even, as writing poetry, they should not be held entirely exempt for their deeds; and Hoffbauer[16] argued that, since a somnambulist is aware of his own malady, *i. e.*, that he is subject to

[11] Mesnet, Le Somnambulisme Provoqué, Paris, 1894.

[12] Des Hallucinations, 3d ed. 1862, p. 336. "The old stock case, which has found a place in every work of this kind for the last fifty years, claims its place here by prescriptive right."—Browne, Medical Jurisprudence of Insanity, 2d ed.

[13] Mesnet, Rev. de l'Hypnotisme, 1887; Dornblüth, "Geschicte einer Nachtwandlerin," Henke's Zeitschrift, XXXII. 2.

[14] Mesnet, Arch. de Méd. 1860.

[15] Traité d'Hygiène, etc., 1813, I. 256.

[16] Traité de Médecine Légale.

such attacks, he should be held responsible for what he does, apparently on the principle that he ought to have himself watched. It is difficult to reconcile such opinions with a scientific view of an affection in which consciousness is entirely abolished.[17]

1154. The case of Fraser.—In medical jurisprudence the most noteworthy case of somnambulism was that of Simon Fraser,[18] tried in the High Court of Justiciary, in Edinburgh, in July, 1878. Fraser was twenty-eight years old, below the average in intellect, but steady, of good habits, and able to earn his living. He was of bad heredity; so bad that it can not well be surpassed. His mother was an epileptic; his maternal grandfather had died in a fit; a maternal aunt and her son had been insane and in asylums; his brother died in convulsions, and his child, whom he killed, had also had fits. This man had for years been a somnambulist, and the victim of bad dreams and nightmares. If excited or worried during the day, the events were usually recalled in dreams that night, and he would then walk in his sleep. On one occasion he rose at 3 o'clock A. M., dressed, took the milk pitcher, and set off for a neighboring farm to fetch milk, being asleep all the time. Another time he went into the yard in the dead of night and began working at moving logs, and only awoke when it began to rain. Many other instances are given. He remembered nothing in the morning except being wearied and unrefreshed. He also had night-terrors of an aggravated type; starting out of bed with the belief that some great evil was coming on him, or that there was a wild beast in the room. He would then pull his wife and child out of bed, throwing furniture about as a weapon, or seizing his wife by the throat. His wife had been in the habit of hiding knives and poker as a precaution before going to bed. In this state he would halloo, roar, and answer questions. It was like a delirium with hallucinations. He had thus assaulted numerous members of the family,—his wife, father, sister, and fellow lodgers,—and his ailment was well known.

Fraser's fatal act was done in one of these paroxysms. He had retired with wife and child, to whom he was greatly attached, and

[17] Browne (Medical Jurisprudence of Insanity, 2d ed. p. 484) attempts to formulate rules of responsibility in these cases on the pattern of the M'Naghten rules respecting delusions. Thus, if a somnambulist goes into another man's house, in the belief that the latter has called him a liar, and kills him, he should be held guilty, because a man in his senses has no right to kill another on such provocation; but if he kills in supposed self-defense, he is innocent. In other words, the sleep-walker, like the delusional lunatic, must act rationally in his delirium! A more unscientific proposal was probably never made.

[18] Journal of Mental Science, 1878, Vol. XXIV. p. 451.

had fallen asleep, when he saw a wild beast enter the room and approach his child. He at once passed into one of his paroxysms; he sprang up to seize the wild beast, and struggled with it. His wife was awakened, as usual; but, before she could prevent him, he had seized the child and killed it by dashing its head against the wall. When fully awakened, he realized what he had done, was greatly distressed, and ran for a doctor. At his trial, when he was asked to plead, he said, "I am guilty in my sleep, but not in my senses." He was promptly acquitted.

1155. Is somnambulism technical insanity?—An important question in Fraser's case under the English law was whether the prisoner was technically, or legally, "insane," for had he been so found, he would have been committed to a criminal lunatic asylum,—a hard lot for a man who was sane except occasionally for a few moments in his sleep. Dr. Yellowlees, one of the expert witnesses for the Crown, defined somnambulism as "a state of morbid activity of the brain, coming on during sleep, of very varying intensity, sometimes little more than restless sleep; but sometimes developing delusions and violence, and amounting really to insanity." Dr. Robertson, another Crown witness, said that "extravagant delusion, high excitement, and dangerous conduct, constitute insanity," and the prisoner "passes out of sleep to a very great extent into that condition of temporary insanity." Dr. Clouston, a witness for the defense, did not consider somnambulism insanity, and yet he thought the prisoner was not responsible.[19] The Lord Justice-Clerk solved the difficulty by directing the jury to bring in the following verdict: "The jury find that the panel killed his child when he was unconscious of the nature of the act which he committed, by reason of a condition arising from somnambulism; and that the panel was not responsible." The question of insanity was thus "conveniently evaded."

1156. Somnambulism is a form of insanity.—The case of Fraser was so exceptional that the law was deemed not to provide for it. Yet a safer course, and more in accord both with law and science, would have been to find the man insane, and commit him to an asylum. He could then have been paroled, if need were, and kept under observation. He was not fit to be allowed to sleep with another person, or to be left unguarded at night. The man was insane during the attacks. He had a species of "transitory insanity," due to somnambulism; and Yellowlees suggested that it be called "som-

[19] See "Pseudo-Insanity of Somnambulism," by Dr. Clouston, in his Lectures on Mental Diseases, 1st ed. p. 421. Also Krafft-Ebing, Traité Clinique de Psychiatrie, trad. par Laurent, pp. 118, 119.

nomania." The only difference between such seizures and an ordinary acute attack of delirious insanity is in their singular brevity, and their accession during sleep.

1157. The possibility of epilepsy being confounded with somnambulism.—In such a case the grave question also arises whether the attacks are epileptic. The family history in Fraser's case strongly suggested this possibility, but the question seems not to have been carefully investigated, although Dr. Yellowlees speaks of it in his report. Fraser was never known to have had a fit in the daytime; and his nocturnal attacks did not last as long as in epilepsy, and he could be awakened from them.[20] In this last respect they differed from most cases of epilepsy.

1158. Sexual assaults on somnambulists and by somnambulists.—Some French writers have raised the question whether a sexual assault could be successfully made upon a woman while she was in the somnambulistic state.[21] The general opinion seems to be in the negative. The sleep-walker, if interfered with, will usually resist energetically; and if the interference is forcible and persisted in, will generally awake.[22]

On the other hand, the sleep-walker is not erotic, and therefore the case tried within very recent years in England is probably unique. A young man was found by a young woman in her bed. He was prosecuted, and claimed as a defense that he had gone there in his sleep; and it was proved that his mother, his brother, and himself were somnambulists. He was acquitted.[23]

1159. Somnambulism and divorce.—Mr. Browne[24] thinks that somnambulism might be a good ground for separation in some cases, but he gives no instances, nor do any seem to have occurred.

1160. Trespass by the sleep-walker.—The same authority reminds us that the sleep-walker, like the lunatic, can commit a trespass and be held for the consequences.

1161. Somnambulism and life insurance.—Taylor[25] supposes a case in which death might occur to the sleep-walker while in his attack, but he gives no actual instance. In such a case, could a policy of life

[20] Consult also Legrand du Saulle, "Le Somnambulisme Naturel," Ann. d'Hyg. 2d Ser. XVIII. 1862, p. 141.

[21] Mesnet, Le Somnambulisme Provoqué, p. 227.

[22] Dewar (Trans. Royal Soc. Edinb. Vol. IX. p. 365) reports a case of somnambulism in a young girl. In one of her attacks she was indecently approached, and, upon awakening, remembered nothing of it; but in a subsequent attack she recalled the incident, and told her mother.

[23] Leeds, Ass. 1901, quoted by Glaister, Medical Jurisprudence, Toxicology and Public Health, 1902, p. 377.

[24] Op. cit. 2d ed. art. "Somnambulism."

[25] Medical Jurisprudence, art. "Somnambulism."

insurance be declared void? We fail to see upon what ground. Certainly not on the ground of suicide, for the accidental death of a sleep-walker is not suicide; and the opinions of some writers, that patients who arise from sleep and proceed to commit suicide are often sleep-walkers, appear to us to be entirely gratuitous.

1162. Somnolentia.—This is a term used to describe states of mental confusion occurring on waking from sound slumber, in the state "twixt sleep and wake." It is also called "sleep-drunkenness," although the patient is not necessarily in a state of alcoholic intoxication. It is not essentially a condition of somnambulism, although it is allied to it. At such times the mind may react violently to a dream-like state, and the patient may even commit a homicidal assault. Persons in this state are often difficult to rouse; their senses are overpowered with slumber; they are in a delusional state,—very transitory, but having distinct analogies with a true delirium.

The term "somnolentia" was first used, according to Wharton,[26] by Plouaquet; and the first case reported was by Bucher,[27] in a sentry, who fell asleep at his post, and when roused by an officer, assaulted the latter furiously with his drawn sword. The case of Levet, reported by Sir Matthew Hale,[28] and often quoted, was hardly a true example. Other cases are on record, as of a peddler, who fell asleep by the wayside, and when roused made a homicidal assault.[29] In another case a man, when roused from a deep drunken sleep, kicked his disturber in the abdomen, causing death.[30]

1163. Somnolentia as an excuse for homicide.—It has been held in an American court that proof of somnambulism or somnolentia is admissible, and that no crime can be committed in this condition, because the necessary intent is absent.[31] The testimony would have

[26] Wharton & Stillé's Medical Jurisprudence, 4th ed. Vol. I. p. 484.

[27] Henke, Zeitschrift, B. X. p. 39.

[28] 1 P. C. 42, 474. Levet, being roused at midnight by a servant with an alarm of thieves, took his sword, went down stairs, and mortally wounded a friend of one of his servants, whom he did not know, and who he did not know was in the house, mistaking this person for a burglar. The act was merely a mistake, and there is no evidence that Levet was in a state of somnolentia. Wharton cites this, however, as a case in point. It is not quoted in this sense by Hale.

[29] Winslow, Plea of Insanity. See, also, Taylor, op. cit. 12th ed. p. 775, and Marc, De la Folie, etc., quoted by Taylor.

[30] *Reg.* v. *Byron*, Winchester Winter Ass. 1863. In this case it was decided that deep sleep caused by voluntary drunkenness is an excuse for crime. The accused, while in that state, kicked another in the abdomen, causing death. The occasion was an attempt to rouse the drunkard from his slumber; he resisted, and in doing so gave the mortal wound.

[31] *Fain* v. *Com.* 78 Ky. 183. 39 Am. Rep. 213. A man asleep in a bar-room, but not intoxicated, was roused by the porter at bedtime with great difficulty; so great that after several vain attempts the porter said the man must be dead. But finally, after resisting and expostulating, the man suddenly pulled out a pistol and fired three shots,

to be very clear, however, for a defense has been made on a simulated condition of this kind.[32] The condition can also be confused with one of real insanity.[33]

wounding the porter so that he died. There was no motive, for the victim was a stranger to the homicide. Proof was offered that the accused was a sleep-walker, and had required watching at night; also that he carried a pistol because his life had been threatened, and this idea was in his mind when, in his sleep, he shot the porter. This testimony was not allowed. But the supreme court ordered a new trial, holding that the testimony was admissible. "If the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation, and the circumstances surrounding him, or that he supposed he was being assailed, and that he was merely resisting an attempt to take his life, or to do him great bodily injury, he should be acquitted."

[32] *Reg.* v. *Jackson*, Liverpool Aut. Ass. 1847. In this case the defense was a sham; the act was done designedly, and the accused was convicted.

[33] *Reg.* v. *French*, Dorset Aut. Ass. In this case the accused was insane.

CHAPTER LV.

WILLS.

1164. An artificial right.
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1166. Legal presumptions.
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1168. The witnesses to the will.
1169. Inconsistency as to the *onus probandi.*
1170. The presumption of sanity.
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1189. Insane jealousy as proof of delusion.
1190. Testamentary capacity in old age.
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1191. A sound and disposing mind and memory.
1192. The legal definition of a sound and disposing mind.
1193. A scientific definition of testamentary capacity not possible.
1194. Evidence of testamentary capacity.

1164. An artificial right.—The right to make a will is a positive, not a natural, right. That is to say, it is a right conferred entirely by the laws of civil society, not by the laws of nature.[1] The making of a will is, in fact, the making of a law to regulate, after death, the

[1] "The practice of testamentary disposition has been adopted by men as a consolation for their mortality." 1 Collinson, Lunacy, p. 610.

property acquired during life-time. This is not a natural right, for no dead man has any rights. The human race are by nature usufructuaries only. It is society alone that creates and protects the right of making a will.[2]

1165. Historical data.—Hence, if we chose to follow the history of testamentary laws (a subject which is foreign to our purpose), we should find that those laws have varied widely; and, indeed, that some nations have had no such laws whatever.[3] The Romans seem to have been the first to perfect a system of testamentary laws. Before their time, as, for instance, among the Greeks and Hebrews, such laws were but rudimentary.[4] But, by the laws of the Twelve Tables, the testamentary rights of the father of a Roman family were recognized;[5] and, according to Sir H. Maine,[6] the English law of testamentary succession to personalty is a modified form of the dispensation under which the inheritances of Roman citizens were administered. This seems to be another instance of the debt of the common law to the civil law.[7]

The Roman law was strict in its limitation of testamentary rights, and these rights were denied, among others, to the insane. Thus, according to Justinian,[8] madmen—*furiosi*—cannot make a will, because they are lacking in mind,—*quia mente carent.* Nor is it material, though the madman afterwards regain his senses, and then die. In other words, the will made when the testator was insane does not become valid by virtue of the testator recovering his mind; but if he makes his will during a lucid interval, he is a legal testator, for it is certain that a testament which a man hath made before he was seized with madness is good; for a subsequent fit of frenzy can not invalidate a regular testament, or any other regular transaction.

[2] Cooper, notes in his edition of Justinian's Institutes, 1812, p. 492.

[3] 2 Bl. Com. 488–492.

[4] Following Blackstone, it is customary for legal writers to say that the law of Solon conferred testamentary rights upon the Athenians; the authority for which statement is a passage in Plutarch's Life of Solon. There is a learned note on the Athenian law of wills in Kent's Commentaries, Part VI. Lect. LXVIII. 502, based on Sir William Jones' Dissertation on the Attic Laws, in his Isæus. As for the Hebrews, the only semblance of such ancient law or usage is found in the expressed intention of Abram to make his steward his heir (Gen. xv.), and Jacob's bequest of a double portion to his son Joseph (Gen. xlviii.). These are slim foundations for a history of wills. According to Markby (Elements of Law, Oxford, 1896, §§ 791–792) the right to make a will was unknown to Hindoo law, and the validity of a Hindoo will has been questioned before the Privy Council.

[5] Table V.

[6] Ancient Law, Chap. VI.

[7] By the law of Turkey, no subject of that country can make a will. By treaty between Great Britain and the Ottoman Empire, an English subject domiciled in Turkey has that privilege. *Maltass* v. *Maltass*, 3 Curt. Eccl. Rep. 231.

[8] Institutes, Lib. II. title XII. § 1.

Thus stood the Roman law according to Justinian, and thus practically stands Anglo-American law to this day. These just and simple principles are, in fact, fundamental. The only questions that arise are in the application of these principles to individual cases.[9]

1166. Legal presumptions.—In its attempt to reduce everything to general rules the law has recognized a series of presumptions as aids to the determination of testamentary capacity. In fact, the discussion of this whole subject, in the works of many legal writers, is made to rest upon these various presumptions. Much learning, and much that is mere compilation and case-hunting, is expended on this general theme, until it looks indeed vast and appalling, especially to the gaze of a layman; but a strictly scientific analysis of this great accumulation of case-reports brings it down, after all, to a question of a few principles.[10]

The present writer, even if he had the space, could not hope to vie with such learned writers as Shelford,[11] Underhill,[12] and Redfield,[13] in explaining the law and in accumulating cases; it would be merely a repetition (for these see *ante,* §§ 299–302) to marshal all the opinions and decisions of the courts in cases of disputed wills. It will rather be his aim in these pages to discuss the principles and presumptions of the law from the standpoint of medical science.

1167. The onus probandi.—And, first, as to the *onus probandi* where a will is produced for probate. It is generally conceded that the burden of proving testamentary capacity is on the proponent of a will. Lord Hardwicke[14] said that it had been determined over and over again that the devisee must show the devisor to have been of sound and disposing mind, in a bequest of real estate. Thus, the heirs-at-law, who may have been disinherited by the will, are protected, and have the right to proof of the testator's sanity from each

[9] By the Statute of Wills, 34 & 35 Hen. VIII. chap. 5, § 14, the wills of idiots or of any persons *de non* sane memory are not good. According to Collinson (loc. cit. § 41), so essential is sanity to the validity of a will, that a testament has been set aside on the ground of insanity after forty years' possession. *Squire* v. *Pershall,* 8 Vin. Abr. 169.

[10] "Great and wonderful is the number of manifold writers of the civil and ecclesiastical laws, and so huge is the multitude of their sundry sorts of books, as lectures, counsels, tracts, decisions, questions, disputations, repetitions, cantels, clausules, common opinions, singulars, contradictions, concordances, methods, sums, practices, tables, repertories, and books of other kinds (apparent monuments of their endless and invincible labors), that, in my conceit, it is impossible for any one man to read even the hundredth part of their works, though, living an hundred years, he did intend none other work."—Swinburne, A Treatise of Testaments and Last Wills, 7th ed. 1803. Preface "To the Reader."

[11] Lunatics, 1833.

[12] Wills, 1900.

[13] Wills, 4th ed. 1876.

[14] *Wallis* v. *Hodgeson,* 2 Atk. 56.

witness.[15] "The *onus probandi,*" said Baron Parke,[16] "lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." Many other authorities could be quoted in support of this rule.[17]

1168. The witnesses to the will.—In this connection it may be well right here to consider briefly the functions of the witnesses. The intention of the law seems to be that the witnesses to a will are to be something more than mere observers of the physical act of signing. They are to be judges, also, of the testator's mental capacity. The business, then, of the witnesses is not barely to attest the corporal act of signing, but "to try, judge, and determine whether the testator is *compos* to sign." Sanity is the great fact which the witness has to speak of.[18] According to this view the witnesses to a will, are, in fact, in somewhat the same position as a commission, for they have to determine the question of the testator's mental state at the moment of his signing his will; and, therefore, the statute of frauds, 29 Car. II., chap. 3, § 5, required that there be three witnesses to a will disposing of real estate. This function of witnesses to wills should be well understood by all parties concerned, and especially by medical attendants, for the gravest questions of mental capacity may have to be determined in great part by the testimony of these witnesses. It is, therefore, of great importance that they should be persons of intelligence, although the law is not particular on this point. The heirs-at-law, or those who oppose the will, have always the right to cross-examine these attesting witnesses as to the sanity of the testator. To a medical mind the fact seems obvious that not a little of the confusion in will-contests arises from the incompetency of these witnesses to do what is expected of them, *i. e.,* to form a rational judgment, and to give their reasons for it. Furthermore, it has even been held that the subscribing witnesses may afterwards be admitted to prove the testator was insane when he executed his will;[19] although Lord Mansfield held that a witness thus impeaching his own act, instead of finding credit, de-

[15] Collinson, op. cit. 2, 24, § 26.

[16] *Barry* v. *Butlin,* 1 Curt. Eccl. Rep. 637, 2 Moore, P. C. C. 480.

[17] See *Delafield* v. *Parish,* 25 N. Y. 29 *et infra,* where this subject is discussed at some length. But the rule seems to be comparatively modern, for Swinburne teaches just the reverse. On Wills, Part II. §§ 3, 4, and 5.

[18] Shelford, op. cit. Chap. VII.

[19] Christian, footnote to 2 Bl. Com. 378. "The real question is whether these witnesses are to be believed upon this evidence, in contradiction to their own solemn act in the attestation of the will and codicil."—Chief Justice Tindal, in *Tatham* v. *Wright,* 2 Russ. & M. 1.

served the pillory; and Lord Eldon said that such evidence should be received with the most scrupulous jealousy.[20]

1169. Inconsistency as to the onus probandi.—The fact that the *onus probandi* is put upon the proponent of a will seems to the medical reader inconsistent with the legal presumption that every man is of sound mind until the contrary be proved; for if this presumption held in this case it should not be necessary to prove it. This is an instance, evidently, wherein the law is not satisfied with its own presumption. It arises out of the jealousy of English law-makers to protect the rights of property. The mere presumption, or theory, of the law as to sanity is swept aside without hesitation when it seems to impose a risk in the inheritance of real estate. If the presumption of sanity is to be reversed in the case of testators, as it is by the rule in question, this reversal can only be based on the theory that persons who are about to make their wills are, in the majority of cases, of unsound mind; but such a theory will hardly be acknowledged by the courts any more than by mankind in general.[21]

1170. The presumption of sanity.—In case a will is contested, however, the presumption of sanity at once has full force, and we have the extraordinary spectacle of a legal right-about-face; for the testator, who could not pass unchallenged at the probate, is now presumed without question to have had a sound and disposing mind.[22] At

[20] Shelford, op. cit. p. 285. See also *Scribner* v. *Crane*, 2 Paige, 147, 21 Am. Dec. 81.

[21] That the courts have felt the inconsistency of putting the *onus probandi* on the proponent of a will, while, at the same time, maintaining the legal presumption of sanity until the contrary be proved, is clearly shown in Redfield's learned discussion of this whole subject (1 Wills, Chap. III. § 4). We have no intention of trying to reproduce the arguments in these pages; in fact, these arguments are so labored and involved as not always to be clearly intelligible to the scientific mind, accustomed to plain statements of facts. "The presumption of sanity," says Redfield, "seems not altogether consistent with the requirement that the executor shall, in his opening, put into the case positive proof of the sanity of the testator. If the law presumes sanity, it surely requires no proof of it until there is some adduced in the opposite direction. And Mr. Justice Thomas [in *Crowninshield* v. *Crowninshield*, 2 Gray, 524, and *Baxter* v. *Abbott*, 7 Gray, 71] is unquestionably right in saying that the court, to be consistent, should recede from one or the other of these propositions." A leading opinion is by Chief Justice Tindal, in *Tatham* v. *Wright*, 2 Russ. & M. 1, in which the reasons for the rule in question are laboriously expounded. The question, after all, is a purely legal one, with which the medical jurist is not particularly concerned, except as it furnishes an example of the futility of some of the legal presumptions concerning insanity. Medical readers who may wish to follow the subject in detail are referred to Redfield, loc. cit.

[22] "Every person making a will is presumed of sound mind, until the contrary be proved; so that the *onus probandi* lies on the other side." 2 Collinson, Lunacy, Chap. XXIV. § 6. It is to be noted how flatly this contradicts the opinions of Lord Hardwicke, Baron Parke, and others quoted in the text. See *Baxter* v. *Abbott*, 7 Gray, 71, for an opinion as stated in the text.

least this seems to be the ruling of many courts.[23] The very fact that the will has been admitted to probate restores the legal presumption of sanity, and thus the burden of proof is shifted upon those who allege an unsound mind. Reduced to a series of logical formulæ, the legal axioms as to mental capacity seem to work about as follows: The first step is the signing of the will, which is attested by two or more witnesses, who act as a sort of commission to judge the testamentary capacity of the will-maker, and with whom, probably, the legal presumption of sanity has full sway. The next step is the probate, where this presumption is put aside, and the burden of proof is put upon the proponent of the will. Finally, on appeal and trial the presumption of sanity is regarded as having been restored by the probate of the will, and the burden of proof now shifts to the other side. But if the will has been refused probate, then, on appeal and trial, the burden of proof is still on the proponent. There are, however, so many exceptions to this somewhat ideal statement, that the whole doctrine of presumptions as to testamentary capacity is left in a state of great confusion for the scientific mind.

For instance, Redfield[24] distinctly says that the burden of proof is on the proponent of the will not only at the probate, but also upon appeal; and he does not make it clear that there is any distinction as to whether the proponent is appellant or appellee; he cites many cases. Chief Justice Whitman[25] said that the presumption that the person making a will was at the time sane was not the same as in the case of the making of other instruments; but the sanity must be proved. As already observed, such a ruling is quite irreconcilable with the legal presumption of sanity.[26]

[23] *Chandler* v. *Ferris*, 1 Harr. (Del.) 454; *Bell* v. *Buckmaster*, 1 Harr. (Del.) 460, note; *Cubbage* v. *Cubbage*, 1 Harr. (Del.) 461, note; *Southerlin* v. *M'Kinney*, Rice L. 35; *Tillman* v. *Hatcher*, Rice. L. 271; *Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459. But Redfield says these are exceptional cases. See also *Pettes* v. *Bingham*, 10 N. H. 515; *Turner* v. *Cheesman*, 15 N. J. Eq. 243.

"In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed." *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

This was evidently the old law, as appears from Swinburne, Chap. XLV. Part II., § 3, who says that that which is accounted notorious (*i. e.*, sanity) need not be proved.

[24] Op. cit. Chap. III. § 4.

[25] *Gerrish* v. *Nason*, 22 Me. 438, 440, 441, 39 Am. Dec. 589. See also *Cilley* v. *Cilley*, 34 Me. 162.

[26] "The question as to the *onus probandi*, where the issue is testamentary capacity, has been a great deal discussed both by judges and text-writers, and has furnished an occasion for the display of much learning and ingenuity. The numerous decisions upon the subject in this country are by no means uniform, and many of them are in direct conflict, so that any attempt to reconcile them would be hopeless."—Judge Brent

1171. The presumption that insanity continues.—In case insanity has existed prior to the making of a will the law presumes that such insanity has continued, and the burden of proof is on him who alleges that the testator had recovered his mind. This is so, however, only in case the insanity has existed within a comparatively short time; for a prior attack of insanity at a remote period will not raise such a presumption.[27] Collinson[28] even says that it is sufficient for the party pleading the insanity of the testator to prove him to have been *non compos* at any time before he made his will, although he does not prove such a state of mind at the precise time of the signing; but the presumption does not arise if the attack has been very brief or very remote. There is evidently wide ground here for diversity of opinion. Much depends upon what the court considers to be a sufficient period. Thus, in England, even in the case of lunatics under guardianship, although the presumption is strong against their right to make a will, yet this presumption may be overcome with proof, and if the Lord Chancellor is satisfied that a lunatic is so far recovered as to be competent to make a will, he may permit him to do so, under the supervision of an officer of the court, without relieving him from the control of his committee.[29] This is opening a wide door for lunatics to make their wills.

1172. The presumption as to lucid intervals.—The right of an insane person to make a will during a lucid interval was fully recognized, as we have seen, in the Roman, just as it is in Anglo-American, law. The burden of proof is generally said to be upon the person alleging such lucid interval.[30] On the other hand, it has been held that if a lunatic has enjoyed lucid intervals, the presumption of the law is that his will was executed in one of these intervals.[31] The present writer leaves it to others to reconcile these two discordant principles. In the one case the presumption is against such a lucid

in *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666. See also Underhill, Wills, Chap. IV. § 86.

[27] *Thompson* v. *Kyner*, 65 Pa. 368. "An abnormal condition of mind is never presumed when a testator makes his will, unless a previous aberration be shown of such a nature as may admit of a presumption of recurring unsoundness at any time." Cases cited were *Stevens* v. *Vancleve*, 4 Wash. C. C. 262; *Halley* v. *Webster*, 21 Me. 461; *Jackson ex dem. Van Dusen* v. *Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Hoge* v. *Fisher*, Pet. C. C. 163, Fed. Cas. No. 6,585.

[28] Op. cit. Part II. Chap. XXIV. § 7. Also 2 Swinburne, Wills, § 3; Shelford, Lunatics, Chap. VII. p. 290.

[29] Redfield, loc. cit. sub-sect. 20.

[30] Redfield, loc. cit. sub-sect. 27; Shelford, op. cit. p. 290.

[31] Collinson, op. cit. § 12; Godolph. 25. The presumption in favor of a lucid interval was fully supported by Hale (P. C. Chap. IV.), who taught that such a presumption always arose in lunacy, both in civil and criminal cases. See also Swinburne (On Wills, Part II. § 3), who says that the presumption is strengthened if the will itself is reasonable.

interval; in the other case it is in favor of it. And there cannot be much doubt that some abuse has arisen from adhering to such violent presumptions, especially the latter; as, for instance, where a man had had insane delusions on the three days previous to his signing his will and destroyed himself on the day afterwards, and yet his will was sustained.[32] There is no authority in law as to what the length of a lucid interval shall be; "whether an hour, a day, or a month; . . . all that is wanting is that it should be of sufficient length to do the rational act intended."[33] To the psychiatrist this must seem like very hypothetical science, for a lucid interval of only an hour or a day is one of the rarest things in insanity. But this subject has been discussed in these pages in the chapter on "Lucid Intervals." (*Ante*, p. 496.)

1173. Presumption is not proof.—It must never be forgotten by medical experts that a presumption in law is not conclusive proof, and that it is always open to rebuttal. In fact, too much importance may be attached to presumptions. They are, at best, only hypotheses, and are of use in legal procedures largely as aids to establish the argument. The main reliance is to be placed on proof. The legal presumptions as to testamentary capacity are often inconsistent, the one with the other, as we have now demonstrated; and they have sometimes led to abuse. The matter to be decided is one of fact.[34] But it is not within the province of any court to substitute a presumption for a proof, although such is the veneration in which these ancient maxims are held by some judges, that they are sometimes made to take the place of demonstrated fact; as in the case of the man who was said to be insane on every other day, upon which a Pennsylvania court decided, without any adequate proof, that his contract had been signed on one of the sane days![35]

1174. Presumptions in science.—In science there is no presumption whatever as to lucid intervals in insanity, except that they are of very uncertain occurrence, and that each case must be examined on its own merits. The statements of the courts on the subject are entirely too dogmatic, and are not based on personal knowledge of the insane. Judges on the bench, having no experience whatever with insanity, have not hesitated to announce the most extraordinary opin-

[32] *Chambers* v. *Queen's Proctor*, 2 Curt. Eccl. Rep. 415; Shelford, op. cit. p. 66.

[33] Sir William Wynne in *Cartwright* v. *Cartwright*, 1 Phillim. Eccl. Rep. 90.

[34] In *Boardman* v. *Woodman*, 47 N. H. 120, Justice Doe said: "The question whether Miss Blydenburgh had a mental disease was a question of fact, for the jury, and not a question of law, for the court."

[35] *Weaver* v. *Weaver*, 28 Pittsb. L. J. N. S. 367.

ions on this most recondite subject of mental pathology. This is no more appropriate than it would be for them to give opinions about the action of arsenic or the course of a typhoid fever. Sir John Nicholl[36] laid down rules about the occurrence of lucid intervals in the delirium of fever, which make an expert clinician smile. Lord Chancellor Thurlow[37] defined a lucid interval as one in which the mind, having thrown off the disease, had recovered its general habit; but he neglected to tell us how that differed from a recovery; for such a state is nothing short of a recovery. Lord Eldon,[38] who was never at a loss for words to describe morbid mental states which he had probably never seen, held that the evidence of a lucid interval need not be as clear as the evidence of the insanity itself, but he did not explain how one state could be distinguished from the other without equally clear evidence of both. The desperate flounderings of legal writers in their efforts to describe lucid intervals are evidence that these writers have no clear ideas on the subject;[39] and, in fact, the thing itself—"lucid interval"—is largely a fiction of the law, which, as shown elsewhere, can be traced back to the old superstition that "lunacy" was caused by the full moon, and that the patient recovered his mind when the moon changed.[40]

1175. A reasonable will.—A favorite maxim of the law has been that if a will is reasonable, it goes far to raise a presumption in favor of testamentary capacity; but we do not see why an insane, and especially a feeble-minded, person, might not be induced by fraud or undue influence, to sign a will which might be deemed reasonable, and yet might be unjust, and not express his intentions. Nevertheless, this presumption is laid down with much confidence in most of the law-books, and is evidently very old. Swinburne[41] announced it several centuries ago; but at the same time he took pains to say that "if there be but one word sounding to folly, it is presumed that the testator was not of sound mind and memory." This same authority said (what, indeed, follows naturally upon this logic) that a lucid interval is presumed to have occurred if an insane man make a reasonable will. The whole test here rests, of course, upon what is meant by a reason-

[36] *Brogden* v. *Brown*, 2 Addams Eccl. Rep. 441. Brown, Med. Jur. Insanity, p. 270.

[37] *Atty. Gen.* v. *Parnther*, 3 Bro. C. C. 444.

[38] *In re Parkinson*, quoted in Beck's Med. Jurisp. Vol. I. p. 368, note.

[39] Redfield, op. cit. Chap. III. § 13, on "Lucid Intervals."

[40] Hale, P. C. Chap. IV. Taylor, in his Medical Jurisprudence, defines a lucid interval in the academic way, so customary in the courts. But Taylor was not an alienist; he was a chemist and toxicologist. His excellent treatise is not high authority on subjects of insanity.

[41] 2 Wills, §§ 3, 14.

ble will,—a question as hard to be determined, in many cases, as the question of sanity itself. In fact, one is the complement of the other; and therefore this test is not so much a test as it is merely a restatement of the question.[41½]

1176. Testamentary capacity a broad and difficult subject.—The subject of testamentary capacity is as broad as the subject of insanity itself. In fact, there is not a form of insanity in which this question cannot arise and has not arisen. Therefore, to discuss it in detail here would require us to traverse the whole field of clinical psychiatry with reference to this one subject. But, as we have already gone over this wide field, the subject of testamentary capacity has already been dealt with in some detail in some of those descriptions of mental disease (*ante*, §§ 912, 952, 992, 1012–1019). This should remind us that the subject is not a simple one,—not one that can be reduced, as some legal writers seem to think, to a few tests and formulæ. It is by all odds the most difficult subject in the jurisprudence of insanity,—a thing which is curiously shown in the fact that the great bulk of literature on the subject is written, not by scientists, but by lawyers and judges in their vain attempts to reduce the question to something like order. For surely, if it were a simple subject, one easily grasped and clearly presented, we should not see court after court expounding it in lengthy opinions, too many of which are contradictory, and all of which show the difficulty with which the topic is beset. Lord Chief Justice Cockburn[42] announced from the bench that this is not a psychological inquiry; and then proceeded, through many pages, to make it such. If it is not a psychological inquiry, it is difficult to see what otherwise it is. It is easily computed that several hundred courts in America alone have tried, each in its own language, to define and determine testamentary capacity.[43]

1177. Some reasons for the difficulty.—There are good reasons why

[41½] Collinson, loc. cit., says that insanity apparent on the face of the will may throw the *onus probandi* on the testamentary heir, as in the case of a man who commanded by his will that his ashes be thrown into the sea. If the testator were proved sane, the will would pass without the condition being complied with. But commanding that one's ashes be thrown into the sea is not much evidence of insanity.

[42] *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 560, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813.

[43] The vast legal literature on testamentary capacity is well reflected in Underhill on Wills. That author was a most industrious case-hunter, and has overloaded his pages with long lists of titles; but such lists teach us little except the complexity and confusion of the subject. That the subject has not been monopolized by legal writers, however, is evident on a glance at the Index-Catalogue (article on "Wills," Vol. XVI. pp. 472–474), where an extensive bibliography is given of the writings of physicians on this topic.

the subject of testamentary capacity is more difficult than most questions in the jurisprudence of insanity. One of the chief of these lies in the fact that the person about whom the inquiry is made is dead. In criminal cases we at least have the man before us, but in will cases he is no more. Everything depends upon the testimony of persons who knew him during life, few of whom are good observers, and some of whom are not disinterested. Some of these cases, in fact, are presented upon such inadequate proof on both sides that, for a scientist, they are worthless; the data for a complete opinion are wanting, and the decision of the court is, at best, a hit-or-miss one. If an alienist were asked, in the ordinary run of practice, to make a diagnosis in a case which he could not examine personally, upon statements of more or less ignorant persons, some of whom had an interest, perhaps, in distorting facts, he would hesitate, or even decline, to commit himself; yet this is often the task set for a court of law in determining testamentary capacity, and it has, of necessity, to be undertaken by a judge and jury who are far from having a scientific knowledge of insanity. A little more tolerance of scientific opinion, therefore, and a little less dogmatism, might be wished for in some of these cases.

1178. The distinction between civil and criminal cases.—We need not go back to Swinburne for tests of capacity.[44] Distinctions were early made on this subject, and especially between civil and criminal cases. Coke[45] was one of the first to make this distinction, and he said that while a man would not be allowed to stultify himself in civil matters, this did not hold in criminal affairs, for the act and wrong of a madman shall not be imputed to him: *"Furiosus solo furore punitur,*—a madman is only punished by his madness." This shows more leniency towards insanity in criminal than in civil matters. But Littleton[46] had already said that, although a man was not allowed to stultify himself, yet "the heir may well disable the person of his ancestor for his own advantage."

The distinction between civil and criminal cases was much more clearly drawn in a later age; and, contrary to Coke, the wider import came to be given to delusions in civil matters. This occurred as soon as "partial" insanity, or "delusional" insanity, came to be fully recognized in English law.

[44] 2 Wills, § 3. The witnesses must depose that they saw the testator do such things as a sane man would not do: "Namely, they did see him throw stones against the windows, or did see him usually to spit in men's faces, or, being asked a question, they did see him hiss like a goose, or bark like a dog, or play such other parts as mad folks used to do."

[45] 1 Litt. 247*a*.

[46] Co. Litt. Lib. III. Chap. VI. § 405.

1179. The old opinion that delusion invalidates a will.—The history of judicial opinion shows a complete change of front on the subject of delusion as affecting testamentary capacity. Erskine,[47] in his speech for Hadfield, had defined delusion and its effects on both conduct and capacity. In the clearest language he maintained that the law in civil cases avoids the act of a man *non compos,* even though the act cannot be connected with the delusion; but he was by no means prepared to apply the rule in criminal cases. This opinion was apparently settled for a long while in English law. In the *Greenwood Case,*[48] often quoted, the testator had disinherited his brother under the influence of an insane delusion; and the judge told the jury that the delusion "would equally have affected his testament if the brother, instead of being disinherited, had been in his grave." In other words, it was not necessary that the delusion should be directly connected, as a motive, with the making of the will. The most extreme statement of this dogma was made in the celebrated case of Bellingham.[49]

But it remained for the acute mind of Lord Brougham to state this whole subject of delusion, partial insanity, and lucid intervals, in language more nearly scientific than any that appears elsewhere in legal literature. The appearance of delusions being proved, said Brougham, and their continuance proved or assumed at the date of the *factum,* it is wholly immaterial that they do not appear in the will itself.[50] For this learned chancellor the human mind is one and indivisible, and an insane delusion is such evidence of an unsound mind that it invalidates the will under any and all circumstances. This opinion of Brougham has been accounted too radical, and is no longer in favor with the courts, but it is based upon sounder scientific principles than those of most of his critics.[51] It is a fact, and always must be a fact, that an insane delusion exposes the acts of a man to

[47] *Hadfield's Trial,* 27 How. St. Tr. 1281.

[48] *Greenwood* v. *Greenwood,* quoted by Erskine, op. cit. Found also in 3 Curt. Appendix, 337.

[49] *Bellingham's Case,* 1 Collinson, Lunacy, 636. See also Shelford, op. cit. p. 44.

[50] *Waring* v. *Waring,* 6 Moore, P. C. C. 341, 12 Jur. 947. "For we must keep always in view that which the inaccuracy of ordinary language inclines us to forget,—that the mind is one and indivisible; that when we speak of its different powers or faculties,—as memory, imagination, consciousness, — we speak metaphorically, likening the mind to the body, as if it had members or compartments; whereas, in all accuracy of speech, we mean to speak of the mind acting variously; that is, remembering, fancying, reflecting; the same mind in all these operations being the agent."

[51] Redfield (op. cit. p. 81, note) condemns Brougham's opinion, and it is also criticized in *Dunham's Appeal,* 27 Conn. 192–204, as an "innovation." But, as is shown in the text, an innovation it certainly was not, for it was in accord with the opinions of the earlier courts.

grave suspicion, and the burden of proof should be on those who lightly assume to be able to read all the intricate motives in an insane mind, and to declare with positiveness that such a delusion does not influence conduct or capacity.[52]

1180. The influence of the criminal law.—But the tendency soon appeared in the courts to define more closely the relation of delusions to testamentary capacity, and this tendency was strictly analogous to what took place in criminal cases. In fact, the influence of the criminal law on this subject is not to be ignored. Under the influence of the M'Naghten rules, in 1843, insane delusions began to be defined with great precision; they were expected to be just so and so and to do thus and thus. The courts again exercised their prerogative to prescribe rules for mental disease. A delusion in an insane man's mind was hedged about with many qualifications; it must act in a prescribed way in order to conform to the requirements of the law. This process of academic definition, once started, seemed likely to go on without much restraint and without much regard for the laws of nature.

1181. The connection of the delusion with the will.—The upshot of it all was, that an insane delusion, in order to impair testamentary capacity, must be proved to have had a direct influence upon the making of the will.[52½] The process was exactly the same as that which occurred in criminal cases, in which it was decided by the M'Naghten rules that an insane delusion must be shown to have been the impelling motive for the crime. In other words, let a man be never so mad,—let his mind be never so harassed with insane suspicions, or buoyed with insane hopes, or enfeebled with insane superstitions, or deluded with insane projects, or clouded with senile deliria,—let him be all this and much more, provided his bequests cannot be traced with unerring precision to some one or other wandering and evasive delusion in his addled brain, and he is a capable testator in the eyes of the law.[53]

Sir John Nicholl[54] gave a precise statement of the law in a form

[52] *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398, 36 L. J. Prob. N. S. 97, 16 L. T. N. S. 841, 16 Week. Rep. 18. In this case any degree of mental unsoundness, however unconnected with the will in question, is held fatal to the capacity of the testator.

[52½] See *ante*, § 82.

[53] Sir Fitzjames Stephen (History Crim. Law, p. 162) says: "It undoubtedly is, and I think it is equally clear that it ought to be, the law, that the mere existence of an insane delusion, which does not in fact influence particular parts of the conduct of the person affected by it, has no effect upon their legal character."

[54] *Dew* v. *Clark*, 1 Addams, Eccl. Rep. 279, 3 Add. 79. The testator had disinherited his only child, a daughter, towards whom he had had an insane aversion and delusions ever since her birth.

which has ever since retained wide favor in the courts. He decided, in effect, that "partial insanity" (by which is meant monomania, or paranoia, or delusional insanity) is good in defeasance of a will founded on or upon such partial insanity. Hence, partial insanity is fully recognized in English law. On appeal, Lord Chancellor Lyndhurst[55] supported this decision, but he used the memorable expression, which he attributed to Nicholl, that a person could not be partially insane and sane at the same moment of time; to be sane the mind must be perfectly sound, otherwise it is unsound. It is hard indeed to reconcile this statement with the legal idea of a partial insanity, in which a person might be capable of making a will, for it distinctly declares that such a person is of unsound mind; and in law unsoundness of mind defeats a will. Practically Lord Lyndhurst's expression put the subject back again upon the ground where Lord Brougham had placed it.

1182. The law as now generally accepted.—The law of wills as applying to delusions, and as generally accepted now in the courts, is about as follows: Partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. The case in which this decision was rendered was that of a lunatic who had been confined in an asylum, who, after his discharge, had remained insane, with delusions of persecution, and who was epileptic, and incapable of transacting business.[56] So we are forced to the conclusion that this lunatic's case has supplied the data for the most widely accepted modern doctrine of testamentary capacity.[57]

He was also crazy on religious subjects.

[55] *Dew* v. *Clarke*, 5 Russ. Ch. 163, 6 L. J. Ch. 186.

[56] *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813. In his opinion in this case Lord Chief Justice Cockburn reviewed the whole subject and combated Brougham's opinion in *Waring* v. *Waring*. The case is a standard one, and has furnished leading ideas to many judges who have since had to pronounce the law on contested wills.

[57] A leading American case, much quoted, is *Dunham's Appeal*, 27 Conn. 192, in which it was decided: "If the testatrix, at the time of executing the will, harbored an unnatural, unreasonable antipathy towards her sisters, or either of them, and that antipathy was the result of morbid delusion as to the character and conduct of these sisters, the will is void, although she may have been sane in all other respects."

The following was disapproved as not sound, and not the principle of law in insanity: "If the testatrix harbored a delusion,—that is, fancied things to exist which had no existence, and of the existence of which she has no reasonable evidence,—she was, while harboring such delusion, of unsound mind, and her will, made at such time, would be void." This, which was in effect the same as Lord Brougham's opinion, was rejected because it did not declare that the delusion was connected with the will.

So far as the present writer can determine from the examination of numerous cases, this statement of the law as laid down by Nicholl and by Cockburn is that which is generally accepted to-day in America as well as in England. It arbitrarily defines insanity as limited to one specific act; and its intent and effect are to ignore the wide range of mental symptoms. It is therefore not in accord with the actualities of disease in most cases of monomania, and it is thus fraught with many risks to righteous judgment. It, moreover, entirely ignores, what no wise alienist will ever ignore, the fact that it is often impossible to trace the whole influence of delusion on conduct. It is given to no man, sitting in judicial isolation, to determine precisely what was the course, the object, and the potency of the delusions of a dead lunatic.

1183. Delusion as the only criterion of insanity.—It is a common error in courts to make delusion the only criterion of insanity; and not a few judges have announced in most dogmatic terms that there can be no insanity in law without delusion.[58] There is nothing either in law or in science to warrant such an opinion. So far as the law is concerned, the whole doctrine of delusion has grown up since Erskine introduced it in his speech for Hadfield, in 1800.[59] There is almost nothing on the subject before his time, and Hale[60] even stated that "partial," or delusional, insanity does not excuse a man for a crime. So far was he from recognizing it, therefore, that he even repudiated it in set terms.

In reference to wills, some later courts have even gone so far as to say that the true criterion as to the absence or presence of insanity is the absence or presence of delusion.[61] Nothing can be more nearly contrary to the facts of science, for not a few testators are incompetent because they are merely imbecile or senile, broken down and enfeebled in mind, devoid of memory and judgment, but in no wise under the influence of delusions. To make delusion the only test,

[58] Judge Fell (*Com.* v. *Meredith*, 17 Phila. 90) said, "Insanity is always marked by delusions."

[59] *Hadfield's Trial*, 27 How. St. Tr. 1281.

[60] 1 P. C. Chap. IV.

[61] *Dew* v. *Clark*, 3 Addams, Eccl. Rep. 79. Sir John Nicholl said: "In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects, in any degree, is, for that reason, essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagance a supposed lunatic may be justly chargeable, and how likesoever to a real madman he may either speak or act on some or on all subjects, still, in the absence, I repeat, of anything in the nature of delusion so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane." This dogma would partly depopulate the asylums.

therefore, as Sir John Nicholl did, is practically to rule that any idiot, imbecile, or person *non compos mentis,* or in the delirium of fever, may make a will, provided he is not influenced by systematized delusions; as few or none of them are. This, as we have said, is a true test neither in law nor in science; for the law simply says that a testator must be "of sound and disposing mind and memory," and does not limit this test to a question of delusions; and science rejects what it knows is disproved in every mad-house.[61½]

1184. Testamentary capacity as affected by delirium.—Attempts have been made by some courts to formulate rules for febrile delirium and the delirium of extreme prostration, such as sometimes immediately precedes death. It has even been announced from the bench that lucid intervals are not uncommon in such delirium. We seem almost to be listening to a bed-side lecture when we are told that "from their greater presumed frequency in most instances in cases of delirium, the probabilities *a priori* in favor of a lucid interval are infinitely stronger in a case of delirium than in one of permanent, proper insanity; and the difficulty of proving a lucid interval is less in the same exact proportion in the former than it is in the latter case, and has always been so held by this court." [62]

According to this opinion the law "presumes" lucid intervals in cases of febrile delirium, and "presumes" further that a will signed by such a patient was signed in such an interval. Therefore the burden of proof must be on those who deny such an interval to have occurred. Thus in one case[63] the testator died of pneumonia three days after making a will; he had been delirious, and medical witnesses testified that he was not competent; but the will was sustained on the ground that it was a reasonable will, and that several lay witnesses testified that the patient was competent.[64]

The presumption that lucid intervals occur in febrile delirium is entirely gratuitous on the part of the law, and cannot be sustained as a general rule by the actual observation of such cases. The weight of scientific evidence is against it.[65] Even though lucid intervals

[61½] The distinction between an erroneous opinion and a delusion is made by some courts. The belief in witchcraft has been held properly not to invalidate a will. See 1 Redf. Wills, op. cit. p. 79, footnote; and *Re Vedder*, 6 Dem. 92. Also *Morgan* v. *Boys* (quoted by Taylor, Med. Jurisp. p. 657), for the distinction between eccentricity and delusion.

[62] *Brogden* v. *Brown*, 2 Addams, Eccl. Rep. 441.

[63] *Evans* v. *Knight*, 1 Addams, Eccl. Rep. 229.

[64] Brown, Med. Jur. Insanity, p. 270 *et infra*.

[65] Hutchinson, "Typhoid Fever," in Pepper's Syst. of Medicine, Vol. I. Also the articles in the same volume by leading authorities on the various infectious diseases. "Lucid intervals" in delirium are not mentioned by any of these writers: the nearest approach is in mild cases, in which the patient's mind might

may occur in some of these cases, their occurrence is not sufficiently common to establish a presumption. Therefore the *a priori* probabilities are not in favor of, but against, lucid intervals in febrile delirium. But why should there be any presumption whatever in the matter? The question is one of fact. The mere fact that a lucid interval has happened in one case is no evidence that such an interval will happen in another. Such a question can only be decided by the evidence.

Moreover, it is easy to mistake a slight remission of symptoms for a lucid interval in febrile delirium. Physicians know this fact full well; and that the laity is easily deceived by the specious appearance of a few calm moments or even by a flicker of intelligence. If such cases are to be discussed merely according to the abstract principles of logic, the proper rule would seem to be the *a posteriori* one, by which each case would be judged by itself, and not according to presumptions.[65½]

1185. Testamentary capacity as affected by imbecility.—It has been held that "imbecility of intellect, though short of insanity," is sufficient to invalidate a will.[66] On the other hand, it has been decided that "imbecility of mind in a testator will not avoid his last will and testament."[67] These two contradictory opinions show how utterly impossible it is to arrive at a uniform opinion about testamentary capacity in imbeciles. Opinions range at large between these two extremes, and courts allow themselves the greatest latitude in interpreting this term. The present writer cannot offer a solution of this problem, based upon the language of the courts.[67½] The subject is discussed in the chapters on "Idiocy" (*ante*, p. 857), "Senile Insanity" (*ante*, p. 791), and "Aphasia" (*ante*, p. 806).

1186. Testamentary capacity and epilepsy.—Epilepsy raises no presumption against the testamentary capacity of the patient, nor is it fair that it should, unless it has been the cause of repeated attacks

be temporarily arrested for a few moments of doubtful consciousness; or in temporary remissions, which are quite uncertain in their occurrence and degree.

[65½] What has been said in the text about delirium applies also, in a measure, to alcoholic intoxication: but the subject is discussed in the chapter on "Alcoholic Insanity." p. 766. *ante*. Swinburne (Wills, Part II., § 6) says of the drunkard, "if he be not clean spent," he may make his will.

[66] *McTaggart* v. *Thompson*, 14 Pa. 149.

[67] *Stewart* v. *Lispenard*, 26 Wend. 256. The decision in this case is criticized and condemned in *Delafield* v. *Parish*, 25 N. Y. 27.

[67½] Swinburne (op. cit.) speaking of idiots, says that a "*grossum caput*, a dull pate or a dunce" is not prohibited to make a will; also that "he that can beget a child" is not an idiot, or deprived of the right to make a will; but Swinburne quotes this to condemn it. It is the only instance in which the test of testamentary capacity has been located in the testicles.

of some form of epileptic insanity. In the latter case the rule should follow that laid down for insanity in general, *i. e.*, that the burden of proof should be on the person alleging a lucid interval. It does not appear, however, that the courts in general have recognized this rule in cases of epilepsy.[68] This subject is discussed in the chapter on "Epileptic Insanity." (*Ante*, p. 726.)

1187. Testamentary capacity and suicide.—Neither does suicide create a presumption of incapacity, although in some courts it has been accepted as a relevant fact. This is a just ruling, for although suicide is not always a proof of insanity, it is so in some cases, and the fact should be admitted for what it is worth, according to the evidence.[69] This subject is discussed in the chapter on "Melancholia." (*Ante*, p. 625.)

1188. Testamentary capacity as affected by moral insanity.—The prejudices of courts against the doctrine of moral insanity have been plainly shown in cases of contested wills. This psychosis has generally not been allowed as a proof of incapacity. It has been expressly held that moral insanity, or the perversion of the moral feelings, not accompanied with insane delusion, is not sufficient to invalidate a will.[70] Here, again, the true test is said to be delusion. No course of harsh treatment, no sudden burst of violence, no display of unkind or even unnatural feeling merely, will avail as proofs to set aside a testament.[71] Disordered affections must be proved to be founded on insane delusions.[72] Anger towards a child because of some offense committed is not ground for overthrowing a will.[73]

A dissenting opinion from all this was given by Justice Doe,[74] of

[68] Underhill (op. cit. p. 157) gives the following references; *Re Rounds*, 25 Misc. 101, 54 N. Y. Supp. 710; *Re Flansburgh*, 82 Hun, 49, 31 N. Y. Supp. 177; *Re Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649; *Re Rapplee*, 66 Hun, 558, 21 N. Y. Supp. 801; *Brown* v. *Riggin*, 94 Ill. 560; *Godden* v. *Burke*, 35 La. Ann. 160; *Foot* v. *Stanton*, Deane & S. 19.

[69] Underhill, op. cit. p. 150, with citation of cases. See especially *Re Kahn*, 1 Connoly, 510, 5 N. Y. Supp. 556. The testator had delusions of persecution, believed that his daughter tried to poison him, and finally killed his wife and committed suicide. The will was set aside.

[70] *Frere* v. *Peacocke*, 1 Rob. Eccl. Rep. 442, in which Sir H. J. Fust delivered the opinion, often quoted in this connection.

[71] *Dew* v. *Clark*, 1 Addams, Eccl. Rep. 279

[72] *White* v. *Wilson*, 13 Ves. Jr. 88. In *Boardman* v. *Woodman*, 47 N. H. 137, Justice Sargent said: "Some injustice may possibly be done by the rigorous adoption of this principle, since delusion may certainly enter into a man's act . . . without one being always able to discover it; but, after all, it is, perhaps, the most equitable way of construing the last wishes of the dead." Hence the most equitable way is one which may work an injustice!

[73] *Den ex dem. Trumbull* v. *Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253. American cases in which the subject of moral insanity has been considered are *Lucas* v. *Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Florey* v. *Florey*, 24 Ala. 241; *Jenckes* v. *Probate Court*, 2 R. I. 255.

[74] *Boardman* v. *Woodman*, 47 N. H. 140. Justice Doe's opinion is discussed at length in the chapter on "The M'Naghten Rules in America" (*ante*, p.

New Hampshire, who said that the question is one of fact, for the jury, and not of law, for the court; that insanity is a condition in which the moral sentiments as well as the intellectual faculties are deranged; that delusion is not always the test of mental disease; and that moral insanity is a form of mental disease recognized by medical authorities. Justice Doe's dissenting opinion is not law; but it shows that a scientific attitude can be taken by judges. Badly disordered emotions, without good and apparent cause, should raise a presumption of unsound mind; and so they do in the ordinary walks of life as well as in science, if not in law. Whether it is possible for disordered emotions to exist without disordered ideas is not a mere academic question, for in this instance it is fraught with important issues. The present writer believes that it is not possible; in other words, disordered emotions are proof of disordered thoughts.[74½]

1189. Insane jealousy as proof of delusion.—Jealousy and suspicion are often evidences of insane delusions, although they are not always so. To determine this question is a problem in psychiatry, and perhaps a very delicate one. But certainly Underhill[75] goes too far when he states that the suspicion of marital infidelity, even when based on evidence of the flimsiest character, such as facts which are perfectly innocent in their bearing, against a wife of spotless character, is not an insane delusion. Some of the worst and most dangerous of insane delusions are these insubstantial suspicions of a

554). It was, in effect, a protest against legal tests for insanity, either in civil or in criminal cases. "Whether delusion is a symptom, or a test, of any mental disease, was also a question of fact; and the instructions given to the jury were erroneous in assuming it to be a question of law."

[74½] It has not been thought worth while in the text to go into the interminable subject of eccentricity as distinct from delusion. Legal writers make more of this subject than medical writers are apt to do, for the reason, apparently, that it seems more difficult to legal than to medical writers. Mr. Schouler (Wills, Part II. Chap. VIII.) attempts to make the distinction clear, and has many excellent illustrations, but his discussion will strike the practical alienist as being mainly of literary interest. The man who ordered his intestines to be made up into fiddle-strings may have been eccentric, or merely perverse, but he was not, because of that item in his will, suffering with an insane delusion, unless a direct connection could be traced between the item and such a delusion. In other words, ordering one's intestines to be made into fiddle-strings is not *per se* an insane delusion. So with most eccentricities, the distinction is usually not difficult; although it must be acknowledged that, here, as elsewhere in mental pathology, the gradations from health to disease are sometimes indistinct. The old lady who fed a multitude of cats, and the man who left his money to found a home for dogs, were not necessarily insane—at least, so far as the cats and dogs were concerned—and it seems like a waste of printers' ink to prove them legal testators.

[75] Wills, § 95. The lunatic referred to in the text had a trick of fastening feathers in the door and over the window-frames. If these feathers were dislodged during his absence, it was sure proof that his Penelope had been admitting her suitors into the house. "Trifles light as air are, to the jealous, confirmation strong as proof of holy writ."

wife's honor. In chronic alcoholism, and in some forms of paranoia, they are rife. Why should Underhill or any legal writer, unfamiliar with the insane, lay down rules for the incursions of insane jealousy? I have known a lunatic to spend all his days and a part of his nights endeavoring to find the "flimsiest evidence" of the amours of a wife who was absolutely above suspicion. To be sure, Underhill draws a distinction between a delusion *per se* and an erroneous belief founded on rumors. This may be a valid distinction in some cases, but not in all. Insane men are apt to distort rumors. Everything is grist to their mill.[76]

1190. Testamentary capacity in old age.—It is in old age, perhaps, that the question of testamentary capacity most frequently arises. The law is very jealous of the rights of aged testators.[76½] Every safeguard is thrown about these rights, and every presumption in favor of sanity to the last limit rises in their defense. To break through these presumptions, or prejudices, of the law, is well nigh impossible; because so long as a spark of memory and intelligence lingers, the court is able to see the evidence of a disposing mind. Even after a man has become incapable, because of mental infirmity, of making a contract, he may still, in the eyes of the law, be able to make his will. Although unfitted to buy or sell a village lot, he is deemed competent to devise millions of dollars worth of property. Although not able to make a lease for a year, he can make a will that will tie up property for three lives. For it has been generally held that a man may not have sufficient capacity to execute a valid contract (as signing a deed) and yet be capable of making a testament.[77]

To the alienist it may well seem in some cases an impossible task to make these fine distinctions with scientific accuracy. Hence, no alienist will approach this subject with the confidence with which it is sometimes treated in courts of law. The decisions are often arbitrary, and expressed in language which does not agree among the various judges.[78] And if it be contended that the motive of the courts (as is doubtless the case) is to preserve the rights of senile tes-

[76] See *Re Smith*, 53 N. Y. S. R. 658, 24 N. Y. Supp. 928.

[76½] Chancellor Kent has said: "The will of such an aged man ought to be regarded with great tenderness." (*Van Alst* v. *Hunter*, 5 Johns. Ch. 148.)

[77] Schouler, Wills, 2d ed. 67. Am. & Eng. Enc. Law, art. on "Testamentary Capacity." In *Thompson* v. *Kyner*, 65 Pa. 368, Chief Justice Thompson said that less capacity is sufficient to make a will than to transact ordinary business. See also *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58. In Maryland, however, the law is different. *Tyson* v. *Tyson*, 37 Md. 567. The subject is discussed also in the chapter on "Senile Insanity" (*ante*, p. 791).

[78] See *ante*, §§ 123–127.

tators, it may be answered that the rights of heirs-at-law (which are also supposed to be protected by the law) are sometimes sacrificed by a too nice regard for the obscure intentions of dotards. But no alienist will contend that science has an infallible rule by which these cases can be determined. Each case must be studied by itself, in the spirit with which a difficult diagnosis should always be approached. The subject has been discussed in the chapters on "Senile Insanity" (*ante,* p. 791) and "Aphasia" (*ante,* p. 806).

1190½. Undue influence.—We are told by good authority that the usual mode of attack on the will of an aged testator is by raising the issue of undue influence.[78a] Therefore it is important to understand what the law means by "undue influence." In the first place, then, the law means something more than mere "influence," for by most legal definitions the very essence of this thing is constraint. Undue influence is defined as "that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist."[78b] It may be either through threats or fraud, but however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made.[78c]

Undue influence is thus readily seen to have a much wider application than merely in mental diseases. Such influence can be exercised upon minds that are perfectly sane, and therefore this subject is not coextensive with the subject of testamentary capacity, or with any other subject purely of mental pathology. It is indeed a medico-legal question only within certain limits, and therefore requires only brief notice here. As a purely legal subject it has been greatly elaborated in courts of law, and could easily be made to cover many pages.[78d]

According to some authorities, undue influence presupposes testamentary capacity, but this capacity may be weak. And yet mere weak-mindedness is not necessarily implied in the legal idea of undue influence; in other words, the law recognizes that persons not of weak mind may, under some circumstances, succumb to undue influence through fear, violence, threats, etc.[78e] These are nice ques-

[78a] Chief Justice Thompson, in *Thompson* v. *Kyner*, 65 Pa. 368.

[78b] Schouler, Wills, 2d ed. § 227.

[78c] *Eckert* v. *Flowry*, 43 Pa. 46. And in *McMahon* v. *Ryan*, 20 Pa. 329, it was defined as a "present constraint operating on the mind of the testator in the very act of making the testament."

[78d] As to effect of old age coupled with undue influence, see *ante,* §§ 87–90.

[78e] "That undue influence which suffices to destroy an alleged will is distinct from weakness, and has no necessary connection with it." *McMahon* v. *Ryan*, 20 Pa. 329.

tions in psychology, and have led some legal writers to go to the other extreme, and claim that undue influence always presupposes some degree of weakness of mind. The present writer can only state, not solve, these fine problems.

It is evident, however, that the question of sanity or insanity must enter into a consideration of some of these questions of undue influence, especially when these questions arise in the cases of the wills of old or feeble-minded persons. In fact, from the purely scientific standpoint, the question then resolves itself into the other question of mental soundness; and although the law is able and obliged to make a distinction between these two issues (testamentary capacity, on the one hand, and undue influence, on the other), it will not often be necessary or even possible for scientists to do so.

The presumption of the law is apparently against undue influence in most given cases, but some authorities take a contrary view in mental cases, and claim that the burden of proof is on the party opposing the idea of such influence. In other words, undue influence is more readily presumed in a case of mental weakness than in a case of sound mind.[78f] Such would seem to be the teaching of science and of everyday experience.

In one case the question has arisen of undue influence having been exercised by hypnotism, but the decision was against this claim.[78g]

1191. A sound and disposing mind and memory.—The term commonly used in law to describe testamentary capacity is a "sound and disposing mind."[79] Sometimes the word "memory" is added. This is practically no definition, for it merely says that testamentary capacity means a sound mind. It is defining in a circle. It opens the whole question of sanity or insanity; and it leaves the problem where it found it. Moreover, the courts qualify the definition so variously that nothing much is left of it. Certainly a "sound mind" is not requisite to make a will, according to the usage of the courts. As we have already seen, a delusional lunatic may make a will; an imbecile may make a will; a delirious patient may make a will; an alcoholic paranoiac, with delusions of marital infidelity, may disinherit his wife or his child; a senile dement may dispose of his es-

[78f] *Walker* v. *Hunter*, 17 Ga. 413.

[78g] *Kingsbury* v. *Howard*, quoted by Glaister, Med. Jurisp. pp. 377, 378.

[79] Underhill (op. cit. § 87) says that this is the invariable language of the statutes.

tate; even a certified lunatic in an asylum may devise his property.[80] These persons have not "sound minds" even though they have "disposing" ones. Hence we must look farther for a definition.

1192. The legal definition of a sound and disposing mind.—The courts, enlarging upon the statutes, define about as follows: The testator must understand the nature of his business, the extent of his property, and the objects of his bounty. This is the legal tripod upon which stands the definition of testamentary capacity. But to determine, after a testator's death, whether he understood all these things, is practically to determine whether he was sane. The problem is only expressed in different language, except that it ignores the question whether the testator had delusions, for a delusional lunatic could understand all these things, and yet disinherit his whole family. There is nothing left, therefore, but to say that the determination of testamentary capacity is purely a matter of diagnosis, and usually one of the most difficult in psychiatry.

1193. A scientific definition of testamentary capacity not possible.—A definition of "testamentary capacity" is impossible, for the reason that the thing itself is not clearly conceived in the legal mind. It means one thing with one court[81] and another thing with another.[82] With some it is destroyed by a loss of memory; with others not.[83] With some it is the ability to transact a little business;[84] with others not even this.[85] With some it is not incompatible with a loss of practically the greater part of the mental faculties;[86] with others it is abolished by a single delusion;[87] while with some not even a delusion will abolish it, even though it lead to the disinheritance of an only child.[88] In fact, to the mind of a scientist, the tests for "testamen-

[80] Permission to do this has been granted by the Lord Chancellor in England. Redfield, Wills, Chap. III. § 4, Subsect. 20.

[81] *Thompson* v. *Kyner*, 65 Pa. 368. "What constitutes the want of a sound and disposing mind and memory is incapable of a definition suited to all cases."

[82] *Converse* v. *Converse*, 21 Vt. 168, 52 Am. Dec. 58. "Every man will have his own mode of expressing the thing."

[83] *Lowe* v. *Williamson*, 2 N. J. Eq. 82. A testator must have memory, but "his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted." This certainly is not a "sound memory." The testator, Lowe, past eighty, intemperate, broken down with age and drunkenness, had harbored an aversion to his family, and left all his estate to a stranger to his blood. The will was sustained.

[84] *Tyson* v. *Tyson*, 37 Md. 567. "The inquiry must always be whether, at the time of executing or acknowledging the will and testament, he was capable of executing a valid deed or contract."

[85] "It does not follow that one who is unable to conduct his ordinary affairs is lacking also in testamentary capacity." Underhill, op. cit. § 59.

[86] *Stewart* v. *Lispenard*, 26 Wend. 256.

[87] *Dew* v. *Clark*, 3 Addams, Eccl. Rep. 79.

[88] *Re Smith*, 53 N. Y. S. R. 658, 24 N. Y. Supp. 928. Smith was an inebriate

tary capacity," as given by the judges, are mostly arbitrary and unscientific. There is no rule about it, but every court applies the test in its own way. To quote the language of all the courts, even if space permitted, would not simplify, but rather confuse, the subject in these pages. References to cases are found in great abundance in text-books and encyclopedias; but this present work is not a digest.[89]

1194. Evidence of testamentary capacity.—The proof of testamentary capacity is a legal rather than a medico-legal question. Nevertheless, it is well for medical experts to know something about the rules governing such evidence. The law regards three classes of witnesses in these cases: First, the attesting witnesses to the will. These have always been given special credence, and may even give their opinions about testamentary capacity, without stating the grounds for them. However ignorant they may be, their opinions have sometimes been accepted even before those of experts. (See § 1168, *supra.*) Second, nonexperts, who had not attested the will. These were formerly ruled out altogether at common law, and their testimony is still received with many restrictions, although they are usually friends and acquaintances of exactly the same class and

with delusions of marital infidelity, and disinherited his only son and only child under the delusion that he was not his son. The testator had entertained this delusion for thirty years, continuing to live with his wife (as is so common with alcoholics in spite of this delusion). This unnatural will was sustained by Judge Vance in an opinion in which was much ill-contrived logic with little, if any, scientific knowledge. The delusion was never mentioned to anyone but to the wife and the priest, and was especially strong when the man was intoxicated. The court made a futile attempt to distinguish between an insane delusion and an erroneous belief founded on rumor.

The Roman law permitted children who were disinherited to contest the will, on the ground that the parent was insane, since it was not consistent with the duty of a parent thus to disinherit a child. Justinian, Institutes, Lib. II. Title XVIII. § 2.

[89] The cases which best reflect legal opinion are *Greenwood* v. *Greenwood*, 3 Curt. Eccl. Rep. 337, Appx.; *Dew* v. *Clark*, 3 Addams, Eccl. Rep. 79; *Waring* v. *Waring*, 6 Moore, P. C. C. 341, 12 Jur. 947; *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398. *Banks* v. *Goodfellow*, L. R. 5 Q. B. Div. 594, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813; *Ingram* v. *Wyatt*, 1 Hagg. Eccl. Rep. 384; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84, 49 L. J. Prob. N. S. 8, 28 Week. Rep. 703, 44 J. P. 220; *Dunham's Appeal*, 27 Conn. 192; *Stewart* v. *Lispenard*, 26 Wend. 256; *Delafield* v. *Parish*, 25 N. Y. 9; *Boardman* v. *Woodman*, 47 N. H. 120, and *Lowe* v. *Williamson*, 2 N. J. Eq. 82. These cases are recommended to medical readers especially. Legal students will require a wider range. Of text-books, Redfield on Wills is probably the best for the use of physicians.

Of medical writings the following are useful: Legrand du Saulle, Étude Médico-légale sur les Testaments Contestés pour Cause de Folie, Paris, 1879; also Traité de Méd. Légale, deuxième ed. Paris, 1886, p. 666; Bell, Medical Opinion in the Parish Will Case, N. Y. 1857; Beck, "On the State of Mind Necessary to Constitute a Valid Will. Case of Stewart v. Lispenard," in Am. Journ. Med. Sci. 1843, VI. p. 507; Chase, "Testamentary Capacity; a Protest, etc." in Univ. Med. Mag. 1890–91, Vol. III. p. 669; Mitchell, "Some of the Medico-legal Relations of Insanity to Will-making," in Edin. Med. Journ. 1872, Vol. XVII. pp. 673, 865, 1057. See Index-Catalogue, Vol. XVI. p. 472, art. on "Wills," for an extensive bibliography.

standing as the attesting witnesses, and in some cases their knowledge of the testator may even be more exact than that of the latter.[90] These nonexperts are usually required to state explicitly the grounds for their opinions, but not the opinions themselves.[90½] Third, expert witnesses, who may testify either from personal knowledge of the testator or upon a hypothetical question. The courts, however, will not, as a rule, permit even experts to give their opinions as to "testamentary capacity;" that is a question for the jury. The experts, however, may testify as to "mental soundness or unsoundness." This distinction is much insisted on by some courts and text-writers. The reasons for it are not always clearly expressed, but the rule serves to show that, in the opinion of the courts, the question of testamentary capacity is not the same as the question of mental soundness, and indirectly proves that a sound mind is not what is sought for in these cases, so much as that indefinable hypothetical condition called "testamentary capacity."[91]

[90] *Boardman* v. *Woodman*, 47 N. H. 120.

[90½] Where testimony is contradictory and confusing it has been held that collateral facts are better than parol evidence. See opinion by Tindal, C. J., in *Tatham* v. *Wright*, 2 Russ. & M. 20. Also *Towart* v. *Sellers*, 5 Dow P. C. 231.

[91] Consult Underhill, Wills, §§ 100, –102.

A very anomalous state of things has sometimes arisen in English practice. A will devising real and personal property, set aside in a trial at common law as to the real property, on the ground of insanity, may yet be good as to the personal property, unless declared invalid in the ecclesiastical court; and after a decision at common law against the will as to real property, chancery may order the personal property to be secured until the spiritual court shall have come to a determination upon the subject. This grew out of the different jurisdictions of the two courts as to the two kinds of property, and was thought by Lord Hardwicke to be "very absurd,"—an opinion in which most persons will agree with him. According to this practice a testator could be insane as to his real property and of sound mind as to his personal effects! Collinson. Lunacy, § 54.

Some of the legal presumptions with reference to wills do not seem, to a scientific mind, more reasonable than that curious old doctrine known as the "Presentment of Englishry." After the Norman conquest, if a man was found murdered, he was "presumed" by law to be a Frenchman until the contrary was proved, because many Norman French oppressors were assassinated. Monod and Bémont, Medieval Europe, p. 451. It is also explained by Bishop, Crim. Law, Bk. X. Chap. XXIII. § 623.

CHAPTER LVI.

THE CONTRACTS AND TORTS OF THE INSANE.

I. Contracts.

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1209. By law a lunatic is liable for his torts.
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I. Contracts.

1195. The ancient law.—According to the Roman law a madman could transact no business, because he did not know what he was doing.[1] Hence, as Coke[2] interpreted that code, all acts done by idiots or persons *non compotes mentis* without their tutors or guardians were utterly void. This was anciently the law also in England, for according to Bracton,[3] who copied Justinian almost *verbatim*, a madman could not trade or transact any business; and, according to Britton,[4] a man's contract ought not to hold if it was made when he was

[1] Justinian, Inst. Lib. III. Title XX. § 8: *Furiosus nullum negotium gerere potest, quia non intelligit quid agit.*

[2] *Beverley's Case*, 4 Coke. 124.

[3] De Legibus, Lib. III. fol. 100; *Furiosus autem stipulari non potest, nec aliquod negotium agere*, etc.

[4] 66*b*. Britton says that this is not the case with drunkards. 2d ed. London. 1640. Also the translation by Nichols. In this respect the modern law is more reasonable.

not in his right senses. But Coke also says that some persons criticized the English common law for not agreeing in this matter with the civil law; hence, it is evident that the common law in Coke's time no longer agreed with the Roman law in this matter.

1196. The doctrine of nonstultification.—In fact, there had grown up at some time in the common law a remarkable doctrine of nonstultification. This doctrine was stated by Littleton,[5] who said that no man was allowed to plead he was insane when a contract was in question, "for that no man of full age shall be received in any plea by the law to disable his own person." In other words, a man could not plead his own insanity to annul his obligations; but, as Littleton goes on to say, a man's heir could "disable the person of his ancestor for his own advantage." Consequently, the heir was not debarred from pleading his ancestor's insanity in order to avoid the consequences of that ancestor's obligations.

1197. This doctrine criticized.—This doctrine, that a man was not allowed to stultify himself, was fully recognized by the old common-law sages, such as Coke[6] and Hale,[7] who seem merely to have followed Littleton. Thus, Hale says that, according to the law of England, no man can avoid his own act by reason of insanity, though his heir or executor may do so. But this ancient rule of the common law, we are told by later writers, must now be considered as entirely exploded.[8] Blackstone,[9] indeed, is unsparing in his criticism of it, and says it rested originally on "loose authorities," dating back to the time of Edward III. One reason for it, as stated by the learned commentator, was highly characteristic of the legal way of looking at insanity, for it was asked how a man could remember his contract if out of his senses when he gave it? In other words, if a man remembered having given a contract, he could not have been insane! But although Blackstone and other writers tell us that this doctrine of nonstultification is no longer the law, it would not be difficult to show that similar ideas still linger in the courts. (See chapter on "Insanity and the Law," p. 504, *ante*.)[9½]

1198. The contracts of lunatics not always void.—Indeed, nothing could be further from the truth than to say, without qualification, that the contracts of lunatics are always void at common law. There are found so many exceptions to this ancient rule, and so many ways

[5] Co. Litt. Lib. III. Cap. VI. § 405.
[6] 1 Litt. 247.
[7] P. C. Chap. IV.
[8] American editor of Hale, P. C. loc. cit.: footnote, with many references to this maxim.
[9] 2 Com. 291, 292.
[9½] Pope (Law and Practice of Lunacy, 2d ed. Bk. II. Chap. I.) has subjected this whole subject to a very learned criticism.

of evading it, that the contrary is more likely to be the result in any given case. The subject, indeed, is not so simple as it looks; for it often involves grave questions of justice to other persons than the lunatic. A man may innocently bargain with an insane person; he may not know that the other party is insane; he may buy of him and sell to him; he may enter into contracts with him, and embark large sums of money or valuable goods; and he may engage in projects which cannot be revoked and everything be restored to its condition before the contract. If a man honestly does these things, or any of them, and is threatened with loss because the other party is declared technically insane, it seems far from just that he should be made to bear that loss. There are two sides to the case, therefore, and the courts have often had to decide nice questions in adjusting the claims of innocent parties against the insane. It is due to the courts to say that in deciding these cases a system of rules has been evolved by which, in the main, substantial justice is done. These rules will now be discussed briefly seriatim.

1199. A lunatic can contract for necessaries.—It is an old rule of the common law that a lunatic can contract for the necessaries of life. Idiots and persons *non compotes mentis* are often classed with infants as being allowed to contract for necessaries, and in being held liable under such contracts.[10] An executor of a lunatic has been held liable for necessaries furnished before a commission de lunatico had issued, and after such commission had issued and before the appointing of a committee;[11] but he would not be liable for improper articles furnished said lunatic. The question of what constitutes improper articles is for the court; and in the case of an English nobleman it was held that the hire of carriages suitable to his rank was a proper charge.[12] This rule is for the protection of lunatics, and is meant to insure to them the necessaries of life. It is therefore just; but it is, of course, in direct conflict with the principle that a lunatic can never contract. It opens the door very wide for many exceptions to that principle.[13]

1200. An exception based on the doctrine of torts.—Another important exception arises from the principle that a lunatic is liable

[10] *Manby* v. *Scott*, 1 Sid. Pt. 1, p. 109 (1659): "Et notre ley allow plusois persons de faire contracts in cases de necessity queux de lur mesmes sont disable." See also *Seaver* v. *Phelps*, 11 Pick. 304, 22 Am. Dec. 372.

[11] *La Rue* v. *Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700.

[12] *Baxter* v. *Portsmouth*, 2 Car. & P. 178, 7 Dowl. & R. 614, 5 Barn. & C. 170.

[13] In *Stuckey* v. *Mathes*, 24 Hun, 461, it was held of a marriage contract between a lunatic and a sane woman, to be not void, but voidable; that its validity could not be impeached collaterally in an action for the price of necessaries furnished to the wife.

for his torts. In other words, if a lunatic, even without malice (for in law a lunatic is presumed to be incapable of malice), causes damages by trespass or otherwise to an innocent party, he is held liable. It is but a short step from this doctrine to the conclusion that if the contract of a lunatic causes loss or damage to another person, he should pay for it. This is so even though the contract was not for necessaries. Most courts have not usually expressed the principle in this way, but some of them have done so. For instance, Chief Justice Redfield[14] held that in a supposed case in which the contract had been duly executed, and the lunatic had enjoyed the goods, and the conditions could not be restored as they were before the contract, the case should be considered as similar to one of torts; for the lunatic, having inflicted an injury, should be held liable.[15]

1201. The real question is often one of capacity.—In some of these cases the legal principles are saved in appearance only; while the real question in the mind of the court is merely a question of capacity (just as in the case of wills); and although the court acknowledges the general principle that a lunatic cannot contract, yet, in the particular case of A. B. it is practically decided that he is not a lunatic in that sense. This opening of the whole question of capacity gives ample opportunity for declaring that an alleged lunatic was capable of making a contract so long as he understood the nature of the act.[15½] In other words, it becomes a question, not of scientific diagnosis, but of legal definition. Thus, in a case in which an alleged lunatic was sued on a promissory note which had been discounted in his favor, the decision was against him, but neither on the principle of torts nor of necessaries.[16] The court evidently held that the defendant had capacity to understand what he was doing, in spite of the fact that he was technically a lunatic. The finding of a commission de lunatico is only prima facie evidence of insanity in these cases. The old principle that a man shall not be allowed to stultify himself in

[14] *Lincoln* v. *Buckmaster*, 32 Vt. 652, Judge Redfield also said: "It is evident, from a careful examination of the decided cases, that the law is not fully settled as to the extent of the liability of lunatics, arising out of contracts."

[15] In *Beals* v. *See*, 10 Pa. 56. 49 Am. Dec. 573. it was held by Chief Justice Gibson that "as an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it." This was a suit to recover the value of certain goods purchased of a lunatic by the defendant, and paid for in other goods, charged at exorbitant rates.

[15½] In the case of Professor Shortlidge, who had killed his wife, and had been acquitted on the ground of insanity, the court, in Media, Pa., recently held that an assignment of a life-insurance policy, made by Shortlidge while he was a patient in the Norristown Hospital for the Insane, was valid.

[16] *Lancaster County Nat. Bank*, v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24.

order to avoid his obligations, while not expressed in so many words, was closely followed.

1202. The question of fraud.—The courts have usually laid stress upon the question whether the party contracting with a lunatic knew that he was a person of unsound mind.[17] Therefore upon the question of fraud; for if it appears that a person, knowing another to be *non compos,* took an unfair advantage of him in a trade, the court would not be likely to sustain his suit.[18] If, however, the contract was fair to the lunatic, the result might be different, especially if the contract had been executed, and the conditions could not be restored as they were.[19]

The courts cannot perform impossibilities, and undo things that have been done, as in a case where, without fraud, a contract has been executed, and the insane person has had the full worth of his money.[19½]

Thus, a court of equity will not interfere to set aside a contract, overreached by an inquisition of lunacy, if fair, and without notice of the insanity, especially when the parties cannot be reinstated.[20] The court might even find that the alleged lunatic was acting in a "lucid interval" when he bought the goods. Thus, the delicate question of a lunatic contracting is avoided by the convenient fiction of a lucid interval,—a fiction which can do service in these cases as well as in others.[20½]

[17] Byles, Bills, 63. A person cannot set up his own insanity unless it was known to the other party.

[18] A security obtained by a Methodist preacher from a woman who was in a state of religious delusion was set aside by Lord Chancellor Northington. *Norton* v. *Relly,* 2 Eden, 286. It was set aside apparently on the ground of fraud. The opinion of the Lord Chancellor is particularly spicy in its observations on spiritual advisers who obtain money by undue influence. "Men who go about in the Apostles' language, and creep into peoples' dwellings, deluding weak women; men who go about and diffuse their rant, etc. . . . And shall it be said that this court cannot relieve against the glaring impositions of these men?"

[19] The law distinguishes in these cases between an "executed" and an "executory" contract. The latter differs from the former in that nothing has yet been done, and the parties stand in the same position as when the contract was made. The courts can more readily annul an executory contract of a lunatic than one that has been executed. See *Cook* v. *Parker,* 4 Phila. 265.

[19½] 2 Greenl. Ev. 16th ed. § 369. In a footnote it is said that the distinction between executed and executory contracts is "of little or no value." "Insanity is no defense in an action on a contract unless the other party knew, or had reason to know, of the insanity." Cases cited are *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. 599, 61 L. J. Q. B. N. S. 449, 66 L. T. N. S. 556, 56 J. P. 436; *Creekmore* v. *Baxter,* 121 N. C. 31, 27 S. E. 994.

[20] *Niell* v. *Morley,* 9 Ves. Jr. 478. In this case the plaintiff bought large quantities of goods at a public auction, paying large sums. He acted so strangely that some one present told the auctioneer he was crazy. He was afterwards found to be a lunatic by a commission. The Master of the Rolls declined to interfere, but said Niell had a remedy at common law. Niel was probably a general paretic.

[20½] Bracton (De Legibus, fols. 420,

1203. The modern view.—Therefore, from a careful sifting of judicial opinion, it seems that the modern view is clear. It was expressed by Chief Baron Pollock[21] in a leading case, to wit: that unsoundness of mind is a good defense to an action upon a contract, but only in case it can be shown "that the defendant was not of capacity to contract, and the plaintiff knew it." What is this but a clear statement that, after all, the question turns upon the matter of "capacity?" That same eminent judge expressed it even more plainly when he said that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo,* such contract cannot afterwards be set aside.

In other words, the court supposes that an alleged lunatic who makes a reasonable, bona fide contract, and enjoys the advantages of it, is, by that very fact, proved to be competent, and does not fall within the legal definition of a *non compos,* whose contracts are necessarily void. It is practically the same thing as in the matter of wills; for the law holds that one of the strongest proofs that a man has testamentary capacity is that he makes a reasonable will. The two cases are exactly on a level, although legal writers are not in the habit of saying so.[22]

1204. The test of capacity.—This being so, it seems useless to discuss, as lawyers are wont to do, with so much learning and nicety, the old legal principles involved, for they are often not involved at all; since the courts decide these cases merely on the question of the person's capacity. Thus, if it be shown that there was no fraud, and that the other party had no idea that the alleged lunatic was *non compos,* and the whole transaction was in good faith, and reasonable, and the contract executed, it is taken as evidence that the alleged lunatic knew what he was about, and the contract is sustained. This has

421) says: "But what has been transacted with such persons at a time when they enjoy lucid intervals shall be ratified." This is a very early statement of this doctrine in this connection.

[21] *Molton* v. *Camroux,* 2 Exch. 487. This is a standard case, teeming with references. Gurney, for the defendant, claimed that there is no case in which an executed contract of a lunatic, made for valuable consideration, and without notice of fraud, has been held void.

[22] In the case of *Dane* v. *Kirkwall,* 8 Car. & P. 679, the court charged: "It is not sufficient that . . . Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it;" and in the case of *Brown* v. *Jodrell,* 3 Car. & P. 30, Moody & M. 105, Lord Tenterden said: "I think the defense (unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant." In other words, if the lunatic was not imposed on, that fact proves capacity.

been the almost universal rule; and to the mind of an alienist it seems clear that it is merely avoiding the old principle, *e. g.*, that a lunatic cannot contract, in favor of the law described by Coke and by Hale,—that a man is not to be allowed to stultify himself in order to avoid his obligations.

In case this rule ever works a hardship, the friends of the insane person may reflect that they have themselves largely to thank for it in not having taken measures to prevent the lunatic from thus entering into a contract. Cases sometimes occur, as in general pareties, in which extravagant and foolish purchases are made. Such a case is referred to elsewhere of a general paretic who purchased in one day a large number of pianos, and sent them home; or of another who bought a wagon-load of snow-shovels. In such a case, as the property could be restored, the courts might possibly decide that the insane person was not liable, the purchases being unreasonable and clear evidence of a want of capacity.[23] So in cases of contracts which have not been executed; the courts may decide on the principle that a lunatic cannot contract.

1205. Drunkenness avoids a contract.—Drunkenness has the same affect as lunacy in avoiding a contract. It was formerly argued that drunkenness in itself is a crime, and cannot be urged as an excuse for other crimes or for avoiding a civil contract.[24] But that rule is now relaxed, as is also the rule that, to make drunkenness a defense, it must be shown to have been brought about by the fraud or contrivance of the other party. The modern rule is that drunkenness frees from liability for contracts, but the degree of intoxication must have been sufficient to render a man incapable of knowing what he was doing. Hence the test here, too, is one of capacity. Baron Parke thus held, as also that a person who takes an obligation from another under such circumstances is guilty of actual fraud; and Baron Alderson, in the same case, said: "It is just the same as if the de-

[23] *Lincoln* v. *Buckmaster*, 32 Vt. 652, was such a case, the insane person having purchased a large number of horses at exorbitant rates, without previous experience in such business. He was probably in the early stage of general paresis. The court decided in his favor. It was also held that a lunatic may sometimes be incapable of contracting even if his infirmity is not known to the other party,—a most important opinion as concerns general paretics.

[24] *Beverley's Case*, 4 Coke, 123*b*. Also, in an old case, *Johnson* v. *Medlicott*, 3 P. Wms. 130, note, it is written: "The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances, for this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the deed, the party from whom such deed has been gained was drawn into drink."

fendant had written his name upon the bill in his sleep, or in a state of somnambulism." [25]

1206. The conveyances of the insane.—It seems that, by the common law, a deed made by a *non compos* is voidable, and not void.[25½] At least, this opinion is based on high authority.[26] But, according to another authority, the deed of a *non compos* was not merely voidable, but void.[27] Whichever of these opinions we take, it is evident that the law is not satisfied with the deed of a lunatic. In fact, a lunatic's conveyance is absolutely void in Pennsylvania,[28] and doubtless in other states. A person may avoid his deed by proof that he was *non compos* at the time of its execution.[29]

1207. The proof of unsound mind in such cases.—But in this connection it is important to consider what constitutes proof of lunacy, or that one is *non compos mentis*. It is all very well to say that the deed of a lunatic is void; but the mere declaration of that principle will not upset the title to real estate as readily as might be supposed. The opinions of the courts as to what constitutes an unsound mind in such cases may differ widely from the opinions of scientists; and, just as in the case of wills and of contracts, so here: the question of capacity will be uppermost in the minds of the courts. A person very far from being of sound mind can make a will if he is deemed to have "testamentary capacity;" and so a person very far from being sane may make a deed, if the court is satisfied that he knew what he was doing.

1208. The finding of a commission is only prima facie evidence.—

[25] *Gore* v. *Gibson*, 13 Mees. & W. 623, 14 L. J. Exch. N. S. 151, 9 Jur. 140. This is a leading case on the subject of drunkenness. The defendant, while drunk, had indorsed a bill of exchange. The authorities have also been collected in Kent's Commentaries, Vol. II. p. 451. *Barrett* v. *Buxton*, 2 Atk. (Vt.) 167, 16 Am. Dec. 691, is an early American case in which the older authorities are examined. See also Kerr, Inebriety or Narcomania, Chaps. XXVII. and XXVIII. for a full discussion, with citation of many authorities in England and America, up to a very recent date.

[25½] The distinction between "void" and "voidable" is often made by legal writers, but it is not always clear. The two words contain much the same fundamental idea. If a contract (such as a marriage or a deed) is "voidable," it must be because it is essentially "void." Thus the marriage of a child under the legal age is said to be "void," just as is the contract of a lunatic; but, under conceivable circumstances, such a marriage could only be avoided on proof by a trial at law; hence it would be "voidable." All results flowing from such a "void" marriage are said to be illegal, or nonlegal; hence children born of such a union are illegitimate; but this might be a difficult rule to apply in case of executed contracts, and especially in the case of some of the contracts of lunatics, and yet all contracts of lunatics are, in the theory of the law, "void." "These are words of very uncertain meaning," says Markby (Elements of Law, § 274), and he criticizes them in somewhat the same way as is done here. But see *Arnold* v. *Richmond Iron Works*, 1 Gray, 437.

[26] 2 Kent, Com. p. 451; 2 Bl. Com. 291.

[27] *Thompson* v. *Leach*, 3 Mod. 301.

[28] 9 Pepper & Lewis, Digest, 14,492.

[29] *Crawford* v. *Scovell*, 94 Pa. 48, 39 Am. Rep. 766.

This is shown by the estimation in which the finding of a commission de lunatico inquirendo is held by the courts as proof of a person being *non compos*. As is well known, these findings often reach backward over a considerable period of time. Thus, a man may be found to have been *non compos* from a date far anterior to the date of the commission. In such a case the finding might overreach the making of a contract or the execution of a deed; in other words, it might supposably upset contracts and titles to real estate. For instance, if a man gives a deed in June, and is found in September, by a commission de lunatico, to have been *non compos* since March, he becomes technically, in the eye of the law, incapable of making a deed; and that incapacity extends back beyond and includes the date upon which his deed was given.[30] But in all civil suits (just as in criminal ones) the courts regard such findings of a commission as only prima facie evidence of unsoundness, and hold that these findings can be rebutted by proof.[31] Hence, the mere fact that a man is technically of unsound mind is not enough to upset his contracts or his conveyances.[31½] The question must be threshed out in a trial at common law; and, whatever the legal principles may be, the decision will depend largely on the question of capacity.[32] This proof of capacity, as we have already said, follows similar lines to those laid down in the case of wills; although, in some states, less capacity is required to make a will than to make a deed. (*Ante*, § 1190, note 77.)

It is true that in Pennsylvania a person who has been found *non compos* by inquisition is thereby conclusively rendered incompetent to enter into a subsequent contract which will bind his real estate.[33] The statute contemplates a complete transfer of his property to the custody of the law; and the committee is substituted for the lunatic or habitual drunkard, and a lucid interval can avail nothing, for the

[30] In *Re Whittaker*, 4 Myl. & C. 441, 8 L. J. Ch. N. S. 313, 3 Jur. 693, a wife opposed the carrying of an inquisition back to a certain date, upon which her husband, the alleged lunatic, had made his will.

[31] *Bowman* v. *Van Baum*, 17 Phila. 633; *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24; 9 Pepper & Lewis, Digest, 14492. This work gives in great abundance the rulings of the courts as to the conveyances of the insane.

[31½] An inquisition overreaching a contract is admissible evidence, but by no means conclusive. Lord Ellenborough, in *Faulder* v. *Silk*, 3 Campb. 126. But in *Leonard* v. *Leonard*, 14 Pick. 280, it was held that the appointment of a guardian for a lunatic was conclusive evidence of insanity, and money paid to the lunatic on a promissory note was not a discharge of the debt. Thus there are conflicting views. Pope (Lunacy, 2d ed. London, 1892, pp. 428, 429) states the law in a series of formulæ.

[32] In some circumstances, also, the finding of the inquisition can be traversed by parties interested in proving that the alleged *non compos* was competent at the time of executing a deed. *Gensemer's Estate*, 170 Pa. 96, 32 Atl. 561.

[33] 9 Pepper & Lewis, op. cit. 14,485.

non compos has nothing in respect to which to contract.[34] Nevertheless, the inquisition and retrospective finding are only prima facie evidence of incapacity, and may, in turn, be rebutted by evidence that the nonsane party was sane at the very time of contracting.[35] Such is the flexibility of the law in this matter of the contracts and deeds of insane persons: the principles are rigid, but the application of them is not always uniform.[36]

II. Torts.

1209. By law a lunatic is liable for his torts.—This means that he is liable for damages by trespass or negligence which he may commit. "Insanity is no defense to actions for those torts in which a wrongful and malicious intent is not an essential element."[37] The element of intent or malice is important, for, in the eyes of the law, an insane man cannot have a criminal intent, and therefore he is not held responsible for crime; but, in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the

[34] *Tozer* v. *Saturlee*, 3 Grant, Cas. 162.

[35] 9 Pepper & Lewis, op. cit. 14,490.

[36] The decisions of the courts do not seem to have been uniform with reference to the proof of unsoundness of mind in cases of deeds and contracts. There is a learned note on the subject by the American editor of Byles, Bills, 8th ed. 63. The finding of a commission de lunatico is full proof until overpowered. (*Rogers* v. *Walker*, 6 Pa. 371, 47 Am. Dec. 470.) But the acts of a lunatic before office found are not void, but voidable (*Jackson ex dem. Merritt* v. *Gumaer*, 2 Cow. 552); after office found they are void (*Pearl* v. *M'Dowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199). The fact that the proof follows, in the main, the presumptions, as in the case of wills, seems clear, except for the *onus probandi* being put on the proponent of the will.

It has, however, been decided (*Cook* v. *Parker*, 4 Phila. 265) that a mortgage by a lunatic is voidable, and cannot be enforced against him, even when the delusion under which he is laboring is confined to one class of subjects, and does not impair his power of transacting business. This is quite the reverse of the rule in cases of wills, and is a very exceptional opinion. Its effect would be to allow a monomaniac, with a few systematized delusions, to mortgage his property, obtain the money, spend it, and then be absolved from all obligation, and his property be free. Needless to say, few courts will uphold such a doctrine. This case also illustrates how some courts have had in mind to draw a distinction between contracts affecting real and those affecting personal property. At common law a lunatic cannot bind himself by sealing and delivery. Again, an exception seems to be made of matters of record. But, as Judge Hare said, the whole subject is a difficult one. In *Bensell* v. *Chancellor*, 5 Whart. 371, 34 Am. Dec. 561, it was said: A grantor "may avoid his acts, except those of record and contracts for necessaries, . . . by allegation and proof of insanity." It is hard to see why an exception should be made of acts of record if the party was really incompetent. Moreover, the finding of a commission de lunatico is a matter of record, and yet, as we have seen, such a finding is held to be only prima facie evidence. See also *Lancaster County Nat. Bank* v. *Moore*, 78 Pa. 407, 21 Am. Rep. 24.

[37] See *ante*, §§ 264–275.

same as a sane person.[38] But he is only liable for compensatory, not for punitive, damages.

1210. The principle underlying this law.—The principle involved is that when a loss must be borne by one of two innocent persons, it shall be borne by him who occasions it. This is essentially just, for it is not right that an innocent person should suffer loss through the insane conduct of another. It may seem, at first thought, unreasonable to hold an insane person responsible for anything,—his torts any more than his crimes; but a moment's reflection must convince a fair-minded critic that if a lunatic does an injury, and is able to pay for it, he should be obliged to do so.[39] Why should an innocent party suffer the loss of an eye from the assault of a madman, or have his house burned down by a delusional lunatic, and not receive compensation, if the insane person's estate can afford it?

If this seems to work a hardship, let the friends of the patient, as already said, thank themselves for their lack of oversight. The moral responsibility, at least, is on them in the majority of such cases. In fact, salutary lessons are sometimes needed by the friends of the insane for disregard of medical advice and ordinary prudence in letting these patients be at large. It is true the friends are not mulcted, but the next worst thing for them is doubtless to have their insane relative mulcted. But perhaps a more ethical statement would be that the insane person himself, if ever restored to his reason, would approve the rule which had obliged him to pay for an injury which he had done when not in his right mind. The law, in this case, acts as the custodian of his conscience.[40]

1211. Illustrative cases.—There are not a few cases which illustrate the law on this subject. An insane man threw vitriol in the face of another person, destroying one eye, and was acquitted in a

[38] In *Haycraft* v. *Creasy*, 2 East, 92, 6 Revised Rep. 380, it was said: "There was a distinction . . . between answering *civiliter* or *criminaliter* for acts injurious to others: in the latter case the maxim applies *actus non facit reum nisi mens sit rea;* but it was otherwise in civil actions, where the intent was immaterial, if the act done were injurious to another."

[39] Hoffbauer, quoted by Ray (Med. Jur. of Insanity, p. 294), strenuously opposed this doctrine. If a patient is "so deranged that he is no longer master of his actions, he is under no responsibility, nor obliged to make reparation for injuries." But this is not good Anglo-American law, whatever it may be on the continent.

And according to Casper (Forensic Medicine, Vol. IV. p. 99, translated by Balfour, London, 1865), it is not good law in Prussia. He quotes the Gen. Common Law, Part I. Tit. VI. § 41.

[40] The law itself is stated in Coke on Litt. 247, 289; 2 Inst. 284, 414; 1 Hale, P. C. 15, 16; Hawk. P. C. Chap. I. § 5. Hawkins says: "If one who wants discretion commit a trespass against the person or possession of another, he shall be compelled, in a civil action, to give satisfaction for the damage."

criminal trial, on the ground of insanity; but, in a civil suit for damages, the court charged against him, and the jury rendered a verdict of $3,700 for the plaintiff.[41] In a case in which an insane man set fire to his own barn, the verdict was in favor of the insurance company, which resisted payment.[42] An insane person has been held civilly liable for an injury caused by a defective doorstep on property of which he was the owner.[43] On the other hand, the master of a sailing vessel, who was alleged to have become insane as a result of trying to save his ship in a terrible storm, was held not liable for the consequences of negligence caused by such insanity.[44] A very tragic case was that in which $2,800 was recovered from an insane man for killing another in a paroxysm of maniacal excitement.[45]

1212. Slander.—In the matter of slander, it has been held that insanity may be shown in mitigation of damages; and where the insanity is so great and notorious that the speaking of the words by the insane person would have no effect on the hearers, it will afford a complete defense.[46]

[41] *Shepard* v. *Wood*, 1 Lanc. L. Rev. 175. Judge Hare in this case said that there was no case reported in Pennsylvania that satisfactorily decided the point involved.

[42] *Mutual F. Ins. Co.* v. *Showalter*, 40 W. N. C. 80.

[43] *Morain* v. *Devlin*, 132 Mass. 87, 42 Am. Rep. 423.

[44] *Williams* v. *Hays*, 157 N. Y. 541, 43 L. R. A. 253, 68 Am. St. Rep. 797, 52 N. E. 589, reversing the lower court (Justice Bartlett dissenting).

[45] Am. Journ. of Insan. 1849–1850, Vol. VI. pp. 92–95.

[46] See *ante*, 264.

CHAPTER LVII.

THE TRIAL OF THE INSANE FOR CRIMES

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I. In general.

1213. The humane principles of the common law.—It has well been said by an eminent writer on the medical jurisprudence of insanity[1] that the disabilities imposed by the common law on the insane, both in criminal and civil matters, are founded in the most humane and enlightened views, and have for their object the promotion of the highest welfare of this unfortunate class. This was saying much on the part of a writer who was noted as a rather severe critic of the courts. Ray's criticisms were not so much directed against the

[1] Ray, Med. Jur. of Ins. 5th ed. p. 294.

principles of the common law as against the methods of judicial procedure by which those principles were applied, or misapplied. In the present chapter we shall examine briefly the principles and methods of the common law as relating to the trial of persons of unsound mind. And we shall premise that we are in accord with Ray in our admiration of those principles, with some few exceptions, to be noted.[2]

1214. An insane person is exempt from trial.—It was a part of the old common law that an insane person was not only exempt from the penalties of crime, but also that he should not even be put on trial for his alleged crime so long as his insanity endured. There is no possibility of denying this statement. All that the law demanded was clear proof of the insanity; that proof being furnished, it followed, as a matter of course, that the madman was not to be subjected to a trial at law. However far the later courts may have deviated from this rule, the rule itself is clear and unmistakable.

Coke[3] says: "If a man commit treason or felony and confesseth the same, or be thereof otherwise convict,[4] if afterward he become de non sane memorie (*qui patitur exilium mentis*) he shall not be called to answer; or, if after judgment he become de non sane memorie, he shall not be executed, for it cannot be an example to others." Coke was here commenting on the statute of treason (25 Ed. III.) which has ever been held by English lawyers to be the safeguard of the citizen against arbitrary and tyrannical trials for that offense. But a later statute, 33 Hen. VIII., chap. 20, had provided that if a person, being of sound mind, should commit high treason, and afterwards fall into madness, he might be tried in his absence, and executed as if he were sane.[5] This infamous statute, so abhorrent to the equitable spirit of the common law, has been condemned by all the best authorities,[6] and was repealed even in the reign of Bloody Mary by the statute 1 & 2 Philip and Mary, chap. 10. It so roused the ire of Coke that he said that this "cruel and inhuman law lived not long, but was repealed; for in that point also it was against

[2] The common law has been defined as the perfection of human reason. It has seemed to the present writer that not a few of its wisest maxims on the subject of insanity it owes to the Roman law. Some of the definitions of Bracton (as shown elsewhere) are in almost the exact wording of Justinian. This fact, however, does not detract from its excellence.

[3] 3 Inst. 4.

[4] It does not appear from Coke how he would be "otherwise convict" before his trial.

[5] The object of this law was "to avoid all sinister, counterfeit, and false practices and imaginations that may be used for excuse of punishment of high treason." This was the sixteenth century way of describing the shamming of insanity.

[6] 4 Bl. Com. 25.

the common law, because, by intendment of law, the execution of the offender is for example, *ut pœna ad paucos, metus ad omnes perveniat,* . . . but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." There is no mistaking this terse and clear language of the great jurist.[7]

Sir Matthew Hale[8] is even more explicit. If a man of sound memory, says Hale, commits a capital offense, and, before his arraignment, becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. The reason given is because he cannot advisedly plead to his indictment. And this holds even though the delinquent, in his sound mind, had confessed the offense before his arraignment. And if such a person, after his plea, and before his trial, become insane, he shall not be tried; or if after his trial he become insane, he shall not receive judgment; or if after judgment he become insane, his execution shall be spared; for were he of "sound memory," he might allege somewhat in stay of judgment and execution.[9] In this passage Hale has reference merely to the question of present insanity, or insanity at the time of trial. And in a following passage he says that "if a person of non sane memorie commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the King's grace to pardon him."

Thus precise and careful was the common law at every stage of the legal procedure, and thus it contemplated an immediate suspension at every step in favor of an insane man. From the moment of his indictment to the very moment of his execution, the proof of insanity was admissible to stay the proceedings; and this was so whether the

[7] Coke's wrath was easily roused in defense of the common law against acts of Parliament (Pollock, First Book of Jurisprudence, p. 250). As Lord Chief Justice he was practically forced off the King's Bench by James I. because he would not serve that monarch with satisfactory opinions. See Foss, Lives of the Judges, for an interesting sketch of his life. Whatever may have been the infirmities of his character, he had a rugged strength and independence that call for admiration. When his successor, the new chief justice, sent to Coke to purchase his collar of S. S., Coke returned for answer, that "he would not part with it, but leave it to his posterity, that they might one day know they had a chief justice to their ancestor."—Disraeli, Curiosities of Literature, Vol. III. p. 290.

[8] 1 P. C. 34, 35.

[9] See also 4 Bl. Com. 24, 395, 396; 1 Hawk. P. C. Chap. I. § 3; 1 Chitty, Crim. Law, 761. Chitty takes pains to tell us that the reason for this lenity is not that an insane man is not a fit object of punishment, but for the merely technical reason that he is incapable of saying anything in bar of execution, or of assigning any error of judgment. This is a slightly different logic from that which held in civil cases, that a man should not be allowed to stultify himself by alleging his own lunacy. Here it is just the reverse.

prisoner was sane or insane when he committed the deed. It is safe to say that never was another code devised by man that threw such safeguards about the person of a lunatic.

1215. Methods for determining the question.—There were several methods for determining this question at common law. First, it might be tried by inspection of the court, and the judge, in his discretion, might discharge the jury, and remit the prisoner to gaol, to be tried after the recovery of his understanding. Second, it might be tried by the jury charged to try the indictment. Third, being a collateral issue, the fact might be pleaded *ore tenus,* and a venire awarded, returnable instanter, in the nature of an inquest of office; in this case the sheriff called a special jury. This latter method is regarded by Hale as the more prudent course in such cases.[10] These methods are preliminary to and independent of the trial itself on the plea of not guilty, and do not interfere with the defense of insanity in case that trial afterwards proceeds. It is to be noted also that this preliminary trial has to do simply with the question of present insanity,—*i. e.,* insanity at the time of the inquiry,—and the bearing of the present insanity upon the question of insanity at the time of the *factum,* or crime itself, is another matter.[10½]

1216. Statutory law on the subject.—These rules of the common law have been embodied in statutes both in England and America. Thus, by statute 39 & 40 Geo. III., chap. 94, § 2, it is provided that when an insane man is indicted, and cannot be tried on account of his insanity, and the insanity is found by a jury impaneled for that purpose, he is to be confined during his Majesty's pleasure. In New York the law reads: "No insane person can be tried, sentenced to any punishment, or punished for any crime or offense while he continues in that state."[11] In Pennsylvania the law is stated in almost the exact language of the English statute.[12] Other states have similar statutes.[13]

1217. No certainty about the application of these laws.—But while these rules of the common law are so admirably contrived in theory

[10] 1 Hale, P. C. 33, 35, 36; Fitzherbert, Nat. Brev. 517; 3 Bacon, Abr. 81; 1 Hawk. P. C. Chap. I. § 4, footnote; Foster, C. L. 46; 1 Wharton, Crim. Law, 10th ed. § 58.

[10½] Hale clearly indicates in a separate passage (1 P. C. 33) how the question of insanity at the time of the crime is to be tried: "Upon his plea of not guilty, by the jury, upon his arraignment."

[11] 4 Rev. Stat. Chap. I. title VII. § 2.

[12] Act of June 13, 1836, §§ 58, 59, P. L. 603, and again in act of March 30, 1860, §§ 66, 67.

[13] An abstract of the laws of the several American states, by Dr. Folsom and Mr. Bailey, is published as an appendix to the American edition of Clouston's Lectures on Mental Diseases. See also the digest by Macdonald in Haines and Peterson's Legal Med.

to protect the insane, there is no certainty in any case that they will be put in practice. This matter is left entirely to the discretion of the court. The judge has absolute power to determine off-hand whether the case is one that warrants the favor of a preliminary inquiry. There is no appeal from his decision in this matter in some jurisdictions.[14] The existence of the doubt as to the prisoner's insanity at the time of trial is a matter to be determined by the court itself. Up to the time of pleading there is no other tribunal that has the prisoner in charge, and can say whether there is a doubt upon the subject. It is one of the functions which must be intrusted to the court, and the law presumes that it will not be abused.[15] But this presumption of the law is not always justified by the facts, for cases have occurred in which trial judges have used a most arbitrary power in refusing the preliminary trial which is contemplated by the common law. Judges have swept aside such requests without taking proper pains to determine whether the facts warranted such a preliminary trial; and have thus defeated the wise provisions of the law. But this has not always been the case, as the records in England and America amply show.

1218. The proper test of insanity in these cases.—The test of insanity in these preliminary trials is not the knowledge of right and wrong, but the ability of the prisoner to understand the details of the trial. Herein, again, the law accommodates itself to the infirmity of the accused. In the case of a deaf and dumb idiot,[16] charged with a capital felony, an English judge, Baron Alderson, ordered a special jury to be impaneled to try whether he was mute by malice or by the visitation of God; the jury found the latter. They were then sworn to try whether he was able to plead; the jury found that he was able, and the prisoner, by a sign, pleaded not guilty.

[14] *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216.

[15] *Webber* v. *Com.* 119 Pa. 223, 237, 4 Am. St. Rep. 634, 13 Atl. 427.

[16] *Rex* v. *Pritchard*, 7 Car. & P. 303. See also 1 Hawk. P. C. Chap. I. § 4. The same kind of a case was that of *Rex* v. *Dyson*, 7 Car. & P. 305, in which a deaf and dumb woman was charged with murdering her bastard child. A special jury, under direction of Justice Parke, found her not sane because not able to understand the proceedings in court. In case a prisoner stands mute, as in *Reg.* v. *Israel*, 2 Cox, C. C. 263, a jury must be impaneled to try the question of malice; and it is only upon their finding in the affirmative that the court is authorized to enter a plea of not guilty. These cases of obstinate mutism were provided for in statute 7 & 8 Geo. IV. chap. 28, § 2, except that the statute did not provide how the question was to be determined; and the court, in the above case, decided that it could only be done by a special jury. It is equivalent to a trial of the question of insanity.

In *Com.* v. *Braley*, 1 Mass. 103, it was held that if a special jury, impaneled for the purpose, finds that a prisoner neglects to plead by the visitation of God, the court will not proceed to try him upon the indictment. The jury so found, and the prisoner was remanded to jail.

The jury were then sworn for the third time to try whether the prisoner was then sane, and the court directed the jury to consider whether the prisoner had sufficient intelligence to comprehend the course of the pleadings, so as to make a proper defense, to challenge any juror, and to comprehend the evidence, and if not, to find him not of sane mind. The jury found him not of sane mind, and the judge ordered him detained, under the statute 39 & 40 Geo. III., chap. 74, § 2. The decision in this case was strictly in accord with the letter and spirit of the old common law.[16½] The *non compos* was not obliged to stand trial for his alleged crime. The same points have been determined in an American case,[17] in which it was held to be error for the jury, in a preliminary trial, to find the prisoner competent to stand trial because he was able to distinguish right and wrong. The real question was held to be whether he was competent to make his defense. If not, he was insane within the meaning of the law, and should not even have been arraigned.[18]

1219. The proper question to be tried.—The distinction between the question of insanity at the time of trial and the question of insanity at the time of the alleged crime is clearly indicated in these cases. The preliminary trial is to determine the former question alone. This is plainly stated, as we have seen, by Hale, who recognizes that a *compos mentis* might commit a crime and afterwards become insane before trial. This is not a common occurrence, but its possibility is contemplated by the law. This was stated by Lord Kenyon,[19] who, when he granted a preliminary trial, said it was not necessary to inquire what effect the present insanity, *i. e.,* insanity at the time of trial, might have on the question of insanity at the time of the act. The law keeps these two questions entirely apart, and

[16½] Blackstone (4 Com. 324, 325) states the law rather differently, for he says that if a jury impaneled for the purpose find the accused mute *ex visitatione Dei*, "the judges of the court . . . shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner who hath never pleaded and can say nothing in arrest of judgment, is a point yet undetermined." He refers to 2 Hale, P. C. 317.

[17] *Freeman* v. *People* (1847) 4 Denio, 9, 4 Am. Dec. 216. "One capable of rightly comprehending his own condition in reference to the proceedings against him, and of conducting his defense in a rational manner, is not insane within the meaning of the rule, though on some subjects his mind be deranged." See also *Guaganao* v. *State*, 41 Tex. 626; *Reg.* v. *Keary*, 13 Cox, C. C. 143.

[18] In *Com.* v. *Hathaway* (1816) 13 Mass. 299, the prisoner, indicted for murder, showed strong marks of mental derangement, interrupting the proceedings "by wild and incoherent remarks, and from his whole manner discovered that he was under the influence of a religious frenzy." A jury, impaneled for the purpose, found him insane, and he was remanded to jail.

[19] *Frith's Case*, 22 How. St. Tr. 307. Frith was very insane, and was so found by the jury in a preliminary trial. The case is a striking one.

logically so; for it contemplates the possibility of the prisoner being put on trial for his act if he should afterwards recover his reason.[20] Practically, however, this is not likely to be done, and in fact never has been done, so far as the present writer knows, for the finding of a prisoner insane at the time of his trial seems to raise a strong presumption of his having been insane when he committed the act, although some courts might rule otherwise. In one case[21] it was held competent to prove insanity at the time of the trial with a view to establish insanity at the time of the act. This must mean that it raises a presumption.[22]

1220. Insanity pleaded in bar of sentence.—As we have seen from Hale, it is also competent for a prisoner to prove insanity after judgment. Insanity has thus been pleaded in bar of sentence.[23] It is within the discretion of the court to say how this question shall be determined. In the *Laros Case,* here referred to, the court declined to impanel a special jury to try the question, but proceeded by the method called "inspection;" that is to say, the judge called the prisoner to the bar and asked him a few questions as to his age and other familiar matters. Having thus "satisfied his conscience," the judge proceeded to sentence. This method of inspection in open court is liable to serious objections and to grave abuse. It presumes that the judge is an expert in insanity, and that he can do in a few moments what a trained alienist might well hesitate to attempt under the circumstances.

1221. A new trial may be granted because of present insanity.—The question of the prisoner's insanity at the time of his trial has been made the ground for a motion for a new trial. In the case of a

[20] Hale, loc. cit. says that the prisoner is to be "remitted to prison until that incapacity be removed."

[21] *Freeman* v. *People,* 4 Denio, 9, 4 Am. Dec. 216.

[22] In *Gruber* v. *State,* 3 W. Va. 699, the two questions were not kept distinct, for the court of appeals decided that "if it had been found that the accused was insane at the time of the trial, the jury impaneled on the question of the sanity of the accused should have inquired whether or not he was insane at the time of the alleged offense." This was an exceptional opinion. But in *Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427, it was held that the question of insanity at the time of the offense must be tried by the jury charged with the trial of the indictment. This is according to Hale and the old common law, and is the general practice of the courts. See also *Shultz* v. *State,* 13 Tex. 401, in which the supreme court decided that the lower court was clearly right in charging the jury that they had nothing to do with "the question of the prisoner's then sanity. That question had been very properly previously submitted to a jury, as a collateral issue, and it had been found that he was sane. There was no question raised as to the sanity of the prisoner at the time the murder was alleged to have been perpetrated."

[23] Trial of Allen C. Laros, at Easton, Pa. in 1876: reported by Edgar, p. 235 *et infra.* The authorities are marshaled in great number by Mr. Scott (now Judge Scott) of counsel for the prisoner.

man tried and found guilty of perjury, a preliminary inquest had been refused, and upon motion for a new trial in the United States circuit court, upon the allegation that the prisoner was insane and had been insane when tried, Judge Blodgett had a jury impaneled to try the question of present insanity. "If found insane by your verdict," said the court, "the verdict now standing against him will be set aside." He was thereupon found to have been insane at the time of his trial on the indictment.[24] Here the question was not so much one of present insanity as of insanity at the time of a former trial. This case, therefore, seems to be an exceptional one.

1222. Insanity acts to stay execution.—A person under sentence of death cannot be executed while insane.[25] This rule of the common law has been embodied in statutes in some of our American states; as, for instance, in California.[26] And in Georgia the sheriff, with the concurrence of the ordinary, may summon a jury to determine the question.[27] In case of insanity occurring after the trial, the burden of proof is on the defendant.[28] In Pennsylvania the supreme court refused to appoint a commission to examine into the alleged insanity of a condemned man on the day before his execution.[29]

1223. Drunkenness exempts a man from trial.—Drunkenness acts in the same way as insanity to exempt a man from trial so long as that condition endures. The drunkenness of a defendant at the time of the inquest has been held to be ground for granting a new trial; and if few such cases are on record, it is because there are few courts, indeed, that would permit a trial to proceed under such scandalous circumstances. We must go to Arkansas for an example; and it is gratifying to read the vigorous, if ungrammatical, denunciation by the supreme court of that state of such a frontier procedure.[30]

1224. The exercise of judicial discretion.—The question of what constitutes judicial discretion in the matter of a preliminary inquest is apt to be a burning one. As we have seen, it is left to the judge to determine whether a doubt exists of the prisoner's present insanity

[24] *United States* v. *Lancaster*, 7 Biss. 440, Fed. Cas. No. 15,555. For rules as to the burden of proof in such cases, see 1 Russ. Crimes, p. 29, 9th ed. There have been conflicting opinions on the subject.

[25] 4 Bl. Com. 395, 396.

[26] *People* v. *Schmitt*, 106 Cal. 49, 39 Pac. 204.

[27] *Nobles* v. *Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Baughn* v. *State*, 100 Ga. 554, 38 L. R. A. 577, 28 S. E. 68.

[28] *State* v. *Paine*, 49 La. Ann. 1092, 22 So. 316; *State* v. *Patton*, 12 La. Ann. 288.

[29] *Ex parte John McGinnis*, 14 W. N. C. 221. The law in Pennsylvania provides for such a commission, but leaves the matter of its appointment to the discretion of the court.

[30] *Taffe* v. *State*, 23 Ark. 34.

when he is called for trial. Is the judge to constitute himself a commission in lunacy for determining this question? Is he to assume the rôle of an expert in insanity, and to test the prisoner's mental soundness by calling him to the bar and asking him his name, his age, and the day of the week? Is he, from the judgment seat, merely to glance at the prisoner in the dock, and, taking a prison physician's word for it, to decide that the accused man, who may have been kept in chains as a dangerous lunatic, is a fit subject to stand trial? Is he to decline to hear the evidence which the prisoner's counsel stands ready to produce, and thus to defeat the humane provisions of the old common law? Lord Chief Justice Hale said that the prudent course was to summon a jury, and try the question of the prisoner's present insanity.[31]

1225. A preliminary trial is not an inalienable right.—The counsel in the *Webber Case* made an ingenious argument to prove that it was the prisoner's "inalienable right" to have a preliminary trial of the question of his present insanity; but such a plea has never been allowed in any case so far as the present writer knows.

[31] In *People* v. *Lake*, 2 Park. Crim. Rep. 215, Justice Dean, in replying to the objections raised by the district attorney to a preliminary trial, said: "If the public or anyone who represents it, desires to see anyone hung without an opportunity to know whether he is in a proper state of mind to be tried, or a fit subject of punishment, they must not ask me to assist at the execution." The prisoner had been tried and found guilty; a new trial had then been granted by the supreme court; then a preliminary trial was granted to try the question of present insanity. This jury found Lake insane.

In *People* v. *Ah Ying*, 42 Cal. 18, the supreme court held: "If, at any time, a doubt arose as to the sanity of the defendant, it was the duty of the court, of its own motion, to suspend the trial or further proceedings in the case at whatever stage the doubt arose, until the question of sanity was determined."

A far different course was pursued in the case of Webber, in Philadelphia, in 1887. The prisoner was considered so dangerous that he had been kept chained to the floor in Moyamensing jail, awaiting trial. He was a delusional lunatic. Judge Arnold declined peremptorily to grant a preliminary trial to determine the question of present insanity, although Webber's counsel were ready with the proof in great abundance. The court took its cue from the prison officials, who wanted to see the man convicted; and instructed the jury that if they found the prisoner guilty of the offense, but insane at the time of trial, they could say so in their verdict,—thus confusing the two questions of present insanity and insanity at the time of the alleged crime. Justice Sterrett of the supreme court, in a dissenting opinion (*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427), criticized this action of the lower court in language that is worth reading. After reviewing the testimony which Judge Arnold had declined to hear, he said: "If that was an exercise of sound judicial discretion, it would be difficult indeed to say what, in a legal sense, constitutes abuse of discretion."

In the *Freeman Case*, 4 Denio, 9, 4 Am. Dec. 216, it is said that the trial judge, in his capacity as examiner in insanity, went to the jail himself and examined the prisoner. (So stated by the district attorney in the *Webber Case*.)

For an important discussion of this whole subject, see an opinion by Justice Brannon in *State* v. *Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

II. The old rule denying counsel to a prisoner on trial for his life.

1226. A matter of historic interest.—It is, perhaps, a matter of mere historic interest to note how, in former times, a man on trial for his life was not allowed to have counsel. When the accused happened to be insane, as was not seldom the case, the extraordinary spectacle was presented of a lunatic conducting his own defense, and trying to prove his own insanity. This rule does something to temper our admiration of the old common law,—a law which in theory was wise and humane, but which in practice was severe and unreasonable. Blackstone attempts to apologize for this rule of law, but only makes the matter worse; for he tells us that the theory of the common law was that the judge was of counsel for the prisoner, — a statement which will cause a smile in alienists of the more cynical type.[32] When a reader of to-day tries to think of Judge Jefferies acting as counsel for a prisoner on trial before him for treason to the house of Stuart, he gives up the attempt as vain.[33] So, too, when he tries to imagine an American judge, prejudiced against the "insanity dodge," acting as counsel for a paranoiac on trial for his life.[34]

In the *Case of Bateman*,[35] an insane man, of whom it was said at the time that he ought never to have been tried, much less executed, the prisoner's son was allowed to help him in his defense; but in those days it was considered to be a misdemeanor to help a prisoner on trial, even by whispering a word to him.

At the trial of Edward Arnold,[36] in 1724, for shooting at Lord Onslow, an effort was made to have a solicitor at the prisoner's side "to call his witnesses only;" but it was most vehemently fought by the four lawyers for the Crown. They contended that the judge was "of counsel for the prisoner," and that the attempt to prove him a

[32] 4 Com. 355. Blackstone speaks of "that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner." But the learned commentator did not approve of the law, and he attempts to explain it away.

[33] See the report of the trial of Lady Alice Lisle before the notorious Jefferies (4 Hargrave, St. Tr. 106). She was aged and infirm, and so deaf that she could not hear what was going on at her trial. Her "crime" had been entertaining a nonconformist minister who was said to have been in Monmouth's rebellion. James II. refused to pardon her, although he did allow her to be beheaded instead of burned at the stake. Jefferies told the jury, after the verdict, that he himself, if on the jury, would have voted to convict her, "if she had been my own mother." By special act of Parliament her attainder was afterwards removed, and Jefferies denounced.

[34] Judge Arnold, of Philadelphia, in the Webber trial, announced from the bench, in a threatening tone, that he would allow no repetition of the *Guiteau Case* in his court. This was at an early stage of the trial, and in response to an excited remark by the prisoner.

[35] 4 Harg. St. Tr. 206.

[36] 16 How. St. Tr. 695.

lunatic "was a design to forestall justice." This was before a word of testimony had been heard. "And the man, to my sight," said the leading lawyer for the Crown, "seems as sensible as myself or any person in court." This snap diagnosis by "inspection" must have been agreed to by the court, for Justice Tracy decided against allowing the prisoner any counsel, but said that he himself would give him all the assistance in his power.[37] This was the case in which the "wild beast" theory of insanity was advanced by the court, as an assistance to the prisoner.

How could a fair trial of such a grave question as insanity be obtained in such a court? When this poor wretch attempted to ask questions of the witnesses, he was badgered by the Crown lawyers. To prove himself insane he would have had to be more than usually sane. He was convicted, but was never executed, Lord Onslow himself appealing in his behalf.

The trial of Earl Ferrers,[38] for the murder of his steward, was held in the House of Lords, amidst great pomp and ceremony, and the defense was conducted by the Earl himself, because he was not allowed counsel. It was an extraordinary procedure. The case was probably one of alcoholic insanity, with delusions of persecution, induced on an hereditary basis. The evidence of chronic alcoholism was very strong: the Earl usually began the day by drinking brandy in his tea, and drank constantly and to excess. There had been a move once to have him declared a lunatic, and his uncle and predecessor in the earldom, as well as an aunt, had been insane. Here was a lunatic on trial for his life, trying to prove himself a lunatic by questioning the witnesses about his own lunacy.[39]

It is needless to say that the law has been changed, and that the defendant in a criminal trial is now allowed counsel.[39½]

[37] In spite of this, it seems from the report that a solicitor did occasionally take part. The account is somewhat confused, but it appears that, on the affidavit that Arnold was insane, he was allowed a solicitor.

[38] 19 How. St. Tr. 886.

[39] Some of Earl Ferrers's questions were as follows: "Have you seen any instances of anything like insanity in me?" "Do you remember any instance where I appeared to be out of my mind, and what?" To one question, "Do you look upon me as afflicted with any and what distemper?" the witness replied very frankly: "Indeed, I have looked upon your lordship as a lunatic for many years." In his summing up he said to the Lords: "I have been driven to the miserable necessity of proving my own want of understanding; and am told, the law will not allow me the assistance of counsel in this case, in which, of all others, I should think it most wanted." Earl Ferrers, like other insane persons, was opposed to making a defense of insanity, and said it was forced on him by his family. His defense and speech were very remarkable; the evidence was very clear of insanity, and yet this lunatic conducted his own case by trying to prove his own derangement. In his case a man was allowed to stultify himself. He was convicted by his peers, and hanged.

[39½] It is not inappropriate here to re-

III. Expert testimony.

1227. A difficult problem.— The problem presented by expert testimony in mental and nervous diseases is, beyond question, one of the most intricate of those that come before the courts of law. To the physician there should be nothing remarkable about this fact, and instead of deploring that for which there is a very obvious reason, he should take firmer ground than he usually does to point out the reasons, and to defend himself and his specialty from the criticisms that are too commonly uttered against both by persons who are either unthinking or not sufficiently informed to arrive at a just judgment. It seems to be the understanding of both the courts and the public that a medical expert, when he goes on the stand, should have arrived at his decision in the case with all the certainty that attends the demonstration of a mathematical problem. He is to have no doubts and but little latitude for variations of opinion. As he is called in order to help to establish some momentous fact, upon the determination of which may depend the question of life, liberty, or estate, it seems to be considered that unless he can arrive at a determinative opinion, his expert testimony is without value; and in case he is opposed by another expert, who is equally as eminent and credible as himself, the conclusion is that one or both of them are either lacking in intellectual honesty or scientific attainment.

fer to the cruelty of the old criminal law of England, because it tends to throw a sidelight upon the treatment of the criminal insane. A footnote to Hale's P. C., Am. ed., Vol. I., p. 749, gives a most graphic statement on this subject. The punishment of death was inflicted for stealing from the person property of the value of five shillings,—that is, for picking pockets; or for stealing from a shop to the same amount,—that is, for shoplifting. The act of William III. inflicting this penalty for such a trivial offense was described by Sir Samuel Romilly as "the most sanguinary" in England. As recently as 1785 no less than ninety-seven persons were executed in London for this offense alone; and the dreadful spectacle was exhibited of twenty suffering at the same time. In 1816 a child not ten years old was lying in Newgate under sentence of death for such petty thieving, and the judge, or recorder, announced that the law would be enforced.

It is related by this same authority (op. cit.) that, in the time of Henry VI., more persons were executed in England in one year for highway robbery than the whole number executed in France in seven years; and in the reign of Henry VIII. seventy-two thousand thieves were hanged, being at the rate of two thousand a year. This unmitigated ferocity seems to have been a characteristic of English law for centuries; and the spirit of it was active in the cases of lunatics, as the savage and precipitate trial and execution of Bellingham showed. The same spirit is very evident in America even to our day, —especially in the fury for lynching men without trial, and in deriding, amidst popular clamor, a scientific defense in some cases of lunacy; as, for instance, in the case of Guiteau. It seems impossible when public feeling is aroused, and the cry of vengeance is once started, to secure a rational and dispassionate hearing for the defense of insanity. The old Anglo-Saxon, and the more recent Anglo-American, tendency to raise a hue and cry after a hunted man or a hunted animal is irrepressible.

Illustrative of the barbarity of English law was the sentence of Christopher

1228. Truth may be elusive.—But this is a crude view. In the first place, truth is not always a fixed quantity, to be arrived at by a rule of thumb. If it were, there would be no necessity for our judges and juries: any man could determine it for himself. No one knows this fact better than the magistrates and officials in our courts of law. The whole system of trial by jury is based on this very obvious fact; the whole machinery of the court is fashioned to give to confusing and conflicting testimony that nice balance that shall point unerringly, in the fiction of the law, to the truth. If this is so in the vast majority of cases that come before the courts,—if, for instance, the details of a street brawl, a petty larceny, the division of an estate, the settlement of a disputed election, or the granting of a liquor license, all present problems of uncertainty, about which even judges and juries cannot always agree; and if, as is the case, these problems are naturally regarded in the courts as perplexing, and no especial comment is excited by this fact; and if it is also a fact that honest witnesses differ in their testimony, and distinguished lawyers appear with equal earnestness and positiveness on opposite sides,—if all this is so, how much more should it be expected that the intricate problems presented by the diseases of the human body, and, above all, of the human mind, will lead to variations of opinion that are strictly within the bounds both of honesty and experience.

Layer (6 How. St. Tr. 265), who was tried at the King's bench, and found guilty of high treason, in 1722: "To be hanged by the neck, but not till you are dead, but you are to be cut down alive, and your bowels to be taken out, and burnt before your face. Your head is to be severed from your body, and your body to be divided into four quarters; and that your head and quarters be disposed of where his Majesty shall think fit." It is to be hoped that he was dead by the time his head was severed from his body, unless he was like St. Denis, who walked about after his martyrdom, carrying his head in his hands.

Death in the pillory from fury of the populace sometimes occurred. John Egan, convicted in the Old Bailey of being an accessory to a felony before the fact, was sentenced to stand in the pillory. He and another convict named Salmon stood in Smithfield in March, 1756. "They were instantly assaulted with showers of oyster shells, stones, etc., and had not stood above half an hour before Egan was struck dead, and Salmon so dangerously wounded in the head that it was thought impossible he could recover. Whatever punishment they might deserve from the law, it is certain they ought not to be killed through the rage of the populace. And we find that April 11, 1732, Edward Dalton and Richard Griffiths were tried at the Old Bailey for the murder of John Waller in the pillory by pelting him with cauliflower-stalks, etc., and found guilty, and both executed at Tyburn." 19 How. St. Tr. 809.

Mr. Yellowplush says, "Laws was laws in the year ten, and they screwed chaps' nex for nex to nothink." (Thackeray's Yellowplush Papers.)

Barbarity in the criminal law supplies, in a sense, its own remedy: the punishments are so atrocious that in time they are evaded both by judges and juries. One expedient in England was for the jury to find, in face of the fact, that the stolen property was not worth five shillings. Finally, at every assizes a large number of criminals who were clearly guilty of these minor offenses would be solemnly sentenced to death,

1229. The province of an expert witness.—In the second place, it is not the province of an expert witness to decide the case. It is too much the custom to regard him in that light; and, unfortunately, he is too apt, in some cases, to regard himself in that light. In a trial for murder, in which a defense of insanity is made, his province is nothing more than to make a diagnosis; with the bearings of this diagnosis upon the issue at large he has, or should have, nothing to do. For making this diagnosis he may have less opportunity and less reliable data than a physician may have in the sick room for diagnosing an ordinary case of pneumonia or croup. His opinion, therefore, should not be demanded from him as a dogmatic statement of fact, but as an indication, merely, of his belief. It is from ignoring this function that some expert witnesses degenerate into advocates. Fearful that they shall be regarded as vacillating or ignorant, they become trenchant and intolerant; but I do not hesitate to say that the fault for this is partly in the courts, who allow both counsel and witnesses to have and to make the impression that the whole *onus* of the case falls on the expert. It should be better understood that a physician on the witness stand can, without detriment to his reputation, decline to follow into all the pitfalls and quagmires of cross-examinations and hypothetical questions.[40]

and then respited. Thus the law was made ridiculous.

The reform of the criminal law in England was largely due to Sir Samuel Romilly, and it is his best monument. He had to contend against entrenched prejudice both in Parliament and in the courts. His bill was several times rejected by the House of Lords; and Lord Ellenborough and Lord Eldon, two of the highest judges, were particularly hostile to it. The Lord Chief Justice, Ellenborough, "lamented that any attempts were made to change the established and well-known criminal law of the country, which had been found so well to answer the ends of justice;" and Lord Chancellor Eldon declared for "the wisdom of the principles and practice by which our criminal code was regulated." Nothing could more clearly prove how extreme conservatism is deaf even to the appeals of justice and humanity; and the fear is not groundless that it has sometimes been equally deaf to the teachings of science.

Sir Samuel Romilly's end was tragic and mournful in the extreme. He committed suicide under the burden of domestic sorrow (the loss of his wife), and probably in an access of melancholia. For some embittered and disgraceful allusions to him by Lord Byron, after Romilly's death, see the poet's works recently published by Murray, of London. Byron hated him for the part he took as legal counsel in the separation from Lady Byron. The bard had no love for either lawyers or doctors after the attempt that some of them made to prove him insane, at the instigation of his wife. Consult Byron's Works, edited by E. H. Coleridge.

[40] Lord Chief Justice Cockburn (Irish Law Times, 1874) deplored the abuse of cross-examination in English courts. "The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honorable and conscientious men loathe the witness box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English courts. . . . I remember to have seen so distinguished a man as the late Sir Benjamin Brodie (the eminent surgeon) shiver as he entered the witness box. . . . Witnesses are

1230. The uncertainty of expert testimony.—In the third place, instead of deferring so much to the criticism that expert testimony is valueless because it is uncertain and contradictory, experts may fairly shift this opprobrium by reminding judges and practitioners at the bar that, in their own provinces, they are equally uncertain. There would be no supreme court if there were no lower courts whose decisions it is necessary to correct and control. Some years ago, in Philadelphia, a notorious politician who had killed a man was sent to the Eastern Penitentiary, but was almost immediately released by the supreme court, who found grave error in the trial below. This was not a question of insanity, but a question simply of who fired the pistol. Oscar Hugo Webber, a plain case of delusional lunacy, for whom the writer testified, was found guilty in Philadelphia, and sentenced to be hanged in spite of the clearest evidence of his insanity; but the supreme court gave at least one dissenting voice in the person of an eminent jurist who was afterwards chief justice of the state,[41] and the governor was never elected who was willing to take it on his conscience to hang the condemned man.[41½]

1231. The ethics of the subject.—As for assuming opposite sides, and contending against one another for the establishment of the truth, medical experts have the brilliant example of their colaborers at the bar. Carlyle's description of an advocate is so well known that one may forbear to quote it. It is difficult to see wherein the ethics of a physician's position differ from that of a lawyer who takes indiscriminately either side of a case, provided, of course, the attempt is made to establish, and not to distort, the truth. No two cases of mental disease are just alike, no two persons were ever injured in exactly the same way in a trolley accident, no two lunatics probably ever made the same kind of a will. In most cases something can be said on both sides, and in a case in which something can be said on only one side, each party thinks that that side is his own. This latitude for varying opinions was never so strikingly shown as in the case of the assassin Guiteau. Many who advocated his hanging believed he was at least partly insane; leading minds in this country

just as necessary for the administration of justice as judges or jurymen, and are entitled to be treated with the same consideration."

[41] Chief Justice Sterrett (*Webber* v. *Com.* 119 Pa. 223, 4 Am. St. Rep. 634, 13 Atl. 427). This opinion should be read by all who are in search of a good judicial pronouncement on the subject of insanity as a defense.

[41½] "A judgment once entered in court was, in pure feudal law, irrevocable; the loser had but one uncertain resource, which was to declare that the sentence pronounced against him was false and bad, and challenge each one of his judges, in succession, to single combat."—Monod and Bémont, Mediæval Europe, p. 432.

took part for and against him; the criminal himself contended that he was sane, and yet a large number of his near relatives had been in asylums. Much depended upon the point of view; the definition of responsibility; the heat of popular passion; the expediency of politics; and the prejudices of opposing sides. The case was finally decided and disposed of in a way that calls to mind the remark of an unscientific critic: "Call these cranks sane or call them insane, but kill them all like rattlesnakes."

1232. Proposed remedies.—From this standpoint, considering the limitations of human judgment, the intricacies of science, and the uncertainties of legal processes, the writer has never fully sympathized with those who are casting about for a panacea for these ills. It is not probable that a state commission of alienists, or a board of experts appointed by the judges, or a consultation of experts agreed upon by opposing counsel, would eliminate the defects. There would remain the same grounds for variations of opinion, the same inalienable right of the prisoner to call his own witnesses. The best that can be hoped for—and it is enough—is that experts will strive more and more fully to recognize their moral and scientific obligations, and to have an eye single to the justice that is founded on truth. Those who ignore this rule of conduct will inevitably suffer in their reputations, and thus weaken their position in court. Hence the evil tends to correct itself. Their services will be cheapened and no longer sought. The expert testimony given in this country to-day is, as a rule, of a high order. This standard can only be maintained by the activity of the medical conscience and by medical training, as reflected in our best schools; and it cannot be achieved by an act of legislature or the decree of a court.[42]

1233. Memoranda for experts.—Finally, medical experts on the witness stand should never forget that they are far better acquainted with the subject in hand than the lawyer who attempts to cross-examine them; and the lawyer, too, should never forget this fact.[42½] More-

[42] Mr. David Dudley Field (7 Alb. L. J. 273) made a very important statement in his paper on emotional insanity. "And I must also think that whenever the administration of the law is brought to that state to which our advancing civilization must bring it, the question of insanity will be separated from other questions, and medical men will sit with the judges, as assessors, or experts, to aid in the decision, in some such manner as nautical men now sit in the English Admiralty upon cases of collision." This opinion, from such an excellent source, is quoted here for what it is worth.

[42½] Lord Lyndhurst's method, when he was chancellor, of selecting a judge, was very simple: "I look out for a gentleman, and if he knows a little law, so much the better." This might be a good prescription both for lawyer and expert,—they should be gentlemen; and if the one knows a little law and the

over, the expert should not permit the lawyer both to ask the question and to answer it. This is attempted sometimes by the lawyer insisting that the question should be answered in a certain way. It is the province of the expert to answer the question according to his own knowledge and opinion; and if the attempt be made to force or beguile him to do otherwise, he should refuse. In most cases he will be sustained by the court, as the writer knows from experience. Neither should an expert submit willingly to be cross-examined about the books and printed opinions of so-called authorities: he should never do so without demanding to see the book. If he disagrees with the book, let him say so emphatically. The courts will never force him to subscribe to other men's opinions, and he will gain rather than lose credit by having opinions of his own.[43]

other a little science, so much the better. See Sergeant Ballantine's Experiences, p. 125.

[43] Mr. Francis L. Wellman (The Art of Cross-Examination, N. Y. 1903, p. 82) an expert trial lawyer of the New York bar, says that "experience has led me to believe that a physician should rarely be cross-examined on his own specialty, unless the importance of the case has warranted so close a study by the counsel of the particular subject under discussion as to justify the experiment . . ."

Chief Justice van Brunt, of New York, is reported to have said, in reference to a well-known expert, "Any lawyer who attempts to cross-examine Dr. ——— is a fool." (From Mr. Wellman's book.)

Mr. Wellman relates the instance, however, of a Philadelphia expert who testified in the *Carlyle Harris Case* that an instance was on record of a patient with morphia poisoning having inequality of the pupils; but the expert was forced to acknowledge, on cross-examination, that he had overlooked the fact that this patient had one glass eye!

In his interesting paper on "The Insanity of King George III." (Am. Journ. of Insanity, Vol. XII. July, 1855, p. 1), Dr. Isaac Ray gives us a glimpse at professional amenities on cross-examination as displayed at that time. Parliament appointed a committee to call and examine the King's physicians as to his case. The leading physician (he was also a clergyman) was Willis. In the examination of Willis by Sheridan, the former, at the very beginning, exclaimed: "Pray, sir, before you begin, be so good as to snuff the candles, that we may see clear, for I always like to see the face of the man I am speaking to." Sheridan was so confounded at this speech of the basilisk doctor that he could not get on in his examination, and for once in his life was posed.

When Burke asked Willis what he should have done if the King had become violent, "I would have looked at him thus, sir, thus!" Whereupon Burke instantly averted his face, and made no reply.

CHAPTER LVIII.

THE EXAMINATION AND CERTIFICATION OF THE INSANE.

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I. In General.

1234. The precautions of the law.—The law has ever been careful to protect persons from being falsely declared insane. As early as the reign of Edward VI. (A. D. 1548) it was enacted that "if any person be, or shall be, untruly founden lunatic, idiot, or dead," he shall have a right to traverse the inquisition at his pleasure.[1] The law seems here to have looked upon an inquisition of insanity as being little better than a coroner's inquest. In either case the aggrieved party had a right to demonstrate to the world that he was not insane, or not dead, as the case might be.[1½]

1235. The old method by inquisition.—The process for finding a man insane is very old in English law, as we have shown elsewhere.

[1] 2 & 3 Ed. VI. chap. 8, § 6.

[1½] "Of the uncertainties of our present state, the most dreadful and alarming is the uncertain continuance of reason."—Dr. Johnson, Rasselas.

The oldest writ was de idiota inquirendo,[2] for in the early days the term "idiot" seems to have been used in this process for all forms of mental disease. Later this old writ was almost supplanted by the writ de lunatico inquirendo, for reasons elsewhere explained. The original motive for legally declaring a lunatic or idiot to be such arose from the necessity of looking after his property, as was shown in the earliest extant statute on this subject,—the statute De Prerogativâ Regis.[3] But it was early a part of the law that not only his property, but also his person, was to be taken in charge by his committee,[4] and when this charge involved the profitable administration of a good estate, as it sometimes did, this privilege was much esteemed and even sought after; so that the expression arose of "buying a fool." The common law and the early legislation on this subject have been discussed elsewhere in these pages. (Chapters XXIV., XXVI.)

It is not within the province of the present writer to describe the machinery of the law for conducting an inquisition in lunacy. That is a purely legal subject, and a very extensive one. The medico-legal subject has reference merely to the question of sanity or insanity. There are some special points, however, which it is well for the medical expert to know and to bear in mind.

The alleged lunatic has the right to be present; and the proceedings have been set aside because he was not summoned in time to cross-examine the witnesses, but was brought in only for purposes of exhibition, and was again excluded when the finding came up for consideration.[5a] In Pennsylvania it has been held, following the English chancery practice, that the finding must be specifically "unsound mind" or *non compos mentis,* and the proceedings have repeatedly been set aside where this rule was not observed.[5b]

The original motive for the inquisition, as stated in the old statute De Prerogativâ Regis, was the care of the lunatic's estate; and this motive has been dominant in these proceedings all through the centuries, and still prompts the language of the courts. Thus, it has been held that the proper question on the traverse of an inquisition is whether the mind is deranged to such an extent as to disqualify the alleged lunatic from managing and disposing his own affairs; al-

[2] Fitzherbert, Nat. Brev. 232; 1 Bl. Com. 303, 304.

[3] 17 Edw. II. chap. 9.

[4] It is the practice of the English Chancery to appoint two committees,—one of the person, the other of the estate.

[5] See also Collinson, Lunacy; Shelford, Lunatics; and Pope, Lunacy, 2d ed. 1892.

[5a] *Re Hinchman,* 4 Clark (Pa.) 184.

[5b] *Com. v. Reeves,* 140 Pa. 258, 21 Atl. 315; *Re Beaumont,* 1 Whart. 52, 29 Am. Dec. 33; *Heft's Case,* 8 Pa. Dist. R. 99; *Re Gaul,* 7 W. N. C. 522.

though the inquiry also includes whether he is capable of conducting himself with safety to himself and others.[5c] The right-and-wrong test is not usually proposed in these proceedings. "The protection of property is one, if not the main, object of the statute."[5d] A delusional lunatic with hallucinations of hearing has been declared by a jury to be sane, in a suit raised by the traverse of an inquisition.[5e]

Finally, it has been held by the courts that the finding of an inquisition is only prima facie evidence of insanity when the question is raised of the responsibility or liability of the lunatic in criminal or civil proceedings.[5f]

1236. The modern method by certification.—With the growth of the modern insane asylums an elaborate system of jurisprudence has arisen to control the admission and detention of insane persons in these institutions. Both in England and America the old method by inquisition on a writ or a commission de lunatico, which is cumbersome and costly, is not necessary for committing lunatics to asylums, although this method still prevails for the control of the lunatic's estate. The method now generally in vogue in Great Britain and America is by a process of certification, which, in the main, is simple, and at the same time acts as a safeguard against the unjust detention of any person in an asylum. But the laws are necessarily elaborate, and they vary in our different states; so it is not practicable, with our limited space, to describe them in these pages.[6]

[5c] *M'Elroy's Case*, 6 Watts & S. 451. The opinions in this case, both in the supreme and lower courts, were admirably clear and instructive. The old definition, that insanity meant a "total deprivation" of understanding and memory, was condemned.

[5d] *Com. ex rel. Euchenberg* v. *Schneider*, 59 Pa. 328. It was held that the state of unsoundness of mind which incapacitates a person from taking care of his person or business is the condition prescribed by the act of Assembly. The real test is inability to care for his property, rather than for his person. The following opinion by the lower court was rejected, and a new trial ordered: "Until the mind is entirely blotted out, persons must be left to the management of their own affairs. As long as there is a spark of intelligence left, the law does not permit their liberty to manage themselves or property to be taken from them." See also *Smith's Case*, 12 Pa. Super. Ct. 649; and Pepper & Lewis, Digest, Vol. IX. 14,383 *et seq.*

[5e] *Com.* v. *Meredith*, 41 Phila. Leg. Int. 64. The issue was defined by the court to be whether the mind was so impaired as to render the party incapable of governing his body and estate.

[5f] Pepper & Lewis, Digest. loc. cit. See also chapter on "Contracts and Torts of the Insane," in the present work (§ 1208).

The Penn. act of June 25, 1895, allows the court to appoint a guardian for a "weak-minded" person, to take care of his property; but apparently this act is not intended to supersede the old inquisition in lunacy. It distinguishes in effect, however, between a lunatic and a weak-minded person: and therefore is not based on scientific principles, but is a reversion to old-fashioned legal psychiatry.

For the proceedings in lunacy, see Elmer, Lunacy; Buswell, Insanity, Boston, 1885; Pope, Lunacy, 2d ed. London, 1892; Wood Renton, Law of and Practice in Lunacy, Edinburg and London, 1896.

[6] A useful abstract of the lunacy laws

1236½. The certification of habitual drunkards.—In some states the chronic inebriate is on the same ground, in the contemplation of the law, as the insane patient; and provisions are made for certifying and committing him to an asylum or hospital. This shows the progress that has been made in the law towards a scientific view of inebriety. In Pennsylvania, by act of Assembly, passed in 1903, the habitual drunkard or the narcomaniac may, on proper evidence, be committed by a judge of the quarter sessions or other magistrate, and detained in a hospital for a period not exceeding one year. This law follows the pattern of the English lunacy law of 1890–91, by which the patient is regularly committed by a magistrate; and differs from the rather more lax laws in some of our American states, in which no such formal commitment is required in the case of insane patients.[6½]

II. Duties of physicians with reference to certifying insanity.

1237. The responsibility of physicians.—In this process of certification the law places the main burden of responsibility upon the physicians. The medical men make the diagnosis and determine the necessity for a commitment. Although it is usually necessary for some responsible person, as a relative or friend, to join in the legal formalities, and a magistrate is required to put his seal on the paper (although he does not act as a committing judge), nevertheless these functions are largely formalities, and it is to the medical certificates that the law looks practically for a warrant for the proceedings.[7]

in our several American states, by Dr. Charles F. Folsom, of Harvard University, and Mr. Hollis R. Bailey, of the Massachusetts Bar, is published as an appendix to the American edition of Clouston's Clinical Lectures on Mental Diseases. The present writer must content himself with a mere reference to that abstract. See also MacDonald, "Laws Relating to the Insane," in Haines and Peterson's Text-Book of Leg. Med. and Tox. Vol. II. p. 194; and Tuke's History of the Insane in the British Islands, London, 1882.

[6½] Act of Assembly, approved April 16, 1903, P. L. 153. See also § 952½, and footnote 57 in the chapter on Alcoholic Insanity, of the present work.

[7] By the English lunacy law of 1890–91, the legal formalities were changed. The order admitting the patient to the asylum is now signed by a justice of the peace or other judicial officer named. In order to secure this commitment a relative or friend of the lunatic petitions the magistrate for the order, and submits the certificates of two physicians. Thus, the medical certificates are merely written opinions, or evidence, upon which the committing magistrate in part bases his order. From the purely legal standpoint this seems to be a more correct method than the one prevailing in many of our American states. It makes the procedure appear more like an inquest; in fact, the magistrate has full power even to have the alleged lunatic brought before him

Therefore, in view of the jealousy with which the law guards the liberty of the citizen, a great trust is here imposed upon physicians, for they, in effect, have the power to commit a person to a place of detention. (§§ 1244–45.) There are, in fact, few more responsible duties assumed by a physician than to sign a certificate of insanity.[8]

The law does not require that the physician who signs a certificate of insanity should be a specialist. It is enough for him to be in good standing and repute; *i. e.*, a properly qualified practitioner. But when two physicians are required to sign, it is not uncommon for one of them, at least, to be an expert. This, in fact, is a good rule for general practitioners to adopt,—to secure the services of a specialist to join in the signing. In Pennsylvania, and probably in some other states, the law requires that the examinations be made separately; but the reason for this rule is not clear, unless it be to prevent collusion, or conspiracy to deprive people of their liberties,—a supposition which is not complimentary to the doctors, and a rule which could not prevent such a conspiracy if such were contemplated. Like some other details of the law, this is finical; but it should be scrupulously obeyed. In fact, every detail should be strictly obeyed, for the signer has to qualify under oath or affirmation; and he may be called to account later for all that he has done.

1238. Details of the legal requirements.—The Pennsylvania law, which may serve as an example, although it is not identical with the laws of all the other states, requires that the physicians be residents of the state; that they separately examine the patient within one week prior to the signing; that they believe that the patient is not only insane, but that the disease is of a character that requires that the patient be placed in a hospital or other establishment where the insane are detained for care and treatment;[9] that they have actually been in

and examined. But it is cumbersome, and it is likely to degenerate into a mere formality, the medical certificates being, after all, the pivot of the whole business. See Tuke, Dict. Psych. Med. art. on "The Law of Lunacy." Much useful information can be found in Tuke's History of the Insane in the British Islands. London, 1882.

[8] When George III. was insane, he was placed in the care of Rev. Dr. Francis Willis, who was a clergyman as well as a specialist in mental diseases. It is related that the King asked Willis, when he entered the room, if he, who was a clergyman, was not ashamed of himself for exercising such a profession (as alienist). "Sir," said Willis, "our Saviour himself went about healing the sick." "Yes," answered the King, "but He had not £700 a year for it." Lord Malmsbury's Diaries, IV. 317.

[9] Great stress is laid by some legal writers upon this detail. It is not enough that the patient be insane: his insanity must be of such a kind that it requires his commitment either for his own welfare or for the protection of others. A somewhat similar test is required in the inquisition de lunatico, except that more importance is there placed upon the question of business capacity. *M'Elroy's Case*, 6 Watts & S. 451.

the practice of medicine for at least five years; that they be not related by blood or marriage to the patient; and that they be not officially connected with the institution in which the patient is to be treated. These requirements are, in the main, reasonable enough, and are supposed to insure care and a due sense of responsibility.

1239. The grounds for certification.—In some jurisdictions the physicians are required to state their reasons for believing the patient to be insane. This rule often taxes the descriptive power of a physician, especially if he is not very conversant with mental diseases. It is best to confine the description to a simple statement of the chief symptoms, and not to indulge in flights of descriptive rhetoric. The error is sometimes committed of attempting too much. Such symptoms as change of character and habits, delusions, hallucinations, maniacal excitement, melancholic depression, loss of memory, of the power of attention, inability to work or to engage in the usual occupations, failure of mental power, suicidal or homicidal impulses, destructive or filthy habits, stupor, confusion, or delirium, are the commonest and the most easily described. The law does not demand a complete clinical history, nor speculative or imaginative discourses.[10]

1240. Concealed insanity.—Some patients conceal their insanity. This is true especially of delusional patients, who may be suspicious of a design to send them to an asylum. This power of concealment is no proof that the patient is not insane; in fact, he may be very insane, even dangerously so. Erskine, in his speech for Hadfield,[11] referred to the case of a man who had concealed his delusion through a long cross-examination, but was finally induced to exclaim in open court: "I am the Christ." A somewhat similar case happened before Lord Mansfield, and another before Lord Lyndhurst, in a man who finally announced that he was the prophet Ezekiel. A delusional lunatic may believe that a whole neighborhood is in league against him; that his wife is faithless to him; and he may hear voices telling him so; and yet he may so deceive a physician that the latter pronounces him sane.[12] Great tact and patience are often required to unearth these cases, and a full history of the case should be obtained

[10] Much could be written about the ludicrous statements which sometimes appear on certificates of insanity. Clouston gives the following specimens: "He is incoherent in his appearance." "Eyes restless and wandering, but following the usual occupation of breaking stones." "She says she is in the family way (she had a baby in a few months)." "Reads his Bible, and is anxious about the salvation of his soul." The last, as a symptom of insanity, will strike some devout readers as far-fetched.

[11] *Hadfield's Trial*, 27 How. St. Tr. 1281.

[12] *Com. ex rel. Rubright* v. *Western Pennsylvania Hospital*, 3 Pittsb. 299.

before attempting the examination.[13] Insane persons will often not stand prodding on the subject of their delusions; therefore skilful and suggestive questions will often start the full flood-tide of their confidences.[14]

It is not well, as a rule, to resort to tricks or subterfuges with these patients, and it is generally best for the examiner not to conceal the fact that he is a physician. This matter, however, must be left to the judgment of the individual in each case. To give intoxicating drinks, in order to make an insane man more voluble, is an unprofessional act. An expert who cannot detect insanity without the aid of alcohol is no expert at all; he is better fitted to be a police detective.

In brief, the task of a physician when he examines a patient for certification is to make a diagnosis. If, for any reason, he is not able to make a diagnosis, he should not sign the certificate. The whole art of diagnosis may be involved in the case, and there is no rule for it except to have a reliable knowledge of insanity.[15]

III. The liabilities of physicians.

Let us consider now a subject that is rather more appropriate to these pages; namely, the liabilities of physicians under the law when they sign a certificate declaring a person insane.

1241. Negligence.—The law will not presume, in case a physician has signed a certificate for a person who is afterwards found to have been sane at the time, that such a physician has acted in bad faith. Therefore, an action for trespass or for conspiracy will not necessarily lie against him. The evidence must be clear that he has not acted bona fide. If he has acted in good faith, the most that can be sustained against him is a charge of negligence. Moreover, if he has taken due care in his examination, and has merely committed an error of judgment, it has been held that he is not even guilty of negligence. This question has been decided in not a few cases.

An excellent opinion was delivered in this case by Judge Stowe, who took a clearly scientific view of the disease.

[13] It was a saying of Heinroth's that lunaties never deny a delusion, although they may abstain from speaking of it. This distinction is not absolute, but it is, in general, true. See an article on "Larvated Insanity" in the Journal of Mental Science, April, 1886, for curious instances. Cases of prolonged concealment of delusions have occurred. One man never went to the same church twice in succession, but no reason could be discovered until after some years, when it was found that he had a delusion that he was followed in church by Jews, who made grimaces at him and interrupted him in his prayers. Tuke, Dict. Psych. Med., Vol. II. p. 699.

[14] Spitzka, Insanity, 1883, p. 322; Chapin, Compendium of Insanity, p. 210; Sankey, Lectures on Mental Disease, p. 420.

[15] Bucknill, "On Medical Certificates of Insanity," in the Journ. of Ment. Sci Vol. VII. p. 79; Ordoneaux, "Judicial Problems Relating to the Disposal of Insane Criminals," in the Crim. Law Mag. Sept. 1881, pp. 591 and 729.

In a leading English case[16] the judge declared that the "true ground of the complaint is the negligence of the defendant, and the want of due care in the discharge of the duty thrown upon him." It has even been provided in the act 16 & 17 Vict. chap. 96, that if any action shall be brought against any person for anything done in pursuance of the act, the defendant may give the statute in evidence, and that the same was done in pursuance and by authority of that act. This statute was evidently intended to protect physicians who act honestly and with due care in signing certificates of insanity.[17] In Pennsylvania the supreme court held that no presumption of negligence arose from the mere fact that the defendants were mistaken as to the fact of insanity;[18] the burden of proving negligence was on the plaintiff. From these opinions it is clear that the courts will not willingly see a physician mulcted in damages, provided he has not been negligent. A mere error of opinion is not evidence of such negligence.

1242. Conspiracy.—Conspiracy to confine a sane person in an asylum is, of course, a crime which the law fully recognizes, and the courts will be vigilant to protect from, and to punish for, such an offense. But the evidence of *mala fides* must be clear. The mere signing a certificate, as already said, does not raise such a presumption. Action will lie against laymen as well as against physicians, as in the case of two men convicted of conspiring to confine the wife of one of them in an asylum.[19] A suit for conspiracy against a superintendent of an asylum has failed under the following circumstances: After commitment to the asylum, the patient was found insane by a commission de lunatico; she afterwards petitioned that the committee be discharged, as she had recovered her reason; and this was done. She then brought suit against the physician for conspiracy. It was held that her petition had been a confirmation, or acknowledgment, by her of her lunacy, and she could not recover for conspiracy to confine her during the period covered by the inquest.[20]

[16] *Hall* v. *Semple*, 3 Fost. & F. 337. "It is not that a medical man is bound to form a right judgment, so as to be liable to action if he does not. . . . It would be dreadful if a man were to be visited, in cases of this kind, for consequences arising from mere error of judgment or mistake in fact."

[17] Lord Chief Justice Campbell held that the person signing the order (not the physicians) is not protected by the statute. *Fletcher* v. *Fletcher*, 1 El. & El. 420, 28 L. J. Q. B. N. S. 134, 5 Jur. N. S. 678, 7 Week. Rep. 187.

[18] *Williams* v. *Le Bar*, 141 Pa. 149, 21 Atl. 525. "The most the case discloses is an error of judgment to which the most careful and skilful physician is liable in a mysterious disease like insanity." A judgment had been given in favor of the defendants, and it was sustained by the supreme court.

[19] *Com.* v. *Spink*, 137 Pa. 255, 20 Atl. 680.

[20] *Johnston* v. *Given*, 14 W. N. C. 326. In this case contradictory views were held by opposing sides as to the force of an inquisition as proof of lunacy.

1243. Trespass and malicious arrest.—The questions of trespass and of malicious arrest have arisen in these cases.[20½] We have said elsewhere (§ 1237, *supra*) that, in effect, the physicians' certificates act as a sort of warrant for the commitment to the asylum. But although this may be so practically, so long as the case is not disputed, it is not technically so in law. Moreover, there is a clear distinction between signing a certificate of insanity and taking the patient bodily to the asylum. With the latter act physicians, as a rule, have nothing to do. Therefore, they are not liable for trespass in causing the arrest of the patient merely because they signed a certificate, unless, indeed, they took part in conducting the patient to the door of the asylum.[21]

1244. A certificate of insanity is merely a written opinion.—A physician's certificate of insanity is nothing more than his written opinion that the person is insane and a proper subject for commitment. It is not a warrant nor a binding order on any person to commit or to detain the lunatic. So true is this, that the authorities of the asylum, or the committee of lunacy, can discharge the patient at any time, even within an hour of his admission, if they deem him an improper subject for detention. Hence, from the moment he enters the asylum, the authorities alone are responsible for detaining him; the physicians who signed his certificate have absolutely no power over him, and, of course, are not legally responsible for him or his detention. Their opinion, as a matter of necessity, is not asked about his discharge. How, then, can they be held responsible for his imprisonment?[22]

One side held that the finding, being a matter of record, could not be questioned; the other side held that the finding was only prima facie evidence of insanity. Many authorities were cited. See also *Com. ex rel. Mintzer* v. *Sheriff*, 8 Phila. 645; *Palmer* v. *Buck*, 83 Mich. 528, 47 N. W. 355.

[20½] Times have changed since the days of which Lord Campbell wrote (Lives of the Lord Chancellors). "It was a good plea in those days to an action for assault, battery, and false imprisonment, that the plaintiff was a lunatic, and that therefore the defendant had arrested him, confined him, and whipped him." See Tuke, History of the Insane in the British Isles, p. 41, for this and some other curious information.

[21] *Force* v. *Probasco*, 43 N. J. L. 539. The court held that the physicians "could not have caused her arrest by the mere making and filing of a false certificate. The certificate was not an order for her arrest, nor did it contain any request to any other person to deprive her of her liberty. The person upon whose petition she was admitted to the asylum might have made use of this certificate to effectuate his purpose, but the certificates of all the doctors in the land would not, of themselves, have restrained her of her freedom in the least degree." So in *Hall* v. *Semple*, 3 Fost. & F. 337, it was held: "A medical man who has merely signed a certificate . . . and has done nothing more towards causing the confinement of the alleged lunatic, is not liable for trespass." See also *Williams* v. *Le Bar*, 141 Pa. 149, 21 Atl. 525. For a different kind of case, see *Dobbyn* v. *Decow*, 25 U. C. C. P. 18.

[22] In *Bacon* v. *Bacon*, 76 Miss. 458, 24 So. 968, the court took a different view, for it held that all persons who

1245. The legal status of a certificate.—The exact legal status of a certificate of insanity is hard for a lay writer to define. It is not a binding order, neither (so say the courts) is it a warrant; and yet it is essential for the admission of a patient, will he, nil he, into a place of detention. Whatever it may be, the man who signs it assumes a large responsibility; all the larger, perhaps, because of the very uncertainty of the legal status.

1246. A certificate may be a libel.—It has even been held that a certificate of insanity is a libel. The supreme court of New York[23] announced that it was libelous to publish of a person that he was "insane, and a fit person to be sent to the lunatic asylum;" and that the libelous character of the publication was not destroyed by the fact that the person uttering it was a physician, who gave it as a professional opinion. Such a publication is not a privileged communication by reason of being certified to before a justice of the peace. This appears to have been an exceptional case. It seems odd that a paper which is prescribed by the law to be signed, under given circumstances, should be held by the law to be libelous.

1247. The power to detain and to discharge.—The power to detain and to discharge a lunatic is lodged, as we have said, in the authorities of the asylum, who are under the control, in most states, of a committee of lunacy, which is a part of the executive of the state, as can be seen by referring to the various state laws. A superintendent of an asylum has been sued for damages for detaining a sane person, although duly certified, and the superintendent acted in good faith in believing the person insane; and in one case the supreme court of Michigan could not agree: two of the judges deciding that if the official acted in good faith he was not liable, and the other two judges deciding that he was liable even if he acted bona fide.[24] Again, the power of determining at what period a patient has recovered, therefore at what time his detention begins to be illegal, must be lodged somewhere, and this power rests with the superintendent or the committee of lunacy, which thus has great power in this matter; unless, indeed, the confinement is terminated by a court, on a writ of habeas corpus.

secured the commitment were equally responsible, although the law in Mississippi distinctly says that the authorities "shall have authority to detain him, but in all cases they shall act at their peril if the person be sane." This certainly does not include the signers of the certificate, who have nothing to do with the detention.

[23] *Perkins* v. *Mitchell*, 31 Barb. 461. In this case a long and technical explanation was given of what constitutes a "privileged communication." The appeal from an order setting aside a demurrer to the plaintiff's complaint was, in its turn, set aside.

[24] *Van Deusen* v. *Newcomer*, 40 Mich. 90. The subject was discussed at great length.

1248. Habeas corpus.—Patients are sometimes released from asylums by the courts on a writ of habeas corpus. As one of the bulwarks of liberty the right to appeal by this writ is apt to enlist the sympathies of the judges, and these cases are not always decided in accord with the ideas of alienists. Such a proceeding imposes on the court the necessity of making a diagnosis. "This question of sanity or insanity," said Judge Brewster,[25] "perhaps the most difficult of all inquiries, is the very last to be welcomed by a judge." And yet he discharged the patient from custody with the remark that if he was dangerous, his friends could proceed against him as a criminal; or if he required restraint, they could have a commission de lunatico!

But the proceedings under a writ of habeas corpus do not need to be discussed here, for they simply involve the trial of the question of insanity,—a subject which has already been described in these pages.[26] In these cases, however, some courts show a prejudice against detaining a person under a mere certificate of insanity, and are in favor of the old method de lunatico. Judge Brewster said that a jury should always stand between a citizen and an asylum; but, as we all know, this is not really necessary in law.

The test of insanity in habeas corpus cases is likely to be the welfare of the patient and the safety of others. Few judges have done as Judge Brewster did in the case above cited,—discharge the patient, and let society take its chances with him as a criminal lunatic. Even where technical defects in the commitment have been proved, courts have not been willing to discharge the patient, if he was likely to be dangerous.[27]

[25] *Com. ex rel. Nyce* v. *Kirkbride*, 2 Brewst. (Pa.) 400. See also *Com. ex rel. Rubright* v. *Western Pennsylvania Hospital*, 3 Pittsb. 299; *Com. ex rel. Stewart* v. *Kirkbride*, 2 Brewst. (Pa.) 419.

[26] A clear account of the passage of the habeas corpus act in the reign of Charles II. is given by Hallam, Constitutional History, Chap. XIII. Medical readers, who sometimes see the working of this historic measure in lunacy cases, will find Hallam's account most instructive and not too long.

[27] In *King* v. *McLean Asylum*, 26 L. R. A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 331, defects in the commitment were alleged, and the question also of jurisdiction was discussed; but the writ was dismissed, as the patient was not believed to be safe. In *Ex parte Greenwood*, 1 Jur. N. S. 522, the patient was discharged because, among other reasons (some technical) he was harmless; but if he had been dangerous, he would not have been discharged on a technicality, such as an error in the certificate. See also, *Gresh's Case*, 12 Pa. Co. Ct. 295; *Com.* v. *Chapin*, 45 Phila. Leg. Int. 434; 9 Pepper & Lewis, Digest, 14,517. In the Pennsylvania law of Apr. 20, 1869, the ground for detaining a lunatic is defined as the "welfare of the patient or the safety of others." For a case involving some other questions, see *Re Rust*, 177 Pa. 340, 35 Atl. 623.

CHAPTER LIX.

MODIFIED RESPONSIBILITY IN THE INSANE.

1248½. This doctrine has usually been denied in law.
1249. But it has also been recognized.
1250. Nothing unreasonable in such a doctrine.
1251. The courts not always agreed.
1252. Degrees of guilt in crime and in disease.
1253. Guilt modified by age.
1253½. Guilt modified by alcoholism.
1254. The degrees of murder.
1255. The meaning of "premeditation."
1256. Alienists as well as lawyers oppose the doctrine.
1257. As to monomania.
1258. The boundaries of insanity not easily settled.
1259. Not a purely speculative question.

1248½. This doctrine has usually been denied in law.—It is a somewhat remarkable fact that, as a rule, mental disease is not recognized in law as having various degrees; or, if it has such degrees, that these can act in mitigation of the degree of guilt. Circumstances often suggest that an insane person is neither wholly responsible nor wholly irresponsible.

This unwillingness in the courts is all the more remarkable because the law recognizes several degrees of guilt in the sane mind. There is never a murder case on trial that the court does not proceed with infinite pains and with much refinement in definition to explain to the jury the mysterious distinctions between murder in the first degree, murder in the second degree, and manslaughter. The sane mind is recognized as having various grades of responsibility, and these grades are based upon some very subtle adumbrations. In fact, they are so subtle that even the courts confuse them at times; and Mr. Bishop, a learned legal writer, after wrestling with them in vain, frankly acknowledged that he was not able to define the crime of murder.[½]

[½] 2 Crim. Law, 7th ed. Chap. XXIII. § 735. "The idea itself is complex and artificial; and, if it were not so, the language has no words in which it could, in a single sentence, be conveyed."

But in the insane mind no such grades are recognized. So soon as it is alleged that a man is insane, just that soon does the law declare that he is not subject to variations or grades of responsibility, and that he is either wholly guilty of the highest grade of crime, or is not guilty at all. In other words, his insanity will not act to reduce the grade of his crime.

1249. But it has also been recognized.—Sir Joseph Jekyll, in the *Duchess of Cleveland's Case,*[1] said: "The law will not measure the sizes of men's capacities so as they be *compos mentis.*" But the law does measure the sizes of them when it distinguishes two degrees of murder. At least one case has been decided in a Pennsylvania court in which a lower than the first degree of murder was accepted because of insanity.[2] In other words, the doctrine of a partial responsibility[3] on account of insanity has been recognized in law.

1250. Nothing unreasonable in such a doctrine.—There would seem to be nothing unreasonable in the claim that mental disorder may, under some circumstances, act in mitigation of the degree of guilt. As there are various degrees of mental impairment, so, one would suppose, there may be various degrees of responsibility. This is a common-sense and practical view, and one that is in accord with every-day experience with the insane. All these patients are not equally irresponsible for their acts, and there is not an asylum in the land where this principle is not avowed every day in practice if not in words. From a purely academic standpoint, however, this is not a popular doctrine either in medicine or in law. Insanity is insanity,—it must be either one thing or another; there is no half way of looking at it. Like the theologians, who will not acknowledge a "dividual essence" in sin, so the lawyers and the doctors will not readily acknowledge that there can be such a thing as a "partial" responsibility in insanity. The lawyers say: "He must be wholly responsible or nothing." The doctors re-echo the cry, with a slight variation: "If he is insane, he is wholly irresponsible."[3½]

1251. The courts not always agreed.—Obviously, there can be no

[1] Quoted by Erskine in *Hadfield's Trial,* 27 How. St. Tr. 1282.

[2] *Com.* v. *Lynch,* 25 Pittsb. L. J. 193.

[3] Partial insanity, in the sense of a partial responsibility, was discussed by Judge Cox in the *Guiteau Case,* 10 Fed. 182. That this plea may be abused was evident in the *Case of Brush,* 3 Abb. N. C. 225, who attempted homicide in the delusion that his food was being drugged. After a short detention in an asylum he was discharged by the commission of lunacy as a "borderline" case. A dangerous lunatic was thus discharged almost red-handed upon the community.

[3½] "Insane or not Insane," as a legal principle, was contested by Yellowlees at a recent meeting of the British Med. Asso. He said that there have been at least three cases in the Scotch law courts in which the principle of a modified responsibility had been recognized. Medical News, Dec. 17, 1904, p. 1196.

one general rule laid down to govern this question, and no such *a priori* statements as the foregoing should be allowed. The question has been presented to the courts a number of times, and the decisions have not been unanimous. In Pennsylvania it is held as a principle[4] that insanity cannot be urged in mitigation of the degree of guilt. "Insanity is either a complete defense or none at all." Thus Justice Dean[5] held it was error to contend that evidence tending to show insanity, although considered by the jury insufficient to establish the same, might have the effect of reducing the degree of murder. The same judge in another case[6] held it was no error not to instruct the jury that insanity might reduce the degree of murder. Nevertheless, and to show how contradictory are the judges, it was charged by Judge Stowe[7] of Pittsburg, in the case of a man who had killed his own child, that the jury could render a verdict of murder in the second degree if they thought the prisoner's mental condition warranted it.[8]

1252. Degrees of guilt in crime and in disease.—If the law acknowledges several shades of guilt in the sane mind, thus making murder to consist of several degrees, by which distinction are implied various shades of accountability,[9] why should not the insane mind be judged with equal discrimination? Why does it require a more subtle act of psychological analysis in one case than in the other? Justice Dean said: "From the very nature of mental disease, there can be no grading of it by degrees, so as to accord with a degree in crime." But what scientific ground had Justice Dean for such a statement? In every disease there are variations in intensity. In typhoid fever the disease may be so mild in one case as

[4] 19 Pepper & Lewis, Digest, 14,579.

[5] *Com.* v. *Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

[6] *Com.* v. *Hollinger*, 190 Pa. 155, 42 Atl. 548.

[7] 25 Pittsb. L. J. 193.

[8] Judge Stowe's language in his charge in *Lynch's Case* is worthy of being quoted more at length than there is room for here. It is almost entirely devoid of the usual judicial distinctions about right and wrong, and it attempts to present the case in a scientific way. "Upon general principles," says he, "I have come to the conclusion —in the light of modern science—that there are many cases which, while not justifying a jury in acquitting of all crime, would justify and perhaps make it their duty to consider the mental condition of a man upon the question of responsibility for the higher crime . . ." The whole charge is a suggestion to the jury to convict in the second degree, because of the prisoner's mental condition. It is as contradictory as can be conceived to the opinion of Justice Dean.

In *Com.* v. *Elvin*, 5 Pa. Dist. R. 593, the judge, in granting a new trial, said of the prisoner: "While not insane, yet his mind was so beclouded as to deprive him of reflection and deliberation. If they [the jury] should have reached such a conclusion from the testimony, then the prisoner could only have been convicted of murder in the second degree."

See also *Nevling* v. *Com.* 98 Pa. 322.

[9] The law makes allowance for human passion. Fost, C. L. 295.

not to affect the intelligence, and so severe in another as to throw the patient into a complete delirium. Between these extremes are all degrees of involvement. This is just as true of insanity as it is of typhoid fever. To state *a priori* that such and such a thing cannot exist, when experience proves that it does exist, is not scientific, even if it be legal.

1253. Guilt modified by age.—In a case referred to by Judge Stowe in the charge above cited, the age of the prisoner (thirteen years) was accepted as modifying the degree of guilt, although the boy had deliberately poisoned his victim with arsenic. It is difficult to see on what ground age can modify guilt unless insanity can do the same, yet this boy was convicted in the second degree only. He was shown a leniency on account of his age which he would not have obtained for a mild grade of mental disorder, and yet a boy of thirteen is quite as capable—nay, more capable—of knowing right and wrong as is a mild-grade imbecile.

1253½. Guilt modified by alcoholism.—We have already discussed this aspect of the subject in the chapter on Alcoholic Insanity. Sir Matthew Hale[9a] recognized chronic alcoholism as a disease, and said that it exempted a man from responsibility. Many of the modern courts have gone even further, and declared that in cases in which a specific intent is essential to constitute a crime, acute intoxication is a matter for consideration, and is competent evidence on the question whether the defendant was capable of forming such an intent or purpose at the time the act was done; and, in line with this ruling, it has also been decided that drunkenness may operate to reduce the grade of crime.[9b] Here is a clear recognition of the fact that there are various degrees of responsibility in mental impairment; for drunkenness is only a temporary form of mental impairment.[9c]

1254. The degrees of murder.—Judge Simonton,[10] in a charge to the jury, said: "The courts do not ask the jury to undertake the impossible task of discriminating between degrees of insanity." And

[9a] 1 P. C. 32.

[9b] 17 Am. & Eng. Enc. Law, 2d ed. art. "Intoxication," p. 398, for references to cases. Also, N. Y. Penal Code, § 22.

[9c] See *ante*, chapter on "Alcoholic Insanity," for a discussion, with references. Also Sullivan, Brit. Journ. of Inebriety, Oct. 1904, who argues for a modified responsibility in alcoholic patients.

[10] *Com.* v. *Hollinger*, 190 Pa. 160, 42 Atl. 543. The principle that insanity cannot have the effect of reducing the degree of murder seems to rest largely on the two Pennsylvania cases quoted in the text. (*Com.* v. *Hollinger*, and *Com.* v. *Wireback*, op. cit.) These are the only two cases referred to on this subject in the 16 Am. & Eng. Enc. Law, p. 621. If the principle has been discussed in other cases at any great length, I have not had the fortune to meet with such cases. In the *Stephani Case*, in New York, for murder, the verdict was second degree.

yet the jury is asked to detect and measure the varying and elusive shades of moral accountability as involved in the distinction between murder in the first and murder in the second degree.

What can be a finer psychological point for a jury to have to determine than whether a man acts with premeditation or without it? And yet the whole distinction between murder in the first and second degrees rests upon this point. What is "premeditation?" and what sort of a criminal act can be conceived of without premeditation? The answer of the law is, that if a man acts passionately or emotionally, on the spur of the moment, and under provocation, he does not display that degree of premeditation which constitutes murder in the first degree.[11] In other words, allowance is made for a mental infirmity which is not pathological, and for which a man should be much more responsible than for a mental impairment that depends upon disease. In the former cases degrees of guilt are recognized, while in the latter cases, which range over the whole field of mental pathology, no such degrees are allowed to exist. Why is a man under the influence of transitory ungovernable passion guilty in a less degree than a man who suffers with some slight permanent defect of his mind? If the latter knows the difference between right and wrong, so does the former. If the former is not able to control himself, neither may be the latter.

1255. The meaning of "premeditation."—When the attempt is made to analyze the word "premeditation," the difficulty is fully seen. Courts have given all sorts of interpretations to this word.[12] Thus, the fact that a man was drunk has been held in Pennsylvania[13] to exclude malice or premeditation, and therefore to determine murder in the second degree only. Thus Justice Thompson, of the su-

[11] Blackstone (4 Com. 190, 191) makes the distinction between murder and manslaughter to be that the latter rises from "sudden heat of the passions:" the former from "the wickedness of the heart." And he says that "the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt."

[12] In the case of *Com.* v. *O'Hara*, tried in 1797, Chief Justice McKean, of Pennsylvania, said: "If he had time to think, then he had time to think he would kill . . . If he had time to think, and did intend to kill, for a minute as well as an hour or a day, it is sufficient." But, it may be asked, can the average jury determine such fine points to a nicety, any better than they could determine degrees of responsibility in the insane? Judge Rush said, in the case of Richard Smith, tried in 1816, for the murder of Captain Carson, "No time is too short for a wicked man to frame in his mind the scheme of murder." And yet the jury must decide that even in an instant of time the deliberation to kill was or was not present, in order to differentiate between the two degrees of murder. Even scientific men, with instruments of greatest precision, find it hard to determine the rapidity of thought. But a jury, often of very ignorant men, is expected to decide such a question in psychology off-hand, even if a man hang for it.

[13] 9 Pepper & Lewis, Digest, 14,582.

preme court, held[14] that a degree of drunkenness which rendered the mind incapable of deliberation would reduce the homicide to the second degree. In other words, the jury must determine the exact amount of drunkenness that would render a mind incapable of deliberation. But a jury that can perform such a psychological feat as this should also be capable of determining the several shades of responsibility in mental disease. Wherein is the one task more difficult than the other? Both tasks are exactly of a piece, and consist in measuring the amount of "malice aforethought" in disordered minds; the only difference being that in one case the disorder is caused by alcohol, in the other by disease.[15]

1256. Alienists as well as lawyers oppose the doctrine.—Some alienists are not less averse than the lawyers to the idea of a partial responsibility in insanity. For them the term "insanity" is equivalent to "irresponsibility." And yet there is hardly a more common term among alienists than the "borderland" of insanity. This is a wide territory, and its boundaries are nowhere fixed. It is meant to imply that sanity shades into insanity by such imperceptible degrees that the exact line of demarcation cannot be determined. This is a thoroughly scientific conception, and is in accord with what is observed in all forms of disease. There is no hard and fast line of division between health and ill-health. This fact is patent to all men. *Natura non operatur per saltum*,—nature does not act by leaps and bounds. Everything in her domain is by gradations.

Dr. Maudsley[16] has a whole chapter on the "borderland" of insanity, in which he enlarges on the fact that the "insane temperament" may show itself in a great variety of degrees. He does not spare the philosophers nor even the Hebrew prophets, for he puts some of them in this borderland; but he would have written more to the purpose if he had told us wherein responsibility is modified in this obscure territory. The conclusion seems irresistible from his writing that, as insanity thus shades by imperceptible degrees into mental health, so does irresponsibility from mental disease have many and indefinable degrees. The demonstration is almost syllogistic.

[14] *Warren* v. *Com.* 37 Pa. 45.

[15] In the case of *Jones* v. *Com.* 75 Pa. 403, it was held that intoxication is no excuse for crime, but if it deprives the intellect of power to think and weigh the nature of the act, it may prevent a conviction of murder in the first degree. This language is self-contradictory, for, under the given circumstances, intoxication does act as an excuse for crime to the extent of lowering the degree. The subject is also discussed at great length in *Nevling* v. *Com.* 98 Pa. 322. These two cases exhibit the difficulties of applying the principle, that intoxication may determine only a partial responsibility, but they show clearly that the principle is recognized by the supreme court of Pennsylvania.

[16] Responsibility in Mental Disease, New York, 1881.

1257. As to monomania.—Monomania, paranoia, or delusional insanity, is the most common type seen in the criminal insane, but this disease is seldom, if ever, of sudden onset. Spitzka,[17] who has given the best description of it in the English language, shows how it is of gradual onset, and is developed on a constitutional or neurotic basis. In many of these cases it would be quite impossible, if their life-histories were carefully studied, to say just where they passed over the borderline; in other words, just where they became insane and irresponsible. The inference is that their irresponsibility, like their disease, has been by gradations.

1258. The boundaries of insanity not easily settled.—Dr. Sankey,[18] a very judicious writer, says that the first source of dissension between doctors and lawyers is in the fact that the "lawyer claims the right of settling the boundaries of sanity and insanity." Dr. Sankey here indicates the difficulty that surrounds this very subject of responsibility: the courts insist on sharply limiting what is not sharply limited by nature. The result can only be confusion, and even, in some cases, injustice. When Sir Fitzjames Stephen[19] says that he limits the word "responsibility" merely to responsibility to the law of the land, he does not avoid this dilemma; he merely states the problem from a different view-point. There is no way sharply to define responsibility so that the definition will apply to all insane persons equally, whether with reference to human law or to general law. This fact is recognized in sane persons, and hence various degrees of murder are defined for them, but it is not recognized in the insane. Dr. Sankey's comment goes to the root of the matter.[19½]

1259. Not a purely speculative question.—From the purely speculative standpoint there is not much to be made out of this question of a partial responsibility, except to fall back on the opinions of the moralists and philosophers, some of whom claim the absolute freedom of the human will, while others deny it entirely.[20] If the will is always and absolutely "free," there can be no such thing as a partial or modified responsibility; and if, on the other hand, there is no such thing as free will, there can be no such thing as responsibility at all.

[17] Insanity: Its Classification, Diagnosis, and Treatment, New York, 1883.

[18] Lectures on Mental Disease, London, 1884, p. 408.

[19] History Crim. Law.

[19½] See also Punton, "Are the Insane Responsible for Criminal Acts?" in the Medical News, Oct. 15, 1904; Richardson, "Graduated Responsibility," in Trans. Am. Med. Psych. Asso. 1901; Mercier, "Criminal Responsibility of the Insane," in N. Y. Med.-Leg. Journ., Sept. 1898; Hitchcock, "Mental Responsibility," in Trans. Am. Med. Psych. Asso. 1900; McDonald, "Mental Responsibility," *ibid.*, 1901.

[20] See A Manual of Moral Philosophy, by William Fleming, for a clear discussion of the subject.

But this is merely academic; the practical sense of mankind claims to be able to discover that the will is free: the whole theory of human responsibility is based upon it. But science, while not denying this thesis, can find ample reasons for claiming that the will, or liberty of choosing, is modified and controlled in various ways, and in no way more variously than by mental disease. In this connection it is odd to hear a distinguished Scotch judge and philosopher, the eminent Lord Kames,[21] deny the freedom of the will, and impute this belief to a delusion. "Though man in truth is a necessary agent," says he, "yet, this being concealed from him, he acts with the conviction of being a free agent." It is difficult to see how Lord Kames, if he believed thus, could ever have passed judgment on a prisoner. A still more eminent philosopher, Leibnitz, likened the human will to the magnetic needle, which seems to act freely, but yet obeys an insensible magnetic fluid. Bayle likened the mind to a conscious weathercock,—conscious of its movements, but not responsible for them. But science points to a middle view as the safest to follow on this subject,—*in medio tutissimus ibis.* The human mind is subject to laws in this as in everything; the element of choice arises in the midst of the activities of these laws; and the will, or the responsibility, is modified in numerous ways by the actions of various forces, among which is mental disease.

[21] Essays on Morality and Religion, Edinburgh, 1751, p. 206. Lord Kames' doctrine brought down upon him such vigorous disapproval from the Scotch Kirk that he retracted in a measure. The Kirk in those days was a high court that was respected even by a judge of the Sessions.

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